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Speakers

- Craig Shepherd, *Herbert Smith Freehills* (Chair)
- Doug Jones AO, *Independent International Arbitrator*
- Christopher Seppälä, *White & Case*
- Rachel Ansell QC, *4 Pump Court*
- Michael Grose, *Clyde & Co*

Craig Shepherd: Ladies and gentlemen, thank you very much for all making it back after lunch. The intention is very much that this should be an interactive session. We had four hot topics to address you on but we've taken the liberty of adding one more.

I'll begin by introducing the panellists to you and then ask each of them to say a few words to kick off a discussion on the topics and perhaps respond to what is said. But the idea is very much that it should be participation from the floor and we are going to be looking for you all to contribute and hear your views. There is no strict rule as to who will be called upon to speak but there is a preference for those attending who have not spoken already – I am sure there are some very fine voices sitting in the audience that we have yet to hear. So if you haven't actually grabbed the microphone yet this is an ideal chance for you to do so.

Craig Sheppard introduced the panel members

We now have four points to go through as on the published agenda and we also want to say a word about the recent UK Supreme Court decision in the *Cavendish* case.

I am going to kick off with our first discussion topic:

***Topic 1: "Experts, hacks and hired Guns"* - how interventionist should tribunals be in ensuring that expert witnesses actually assist in clarifying complex technical issues in an efficient manner?**

Before I ask the audience for your opinions, I am going to ask Doug for his.

Doug Jones: Thanks very much and for that very generous introduction. Experts represent a significant amount of the money which parties pay in arbitration. In construction

arbitration, perhaps my usual anecdote about accountants is not quite apposite, but in some international arbitrations I think the accounting experts who command hourly rates well in excess of lawyers' rates represent the far greater cost than do lawyers. The question is, how interventionist should tribunals be to try and manage the process of expert evidence, bearing in mind of course that the usual approach is for the parties to call their own experts, and although there is a theoretical possibility of tribunal-appointed experts in international arbitration, that phenomenon is uncommon.

To answer the question about what tribunals should do, I think it is fair to say there are three categories of experts. The first are real experts, who have a discipline like metallurgy or the like, and are true "gurus" in their field. The second category is quantum and delay experts. They do a lot of the hard yards for the parties and tribunals, marshalling the facts and presenting them in a format that can be digested by the tribunal. They are experts in marshalling that detail, but they are probably not the "guru" type of expert as my first category. The third category is legal experts. I think they are the most difficult sort of experts to have because when one tries to get consensus between lawyers it is quite challenging. Let's leave them out of the picture at the moment because they are a topic in themselves and talk about the first two categories.

With the "guru" type of expert, it's my experience that sometimes you see an expert giving evidence about a particular area of expertise for the first time, so they are there to really tell the tribunal about an area of expertise that's been with them their whole lives that they teach or research on and so forth. Extraordinarily, I have had a number of hearings in which both sides of a particular technical debate have produced experts who are appearing as witnesses for the first time and I think how one approaches those sort of experts is entirely different to the way in which one approaches the second category of expert, the delay and quantum experts who are well-experienced. One might even call the second category, without being pejorative, expert witnesses. They are experts at being witnesses because they do it so often, and the approach which can usefully be taken to try and save the parties money and corral the expertise that these two different categories of experts provide, is in my view different.

Either way there are two guiding principles that might be borne in mind. The first is that one can't take counsel out of their comfort zone because, as you will appreciate in international arbitrations, counsel come from a variety of different legal systems and have with them what they are used to in the context of their local practice. Therefore, in devising with counsel a way of dealing with expert evidence, one needs to remain within the comfort zone of counsel rather than impose something which leaves one counsel or

the other – or perhaps both if they both come from say Cleveland, Ohio – uncomfortable. That's one issue.

The second is that – bearing in mind counsel's comfort zone – a tribunal should approach the provision of expert evidence in a proactive way with parties and counsel to try and avoid an evidentiary hearing where the expert's evidence is being assessed with two diametrically opposed views. This requires defining really early on in the arbitration what areas of expertise will be the subject of expert evidence, who the experts will be so that there can be an early debate about their merits as experts, and defining what the issues are within each proposed area of expertise so that experts within a common discipline area are asked the same questions. It is a common law practice at least, without intervention at an early stage, for experts to be asked questions about each party's forensic theory in a case, which is fine but there will be another theory to the case by the other side. So having a common set of questions which appropriately recognises the competing theories is of great value.

Then you ought to ensure that experts work off a common database, a common set of documents or an electronic library and suggest to the parties to let the experts to talk to each other without prejudice to exposing their discussions to the tribunal. This way the experts can discuss their answers to the common questions being put to them and try to identify and produce areas of agreement and disagreement. Then they can produce individual reports which can be the subject of discussions at the hearing between counsel, the tribunal and the experts in an interactive way – sometimes called a "hot tub" and there are various ways of doing that. It's hard work but some form of witness conferencing is useful. So there should be early intervention for the second category of experts.

