INTRODUCTION

This final issue of 2020 covers a range of important and hotly contested topics. Some have a wider reach, such as the potential impact of Covid-19 on our industry going forward and achieving net zero greenhouse gas emissions, while others are more focused on the construction sector, such as the prevention principle and the extent to which discretionary powers should be curtailed.

We kick off Part 4 of 2020 with Part 1 of Tony Marshall's two-part article "The Prevention Principle and Making the Contractor Pay for Employer Delay: Is English Law Departing from its Roots?". Marshall carries out a meticulous and fascinating analysis of the approach over time of the English and Commonwealth courts to the prevention principle. All too often one only looks at the more recent cases, but Marshall takes us back in time, covering in this Part 1 the journey from a 15th century case in which the plaintiff was Queen Joan, the reigning King Henry VI's grandmother, to more recent and familiar authorities of the 20th century, up to and including the infamous 1999 Australian case of *Gaymark*. In Part 1 Marshall sets the scene and asks the reader to question the shift away from the traditional approach in which employers could avoid the consequences of the prevention principle if the contract included very clear language to that effect or if the contract included a mechanism allowing the employer to extend time for the delay caused by the employer. Part 2 will take us up to the current day position and include a discussion of the central questions against this backdrop, taking into account the civil law approach.

Our second contribution is highly topical. 2020 will undoubtedly be remembered primarily for the Covid-19 pandemic and it seems likely that the construction industry will continue to experience the consequences for some time to come. In "A Look Beyond the Lockdown" James Pickavance and his co-authors, representing a wide range of jurisdictions review the lessons learned. In this considered, comprehensive and engaging article they address the impact of future project planning from a contracting, financing and due diligence perspective before moving on to consider the types of disputes that can be expected to arise. On the practical side, of particular interest is the likely continued shift in the procurement of construction

services toward a more electronic or virtual process, even amongst the more conservative governmental departments. In this regard the developments reflect the wider commercial and disputes world where due to necessity we have seen a significant shift towards virtual communications. The burning question going forward is to what extent this sea change is with us for the future, or whether as and when the pandemic ceases to be an issue, the industry seeks to backtrack on some of the technical advances. In terms of the financials, it will remain to be seen how and to what extent the traditional risk allocation process during the tender stage will be affected, first in relation to those projects currently being tendered at a time when a vaccination is not yet available and secondly in the longer term where parties may, reflecting on 2020 and the pandemic, wish to expressly allocate the cost risks associated with any future pandemics. Although there is evidence of greater collaboration during the heights of the pandemic, it's clear that there will be fallout by way of disputes. The authors rightly flag that however the disputes are presented a central issue is likely to be causation and the ability of the claiming party to prove that the "event" complained of has caused loss or otherwise significantly impacted on the performance of the contract.

In 2017 the *International Construction Law Review* published an article introducing the then imminent enactment of the so-called German Construction Law, introducing a legislative regime for construction contracts for the first time.[1] Three years later, and with the benefit of seeing the new law in practice, Andreas J Roquette returns to this subject in "Unnecessary Complexity – Recent Developments in German Construction Law". Roquette provides a detailed assessment of the impact of the legislation and highlights potential reforms which he argues would improve the utility of the legislation. His article highlights two central limitations which affect the effectiveness of the legislation. First is its failure to encompass some of the most common risk allocation aspects of construction contracts, such as time for performance, payment dates for interim or final invoices, security or guarantees, and secondly is the failure to update the standard industry contract terms, the VOB/B, to reflect the new legislation. The new statutory regime focuses on additional work, introducing a three-step procedure for change orders and providing clarity regarding the basis of payment for additional work.

[1] Roquette, A J and Schweiger, D, "Germany Enacts New Construction Law", [2017] ICLR 443.

We are delighted to have, as the third article, Paul Tamburro's "Controlling Contractual Discretions: The Limits Placed on Discretionary Powers in Construction Contracts" which was awarded a high commendation the UK Society of Construction Law's Hudson Prize in 2017. Tamburro grapples with the approach of the courts to contractual discretions and the extent to which limits are placed on the exercise of contractual discretions. This has been a hot topic in common law jurisdictions for some years, particularly following the UK Supreme Court's decision in *Braganza v BP Shipping Ltd.* Many of the judgments often cited post-*Braganza* did not concern construction projects (any more than *Braganza* which arose in an employment context), giving rise to questions as to the extent to which the principles in *Braganza* (and subsequent cases) are applicable to construction contracts. His article provides a valuable overview of the different types of discretion commonly conferred on the principal and on the contractor in construction contracts and how express, or implied, terms might be used to constrain the exercise of such powers. Tamburro's overall assessment is that the application of "good faith" restrictions is likely to promote fair contracting, without adding unmanageable uncertainty.

Various governments have committed to or indicated targets for achieving net zero greenhouse gas emissions in the coming decades. With this will come real challenges for the construction industry and those who operate in it. The final article tackles the contemporary concern of climate change. In "Pursuing Zero Carbon Targets Through Collaborative Construction Procurement and Contracting", Roxana Vornicu, Eur PhD and Paolo Ettore Giana, PhD investigate how collaborative procurement and contracting systems might be able to assist the construction industry in developing and testing integrated solutions which can help deliver sustainable build assets in line with zero carbon targets. The authors take the readers through a number of case studies to establish their conclusion that there are economic, social and environmental benefits to be gained from the greater use of integrated collaborative procurement systems and contracting systems, including helping deliver net zero carbon targets. The insightful discussion of the structure of collaborative contracts and the contractual mechanisms which the authors consider can support a collaborative environment is of particular interest, with reference to the FAC-1 framework alliance contract as an example of an enterprise contract which has been adopted in UK procurements with a total value over £45 billion and which has been translated for use in Italy, Germany, Spain, Russia, Bulgaria, Brazil, Peru and Chile.

We conclude with two book reviews, first, Professor Doug Jones AO's review of the fifth edition of *The Law of Shipbuilding Contracts* by Simon Curtis, Ian Gaunt and William Cecil, and secondly, Chantal-Aimée Doerries QC's review of the third edition of *Construction Law* by Julian Bailey.

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