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LIDW 2022: Changes in Construction and Infrastructure Disputes: 2022 and Beyond

Andres Mazuera (Queen Mary University) · Friday, May 13th, 2022

On the fourth day of the LIDW22, the session on "Changes in construction and infrastructure disputes: 2022 and beyond" looked at how construction contractors and employers have found ways to either avoid liability or impose extended liability on their counterparties. It also examined how English law has responded to these new developments.

The conference was hosted by Atkin Chambers, HKA, Jones Day, Keating Chambers, and White & Case. The speakers were Julian Bailey (White & Case), Franco Mastrandrea (HKA), James Pickavance (Jones Day), and Jennifer Wild (Keating Chambers). The moderator was Fiona Parkin QC (Atkin Chambers).

The conference started with Jennifer Wild discussing fiduciary duties in construction disputes. It was indicated that fiduciary duties arise in relationships of trust and confidence under English law. There are two types of relationships implying these duties: 1) established categories, such as solicitors and clients, and 2) relationships on which facts might impose such duties. In short, the core duty imposed under the concept of fiduciary duties is that of loyalty, which can be understood as not putting yourself in a position where conflicts of interest may arise.

She highlighted the case Secretariat Consulting Pte Ltd, Secretariat International UK Ltd, and Secretariat Advisors LLC v A Company and its reflection of three recent developments in fiduciary duties:

1. Fiduciary duties owed by the expert to their clients, where she argued that experts or any professional in a similar position might have an obligation to avoid conflicts. However, it is still unclear in which cases the law would impose such duties.
2. More certainty in English law in cases where it is necessary to separate fiduciary duties and their remedies from other kinds of duties, such as good faith or expert duties to the court.
3. Finally, the judgment's reasoning suggests that, under English law, parties to a construction agreement could include clauses that exclude or limit the liability for breach of fiduciary duties.

James Pickavance addressed the concept of good faith in English law. Even though he recognised that English courts are still reluctant to accept good faith as an overarching duty, it is evident that the notion of good faith is becoming more relevant. In that regard, he explored five circumstances that prompted this discussion: 1) the pandemic has triggered the search for extracontractual remedies, 2) commonly, both bespoke and standard form construction contracts contain provisions

of good faith, 3) parties to construction disputes are increasingly pleading a duty of good faith, 4) the concept of good faith is not settled under English law, and sometimes it is confused with other doctrines, and 5) some senior members of the judiciary are advocating for a more prominent role of the notion of good faith.

Julian Bailey discussed economic duress in renegotiated construction contracts. Current circumstances such as Brexit, Covid, supply chain deadlocks, and international conflicts have caused the widespread need to renegotiate construction contracts. He argued that there is no general contractual right for a party to seek the agreement's renegotiation under English law. However, parties could pressure their counterparties to agree to renegotiate the contract.

Therefore, he discussed a recent UK Supreme Court ruling in which the court analysed whether lawful acts could constitute economic duress and what implications this may have on construction contracts. Although the facts of the case are not related to construction projects, it offers some guidance applying such a concept. In short, the Supreme Court established that economic duress exists under English law. It arises in rare exceptional cases where one party is making an illegitimate threat, and the other party does not have any other alternative than to give in to the threat.

Franco Mastrandrea addressed current trends in the evaluation of delay analysis. Firstly, he discussed the application of liquidated damages before and after the termination of the construction contract. After that, regarding delay analysis, he concluded that where the agreement does not provide a method for running such analysis, English law favours the retrospective analysis over the prospective approach. Additionally, he talked about the 2021 FIDIC Green Book and how it addresses liquidated damages for prolongation costs associated with a compensable extension of time.

Finally, Fiona Parkin QC raised the issue of whether these changes will impact on the choice of English law to govern construction contracts. The panel concluded that there are no fundamental adjustments to English law as recent developments represents only subtle variations to the law within the common law framework. Therefore, English law continues to be a choice of law that offers certainty to parties operating in the construction industry.

More coverage from LIDW is available here.

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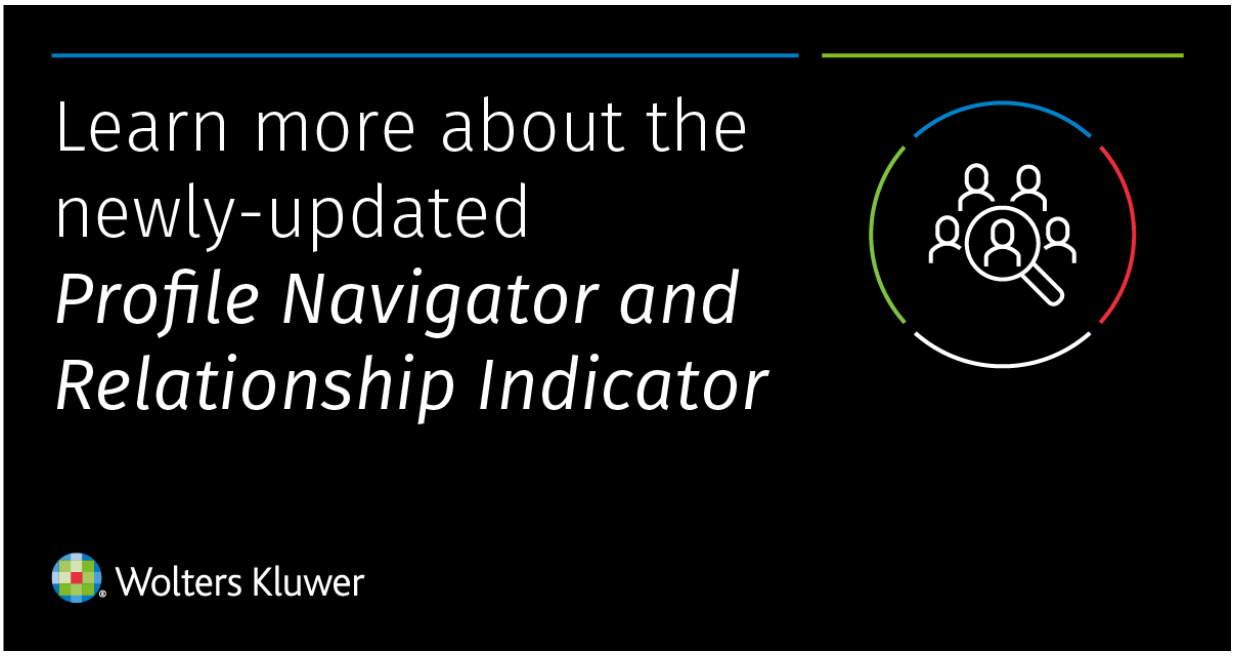

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