To a degree, its horses for courses and each case should be approached differently and proactively but that's my take on the subject.

Craig Shepherd: Thank you Doug. Rachel, do you profess to be in Doug's first category as a "guru" or his last category as a legal expert or are you able to straddle and join both together?

Rachel Ansell: Probably both – I'm definitely a counsel who doesn't like being out of her comfort zone. I agree with everything Doug said but I'm going to put in a plea as somebody who still appears as an advocate in arbitrations. I don't mind the tribunal interventions that Doug's talked about. I think it's a good idea to have a list of issues. I'd like delay experts to meet much earlier than they do to agree methodology because there is nothing worse than still arguing that a long way down the line. But I find there is

nothing more annoying or soul destroying when, after having spent hours preparing my cross-examination of the experts and establishing a particular order to ask the questions, the Chairperson decides that he or she has worked out where I'm going and says something like, "I see what you're about to say Ms Ansell" and there's a stunned silence as the expert also realises where I'm going to get to in five questions' time. So while the interventionist approach helps experts and counsel narrow the issues for everyone's benefit, my plea is that once we are actually live, I would appreciate if tribunals let me proceed with examination and then ask the questions I've missed.

Craig Shepherd: At this point I'm going to ask if anyone from the floor has anything to ask or contribute particularly if there's anybody who acts as an expert as opposed to somebody who is typically cross-examining an expert?

Dan Harris (audience): Hi there, Dan Harris from the Brattle Group. I'm curious to know your views on expert independence. If we as experts are supposed to be independent in our duties to the tribunal but, as Prof Jones said, we're seeing repeat experts and the same people appearing in front of you several times, then to what extent do we maintain, perhaps, this fiction that they really are independent and not working for one of the parties? Is it time to acknowledge that these are not unbiased independent people but you can treat them, in a way, as similar to counsel? Are the facts of 'repeat' experts' and that in reality they will be somewhat partial, to some extent, an issue?

Doug Jones: I don't think the fact that experts – limiting this to delay and quantum experts – regularly give evidence means that they're not independent. Clearly they are paid by a party and the choice of expert is a forensic one in an environment where counsel and the party wish to prevail. That is a fact of life. However, in my experience the experts who appear repeatedly come to realise that their own personal reputations depend on avoiding extreme positions which are unsustainable. They understand that they are far more effective if they put fair propositions that they themselves can justify intellectually. I think the Chartered Institute of Arbitrators' protocol for experts giving evidence requires the statement of independence to state they owe a duty to assist the tribunal and give an undertaking to disclose everything favourable and unfavourable to a party when they give evidence. But you might say the reality is they're paid by a party. However, I'm finding that the role of repeat experts is actually saving parties a lot of time and money because they persuade parties not to run the unwinnable and to reduce the disputed issues to the truly contestable ones. That helps parties work out a risk analysis as to what their prospects are and helps them reach an accommodation often for settlement. That applies to both delay experts and to quantum experts in my view.

So I think repeat experts are a good thing. They get to understand the system and they become empowered by the tribunal to be independent. They can say to their clients "that won't wash and I have to be independent" rather than be persuaded to run something which will mean that their intellectual integrity is impugned before the tribunal. It's very positive for the process. What I'm proposing in international arbitration has been tried in several domestic jurisdictions by courts that are tired of having hired guns, particularly in medical disputes and other areas including construction. I found that as an advocate I was really helped by being challenged by repeat experts and told an issue won't run. It would help me with my client as well to be able to say that's just stupid and the whole system works better as a consequence of that. There are outliers of course, but I think they get a reputation which is not consistent with repeat work.

Michael Patrick Joyce (audience): My comment is similar but sufficiently different to the discussion which has just ensued. When I was looking at the way in which this topic is set out and talks about ensuring that expert witnesses actually assist, I felt that there was a pejorative undertone to the way this was expressed as if there was an option of non-assistance. That led me onto another threefold categorisation of experts within the first category of experts – the "gurus". They can probably be categorised in three ways: the "gurus" who give their evidence straight forwardly, the "gurus" who know their stuff and don't give the evidence as straight forwardly as the first sub-category, and thirdly the "gurus" who aren't "gurus" at all and don't know anything about what they're saying. There would be no difficulty in ensuring the first sub-category actually assists, but there would be difficulties with the second and third sub-categories. The response from the tribunal may also be different subtly or otherwise in relation to each of the challenges thereby posed.

Craig Shepherd: Before I ask anyone to come back on that there's a comment immediately behind you I think.

Sam Berwick (audience): Sam Berwick here, I sit as an expert mainly in construction disputes. As a tribunal, what's the preference with regard to the mandates given to the experts? Is the preference to be very specific and adhering to that or is the preference to be duly flexible in the whole process? Especially with delay analysis issues or quantum issues, we sometimes see experts crossing the lines and introducing facts that have not been pleaded or giving an opinion with regard to quantum experts on the borderline as to a quantum issue or an entitlement issue. What control would the tribunal like to have within proceedings with regard to experts specifically sticking to the mandate given?

Craig Shepherd: We've had a couple of comments there from the floor. Christopher did the comments chime with you? Does that fit in with what you think you've been seeing in the world of expert witnesses?

Christopher Seppälä: Thank you. I'd like to comment from a counsel perspective not from a tribunal perspective. This may be obvious to many of you but to me it's a fundamental duty of counsel to make complex issues or foreign law issues clear to the tribunal. The tribunal should have no difficulty in understanding the case as developed on the basis of expert evidence. I often see lawyers engage experts and frankly they don't fully understand what the experts are saying and if they don't understand the tribunal is going to have difficulty understanding. When a lawyer such as myself presents an expert witness, I consider the lawyer 100 per cent responsible for what that expert is going to say. I have to be satisfied that we are appointing the appropriate expert, that is to say, one who has the relevant expertise, and who is able to communicate effectively what he or she knows – these characteristics are extremely important. I've come across experts who cannot express themselves well orally nor write a comprehensible report. I regard it as my duty to my client to ensure that the expert evidence is 100 per cent comprehensible, that there are no contradictions in the report, that it's clear, and that it can be presented in as simple a way as possible. I want to emphasise that I think that's a very important duty of counsel.

Craig Shepherd: Thank you Chris. I'm conscious of the time and of the fact that performance bonds are an incredible issue in the Middle East. Michael I will call on you to discuss our next topic about unmeritorious performance bond calls.

Topic 2: How to prevent employers from wielding their sword of Damocles' over contractors through unmeritorious performance bond calls.

Michael Grose: Thank you Craig. I will start by talking about the sword of Damocles because that's much more interesting than performance bonds and it is a mildly instructive story as well. Damocles was a gentleman who lived about 2,400 years ago in Sicily under the rule of Dionysius II who was a king of a city state in Sicily. One day he was flattering King Dionysus about how great it must be to have the King's wealth and power and the King said "if you think it's so great why don't you come and sit on my throne". Damocles accepted the invitation and went up and sat on King Dionysus' throne only to find a very sharp heavy sword hanging over his head suspended by a single thread of horse's hair. The King said that the sword was to remind Damocles of the ever present and imminent peril faced by anybody in a position of power. The reason I think the story is instructive because the power that bonds give is not just the power of the

threat they hold over the procuring party but there are responsibilities and consequences that go with an exercise of demand under a performance bond for the employer or whoever makes that demand. A demand will more often than not result in formal legal proceedings and, when a party turns up in those proceedings having encashed a performance bond, my experience is that the onus is generally on that party to demonstrate why the demand was made and if it can't do so, you will struggle to satisfy the tribunal to sympathise with your position. So from a beneficiary's point of view, that power needs to be exercised with great caution. But what if the beneficiary, unlike Damocles, can't leave the throne and return to where they came from and the bond has been issued and threats are being made about encashing it.

I think we need to distinguish between the types of bonds – there are conditional bonds and on-demand bonds. In this part of the world, the almost invariable practice is that bonds are issued on-demand without conditions so there isn't the option of going and trying to prove that the conditions have not been satisfied. In common law jurisdictions, it's well established that there must be evidence of fraud in order to restrain a bank from making a payment under a performance bond. That's because performance bonds are an important part of banking and financing practice which should be honoured and respected as such. It's a high threshold to meet.

But in recent years there's been a new angle of attack particularly in an English case in the UK called *Simon Carves v Ensus* where the party who had procured the bond sought to restrain the beneficiary from making the demand under it. The case came up before Mr Justice Akenhead in the Technology and Construction Court in England. Mr Justice Akenhead said that there is no principle of English law that entitles a beneficiary under a bond, who has a contractual obligation not to call that bond, to go ahead and call it in breach. He said if a contract sets out the conditions to make a demand and a party breaches those conditions, there's no reason why that party cannot be restrained from making the call. He granted the injunction and prevented the claimant from proceeding with the bond demand.

What is interesting about that case for those of us practising in this region, is that the FIDIC 1999 conditions, which are almost ubiquitous on construction projects here, at clause 4.2 prohibit making a call on the performance security other than in certain broad circumstances. I won't go through them now, but if the English courts have jurisdiction at least, there certainly is the possibility of getting a restraining injunction against the party seeking to make a demand on a bond in breach of those clause 4.2 conditions. The difficulty in practise is the English courts generally won't have jurisdiction in this region in such a situation and the problem with courts here is that they do not grant injunctions to

restrain a breach of contract. The closest you'll get to a similar sort of power is a summary of precautionary attachment order by which you might be able to attach the funds in the party's account when the beneficiary receives them from the bank. By the time that happens, most of the damage is done albeit that the funds are preserved in that account should it turn out that they are required in order to refund the party who issued or procured the bond. In the UAE however, there is a specific provision of the UAE Commercial Code, Article 417, which permits courts in exceptional circumstances to grant an attachment against the bank to prevent it from paying out under a performance bond. There certainly are cases in which courts have exercised that power against banks. Usually, the courts are amenable to granting that kind of order if the beneficiary is a foreign party and there is a fear that the cash will leave the jurisdiction and will not be available to secure a judgment should they find that the bond demand was improperly made. But procurers of bonds are largely at the mercy of beneficiaries of bonds and given that bond demands are increasing in number since the last global financial crisis, the question that is being debated is does it remain appropriate nowadays for construction projects to be secured as commonly as they are by on-demand performance bonds when something conditional would be just as good and probably fairer.

Craig Shepherd: Thank you, Michael. Chris, I must turn to you for a response on that.

Christopher Seppälä: Thank you. As long as I've been practising in Paris, lawyers have been talking about proposing conditions to on-demand bonds. I remember the IBA a number of years ago issuing some document to the effect that they should be subject to an arbitration award – you shouldn't be able to call such a bond without an arbitration award. Everyone realised that was totally unrealistic. Since then we've heard about a DAB decision as a condition to the calling of a bond but I haven't seen this used that much because construction contracts are written by employers in their own interest and they have the market power to insist on unqualified on-demand bonds. That's been the case for many years and so far as I'm aware will continue to be the case.

However, I do think things are developing a bit in the contractor's favour. A few years ago, I was involved in a case for an Asian contractor who was doing some work in Egypt and was very worried that the Egyptian employer would call its on-demand bond. It was issued by the Cairo branch of the Bank of Nova Scotia. Branch banking is pretty common in the banking field and in that particular case we moved against the Bank both in Cairo and in the United States because that Bank was also present in the United States. We were able to get jurisdiction in the United States and to persuade a court there to issue a temporary restraining order preventing the Bank from honouring the bond issued by its Cairo branch after depositing funds equivalent to the amount of the bond

into an escrow account in the United States – this was a victory as we thought that if the funds were paid out to the employer in Egypt we would never see them again. So where a branch of an international bank is issuing the guarantee you may be able to prevent that branch from honouring it by taking action in other jurisdictions where the bank is located. If a foreign contractor is involved, it's also common to have a counter-guarantee or a series of counter-guarantees originating from the contractor's bank in its home country and there's the possibility of taking action in any of the jurisdictions where those counter-guarantees are payable. If you block one of the counter-guarantees, it can have a domino effect on the chain of guarantees because no bank will want to pay if it's not covered by the counter-guarantee which it has received.

There are further options which haven't been explored. For example, in FIDIC contracts we now have a DAB which has the power to order interim or provisional measures, such as an order directing the employer not to call a bond. I haven't seen a DAB exercise that power as I don't think many people are aware that DABs have that power. Where a construction contract does not provide for a DAB then, under the January 2012 ICC Rules, a contractor may apply to an emergency arbitrator, even before the arbitration has commenced, for a provisional measure directing the employer not to call a bond. So that's another option in addition to going to local courts. I think it's an important option because parties will be hesitant to disregard an emergency arbitrator's order as he or she is typically appointed by the ICC. A subsequent arbitral tribunal will be interested to see whether parties have complied with the rulings of an emergency arbitrator established under the same rules as the arbitral tribunal. That is a significant development for cases under the ICC Rules.

Let me add two points on what Michael was saying. In France today, if the place of arbitration is France then French courts will be able to order interim measures regardless of where the project is located and, indeed, even if the bond contains a forum selection clause referring to another forum. Such a clause is ordinarily interpreted to apply only to substantive issues and doesn't apply or prevent you from seeking interim or conservatory measures from another jurisdiction. If the place of arbitration is France you have that possibility. The French Court ruling may not, in practice, constrain a determined employer located in another country, but a favourable ruling can at least support any application you make in any other jurisdiction for equivalent relief, so it can be helpful in that respect. Instead of the fraud criterion used in common law countries, in France and other civil law jurisdictions one refers to 'abusive right' or 'manifest bad faith' as grounds to prevent calling a bond. Manifest bad faith is where, for example, certified amounts payable by the employer exceed the amount of the bond. If a bond is called or threatened

to be called in those circumstances, that could be a ground for a court to stop payment of the bond.

Craig Shepherd: Thank you Chris. Michael?

Michael Hwang (audience): When you are talking about a performance bond and rushing to a local court or tribunal to restrain the call on the performance bond, what is the applicable law to be applied? The position that Michael Grose describes is probably the situation that would occur in DIFC courts because if English law or some other common law governs the performance bond, our rules in the DIFC are pretty much the rules of the CPR in England & Wales and so the position would be as Michael described.

Let me give you an example from Singapore which turned out differently. The performance bond was governed by English law, the call was made but the contractors were in Singapore. The employers were in Singapore so they ran to the local Singapore Court for injunctive relief to prevent the call. The question was what law would the judge apply in determining whether or not to enjoin the call in the performance bond? English law governed the performance bond but an application for an injunction might be considered to be a matter of procedure under Singapore law. The fraud test under Singapore law is different – it is the 'unconscionability' test which is arguably a lower threshold. The party asking for the injunction asked to apply Singapore law and unconscionability. The judge replied that a performance bond is a self-contained contract and its one purpose is to allow a call. If he grants a temporary injunction that interferes with the substantive rights of the parties, he should treat it as an issue of substantive law by applying the English law test for fraud. So you have to think about which local court you're going to, what their procedure is and how that relates to the governing law of the bond.

Tim Taylor QC (audience): This is Tim Taylor. Picking up on Michael's point, one practical point for contractors here is that if you've got to go to local courts, make sure you're ready to go with an Arabic translation of the bond clause in the arbitration provision. If you're lucky you can restrain and then start your arbitration to keep it within eight days/ 80 days. I've seen mixed outcomes or heard of mixed outcomes in that but the point that Michael Hwang raises is a particularly interesting one here. An English man's word is bond which means "read the small print", because there is no implied concept of good faith and fair dealing in contract nor do we have a concept of an abusive right. But both of those things arise here automatically. There are matters of public order here which arguably have an overarching feature wherever you make that application. The current view of the DIFC courts is to ignore the civil procedures code discretionally

because of the disapplication of civil and commercial law. It's a curious proposition in the minds of some public lawyers. But if they move away from that then the local civil procedures code would actually give the DIFC court an ancillary jurisdiction to grant interim relief in aid of proceedings anywhere else in any other court in the UAE. So it may be something that'll be thought about in the coming months and years.

Craig Shepherd: Thanks. I'm surprised that we managed to get through that discussion with no-one making a dreadful pong about the spectre of bonds given what's going on in the cinema at the moment. The next of our hot topics is in relation to disclosure or discovery and in particular whether we are discussing mountains or molehills. Doug you must have seen more disclosure exercises than most of us, what are your thoughts?

Topic 3: *"Mountains or molehills?"* - efficiently dealing with disclosure given the significant volume of relevant documentation demanded by construction disputes.

Doug Jones: The IBA tried to effect a compromise between the civil law view that documents are not required to be disclosed unless relied upon and the common law view that justice could only be done by a full disclosure of documents relevant to the dispute by both parties. In my experience, the IBA Rules of Evidence have failed to provide a common level of understanding between parties on the question of disclosure for two reasons.

Firstly, there are some cases where both counsel come from jurisdictions where they would make assumptions about disclosure that are generous and therefore seek both to make demands for documents and deal with disputes about disclosure on a different basis to that which would be adopted by counsel from other jurisdictions. Sometimes when counsel come from different jurisdictions with wholly different concepts of what the IBA Rules of Evidence is supposed to be. In my view, there is no presently common useful application of the IBA Rules for document disclosure.

Secondly, at the time when the Redfern schedules are being ruled on by the tribunal, the tribunal is usually less across the detail of the issues between the parties than would be desirable for a fully granular decision on each of the contested areas of disclosure. At the moment I think this is one of the least satisfactory solutions found by the arbitral community to the question of document disclosure because in a day of huge electronic transfer information on projects, the amount of material can be monstrous and very expensive to cope with. I think we need to approach the issue slightly differently to the way in which it is presently approached. The assumption at the moment is that there is a right to the exercise and a ruling on disclosure. The emphasis could perhaps be changed to one where, if a party wants to assert that right it then must bear the cost of the outcome of the determination of that right. This would make it an obligation in the first

instance to make the cost of disclosure being demanded of the other party and introduce a cash flow constraint into the issue of disclosure. That might attract the attention of the parties behind the cases to whether there is really a need to pay for in the first instance, the documents being demanded. At the moment there is talk of proportionality, there are tests of proportionality, but it is really not something that is able to be satisfactorily assessed by tribunals at the moment. I know that's a slightly controversial admission of an issue but that's my perception and I'd be interested if others have the same concern.

Craig Shepherd: Thank you, Doug. I'm going to come to the floor now. Doug mentioned that there had been an attempt to strike a balance between a common law and a civil law position. I come from a common law background but actually Scotland is quite unusual in actually having a very restricted approach to disclosure. It might be interesting to see whether there is any relationship between people's backgrounds and the views they espouse.

Zarghona Fazal (audience): Hi, I'm Zarghona Fazal from Hadef & Partners. I come from Australia, a common law background where we have quite a lot of disclosure. I just wondered if Doug could expand upon his suggestion that the party would be expected to inject cash flow if they're going to insist on discovery. When you say that, do you mean the legal cost for looking for those documents or is it the cost to the business that they will incur for looking for those documents?

Doug Jones: It seems to me that the search for documents involves both costs and they are real costs.

Zarghona Fazal (audience): One of the considerations discussed at the young arbitrators event was a smaller amount in dispute. In those circumstances the tribunal takes a decision as to whether there should be any discovery or production at all and take some more interventionist approach. What would be your views on that?

Doug Jones: It will depend on what the parties' views were in the first instance but if one party said there should be no disclosure and the other party said there should be disclosure, one would have to look at whether it was critical to the fair determination of the matter that there be any or some disclosure. That would be a discretionary issue.

Zarghona Fazal (audience): I tend to agree with you. It does depend at this stage of proceedings on whether a particular category of disclosure or any request is reasonable or not. It's often at a stage when the tribunal doesn't have quite a grasp on the issues between the parties, so they tend to let certain requests through that perhaps shouldn't go through. Another alternative is if it's a three member tribunal or if someone takes on a

little bit more responsibility, which might increase cost, to look at the pleadings and scrutinise the requests a little bit more closely.

Doug Jones: I certainly find that if you have an oral argument about it, it crystallises really quickly. But it's not so clearly crystallised in the Redfern schedule format. Indeed I tend to describe Redfern schedules with the pejorative deleted before I use the word Redfern normally.

Nick Nabily (audience): Nick Nabily from England so a common law background. I've been here for eight years. Is the problem that often requests for disclosure are made before the tribunal have grasped the issues? One possible mitigation measure, if you accept that disclosure is a problem, is the timing. When tribunals are setting directions and parties are applying for them, the timing should be at such a stage where it can be assumed that the tribunal will have an understanding of the issues.

Doug Jones: I think the pleadings have normally been exchanged, so there is an explanation of the competing contentions but it's probable that in the dealing with the Redfern schedule the tribunal will not undertake a huge level of analysis on the exchange of pleadings that exist. Sometimes they have to but by and large it's done as an exercise needed to be done quickly and on the basis of summaries of contention contained in the Redfern Schedules. So it may be that there is enough there but it's not I think generally speaking, drilled down to the level which the parties have done when they've considered their competing contentions.

Michael Grose: Construction disputes inevitably are always going to involve lots of time looking at documents. The supply chain is long and wide, and to some extent it's a problem which I don't think can be completely solved. A lot of construction lawyers get some interesting war stories out of being dispatched off to dusty porter cabins in the middle of a site office, in the middle of summer with no air conditioning. But ultimately it has to fall to the tribunal to take a fairly robust approach and it would rarely be appropriate I think these days for whole categories of documents to be ordered as disclosure in a blanket fashion, simply because the cost of those kind of exercises and the satellite arguments it tends to give rise to result in the costs running away from everybody. And different lawyers from different cultures do not necessarily have the same level of understanding as to the obligations that go with that disclosure exercise, so one doesn't necessarily flush out all of the unhelpful material in undertaking that approach to disclosure. I would certainly be in the camp of the tribunal taking the lead and taking a robust approach to controlling levels of disclosure.

Craig Shepherd: Thank you, Michael. We move from disclosure to a lack of disclosure by the Chairman. I'm going to ask Rachel to lead the discussion of an important Singaporean case.

Topic 4: Preliminary enforcement of DAB or Engineer's decisions as partial awards pending a final award - can arbitral tribunals be persuaded to follow the reasoning of the Singapore Court of Appeal's decision in *PT Perusahaan Gas Negara (Persero) TBK vs. CRW Joint Operation*?

Rachel Ansell: I'm going to summarise the judgment quickly because I think it would be helpful to answer whether tribunals are good at following the reasoning by taking you through it first. This case involved a contract under the FIDIC 1999 Red Book and was governed by Indonesian law. In November 2008 the contractor obtained a DAB decision on its variation claims but the employer refused to pay and issued a notice of dispute. The DAB decision was binding but not final. Clause 20.7 expressly states that a party can refer a failure to comply with a final and binding DAB decision to arbitration but not a final and non-binding one so that didn't apply. The questions that arose were whether compliance with the DAB decision, which required payment of a sum of money, could be enforced by way of arbitration pursuant to Articles 20.6 and if so how? The other question was whether any redress the contractor might have in respect of that payment requirement would have to be taken through the courts. The party got their DAB award in 2008. The contractor commenced arbitration in 2009 pursuant to clause 20.6 on the narrow issue of whether or not the employer was required to comply with the DAB decision. There was no counterclaim by the employer although in their defence they mentioned they were challenging the decision of the DAB on the merits. The tribunal said that there was no doubt that the employer had an obligation to make immediate payment. So the contractor went to court to try and enforce that award. The employer managed to have it set aside by the High Court on the basis that the tribunal had exceeded their jurisdiction by converting the DAB's decision into a final award without deciding the correctness of the decision. The Court of Appeal upheld that decision for that reason and others.

There are two points to note. First, the High Court judge said if you wanted to enforce your DAB award you needed to get a second decision, so go back to the DAB and get them to resolve the issue of whether or not it had to be paid promptly. Second, the Court of Appeal thought there was a different way. They said you should issue arbitration to determine all of the merits and make an application within that for an interim or partial award. So the contractor is now in 2011 and hasn't received its DAB payment for three years. It issued proceedings to get a final determination and pending that a partial or

interim award which the tribunal gave because they said the DAB decision must be binding even though you've issued a notice of dispute. Because if you didn't find out then effectively there'd be no commercial reason for having this DAB mechanism; it would be toothless.

So the first instance found that the interim award was good and should be upheld. The Court of Appeal focussed on whether or not an interim decision was final and binding under the Singapore Arbitration Act and whether it could be enforced.

The bit we are interested in is whether or not there was a mechanism under these particular FIDIC terms for enforcing the DAB decision under arbitration. The majority of the Court of Appeal ruled that there was a distinct contractual obligation on the parties to comply with the DAB decision once it was issued regardless of whether or not it was opened up later. It seems to me that must be right under clause 20.4. They concluded that it could be enforced by a separate arbitration so they came up with a third way to enforce this judgment the Court of Appeal way. They found that the narrow dispute of whether or not the DAB decision had to be complied with promptly fell within the wide meaning of the dispute under clause 20.6.

So they said if the dispute fell within the arbitration clause the question then was whether you had to go through the process of making a second reference to the DAB as the first instance judge had suggested. They decided that wasn't necessary because the DAB decision explicitly said payment had to be made promptly. This meant that the employer's notice of dispute conveyed his dissatisfaction, not only with the overall finding, but also with the implicit finding that it had to be paid promptly. Therefore, going back to the DAB, who had already decided that payment had to be made promptly, would be a waste of time and lead to practical difficulties. It seems to me you could have a continuous round of references back. The Court of Appeal said the whole intention of clause 20.4 would be defeated if you could say that clause 20.7 makes express provision for referring final and binding decisions to arbitration and that means you can't refer the enforcement of, or the effective enforcement of, binding but not final decisions.

Essentially, they found that there was an obligation to pay a DAB award. It could be enforced through arbitration; it could be enforced through a single arbitration which is what the contractor did the first time around but was told he could not. But they also then found that the other way was issuing it as an interim award. The dissenting decision was that the arbitration clause 20.6 could only apply to the primary disputes on the merits and not the enforceability dispute. Whether or not it had to be paid promptly was a dispute on the law and could not be settled amicably, which was a precondition of arbitration under

clause 20.6. The dissenting judge also found that clause 20.6 could only apply when there was a relevant notice of dispute. Therefore there was already a notice with which he didn't agree. He also found there could be no dispute as to whether or not payment had to be made promptly which was an interesting technical argument.

Finally, clause 20.6 had to be contrasted with clause 20.7 and he said that the fact that clause 20.7 only allowed final and binding decisions to be referred straight to arbitration in order to get enforcement proved that the parties never intended to allow this to effectively be an interim enforcement of these DAB awards.

So will the tribunals follow it? I think if you have a FIDIC 1999 Red Book contract governed by Indonesian law and you are sitting in Singapore, you probably will. On balance I think one can see how the majority got to the decision they did – it's commercial. However, I find it quite difficult when you've got one clause that seems to deal with a situation that is final and binding but not one that deals with binding and non-final. That seems to be ignoring the elephant in the room. That said, I think an English tribunal would probably follow it. But if I was sitting in Dubai, in a local ad hoc DIAC arbitration, I'd feel quite nervous about following it. If there was an arbitration to enforce a DAB decision, that would be quite difficult to enforce in a court. So you might get an award but you wouldn't be able to do anything. But I also think there's a general concern over having interim awards here.

Craig Shepherd: Chris, I know this is a matter very dear to your heart, upon which you have written extensively. Are DAB decisions worth the paper they're written on?

Christopher Seppälä: Rachel has described the case very well. I'd like to discuss why 20.7 is in the contract. I happen to recall its history as I wrote about it at the time. The FIDIC contract is drafted by engineers but in a sense I was responsible for clause 20.7 being in there. If you recall, in the second and third editions of the Red Book, FIDIC provided that you could refer a dispute to arbitration where a notice of dissatisfaction had been given with respect to an engineer's decision but not if none had been given and the engineer's decision was final and binding. Thus, oddly, arbitration did not seem to be available if payment was not made of a final and binding decision. I flagged this problem in an article in 1986 in The International Construction Law Review. As the original form of the FIDIC Red Book contract was based on an English form of contract, in England, I understand, you could just go to a court and get an order enforcing payment of such a decision. But FIDIC contracts are rarely used in England; they're much more often used in other countries where the contractor may not want to go to court. Indeed that is why the FIDIC contracts provide for international arbitration and, in a case I was involved in, the country

concerned was Libya and our client definitely did not wish to claim against the employer (the Libyan government) in the Libyan courts.

As a result of the criticism I made, FIDIC inserted clause 20.7. And when it comes to changing things, FIDIC's principle tends to be 'if it is not broken do not fix it'. The only issue at that time was getting final and binding decisions before the arbitrators. There never was any suggestion that binding decisions could not be enforced by arbitration. Indeed the clause provided that if a notice of dissatisfaction had been given the matter could be referred to arbitration and there was no reason why that could not include enforcement of a binding decision, at least I think that's a way it could have been looked at, although I'm not sure anyone thought of it at that time. That's the brief history of that clause.

I found it very impressive of the Singapore Court of Appeal in Rachel's example to explore the intention behind these provisions. They looked at the history of how clause 20.7 was inserted in the contract and even the dissenting judge did not disagree with that history. After exploring the intention, they corrected themselves by reversing in effect their earlier decisions and I think that's very much to the credit of the Singapore Courts. I have not seen many courts in the world which rectify their position unhesitatingly and go back to square one when they consider their earlier position was wrong.

I would add that there is another precedent if you are faced with this – *Tubular Holdings Limited v DBT Technologies*, a South African court decision of 2013. It says that the clause imposes a distinct contractual obligation on the parties to comply promptly with the DAB decision once it is issued and it enforced a binding decision in that case. There are also two ICC arbitration awards: ICC case 10619 from 2001, which many of you know, and ICC case 16940 from 2011. They are published in a 2015 issue of the ICC Court of Arbitration Bulletin.

Craig Shepherd: Thank you. I want to do a quick summary on some new developments. I'm going to ask Doug to say a word on what I thought was the hottest topic we were going to have in the course of today's discussion, a UK Supreme Court decision from 4 November. It's a couple of weeks old and looks at and changes the position on liquidated damages. It's not a matter of arbitration practice and procedure but it comes up in virtually every construction arbitration around the world.

Doug Jones: One hundred years ago Lord Dunedin established in *Dunlop Pneumatic Tyre* a test for whether something was enforceable as a liquidated damage as opposed to being unenforceable as a penalty. Among the tests he enumerated was the proposition that something is likely to be a penalty if the amount specified is beyond that which could

conceivably have been the loss likely to arise from the breach for which liquidated damages is provided.

One hundred years later the UK Supreme Court has said that that is too narrow a test of what is a penalty. In a joint judgement of Neuberger and Sumption and a very interesting judgment by Matz, the whole area of penalties has been considered and revisited. What they fundamentally and crudely said is that the test is not necessarily a pre-estimate of loss because a party might legitimately protect its interests by the establishing an amount which it values as its interest and drew by way of example on injunctive relief available to prevent breach where damages would not be an adequate remedy.

The test of whether it was a pre-estimate of loss is now no longer the sole test of determining whether something is a penalty under English law. But I am not sure why we are talking about English law in Dubai because, as one finds in arbitrations, the law regarding penalties and liquidated damages in civil law systems is entirely different as is the law regarding liquidated damages. Nevertheless, in that case, the Supreme Court disagreed with recent authority of the Australian High Court in a judgment about what would and would not be a penalty when dealing with bank charges. Suffice to say that although the Supreme Court decided two cases in a single judgment in a non-construction area, it will resonate in English law on construction.

Craig Shepherd: Thank you, Doug. The full judgement is available online, it's 120-odd pages that are actually extremely readable. I agree with Doug that it's a really interesting case and a really well written judgment. I would recommend it to everyone.

Michael Patrick Joyce (audience): I bet very few people in this room know what is the applicable law of liquidated damages in the DIFC? You would think that DIFC is a common law jurisdiction and we would have gone for the liquidated damages versus penalty distinction, but we don't. So somewhere either in the contract law or in the law on remedies we've taken the civil law test so in the DIFC you can have a penalty but the court will have power to moderate that penalty if it is excessive.

Craig Shepherd: Once again the DIFC leads the way where the Supreme Court follows. Ladies and gentleman I think it is now a sign that we break for coffee?