Neutral Citation Number: [2019] EWHC 1659 (TCC)

Case No: HT-2019-000131

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/06/2019

Before:

MRS JUSTICE O'FARRELL DBE

- -

Between:

BABCOCK MARINE (CLYDE) LIMITED	**Claimant**
- and -	
HS BARRIER COATINGS LIMITED	**Defendant**

- -
- -

Ms Gaynor Chambers (instructed by **Osborne Clarke LLP**) for the **Claimant**
Ms Jennifer Jones (instructed by **Hill Dickinson LLP**) for the **Defendant**

Hearing dates: 18th June 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE O'FARRELL

Mrs Justice O'Farrell:

1. The following matters are before the court:

   i) the defendant's application for relief from sanctions and an extension of time for service of its Part 11 application contesting the jurisdiction of the court;

   ii) the defendant's application for the claim form to be set aside or for proceedings to be stayed pursuant to CPR 11(6) on the ground that the Courts of England and Wales do not have, or should not exercise, jurisdiction to determine the dispute;

   iii) the claimant's application for further directions, if appropriate, in the adjudication enforcement proceedings.

The Contract

2. By a contract dated 15 December 2014 ("the Contract"), the claimant ("Babcock") engaged the defendant ("HSBC") to carry out ship lift docking cradle re-preservation works at Her Majesty's Naval Base Clyde ("HMNB Clyde").

3. The Contract was based on the NEC 3 Engineering and Construction Short Contract (June 2005), subject to amendment by the parties.

4. The total price for the works was £800,000. Clauses 50 and 51 (as amended by clause Z12) and the Contract Data provide for periodic payments to be made to HSBC against assessments made on the last Monday of each month and for such payments to be made by Babcock within 30 days of the assessment.

5. Clause 93 (as amended by clause Z 17) provides for a tiered dispute resolution process:

> "A dispute arising under or in connection with this contract is notified to the *Employer's* and *Contractor's* commercial management organisations who shall use all reasonable endeavours to resolve through negotiation. If the dispute is not resolved within three days the matter shall be escalated to commercial senior management who shall have 3 days to resolve. If the dispute is not resolved the matter shall be escalated to commercial directors, who shall have 3 days to resolve. If resolution fails, the dispute shall be decided by the *Adjudicator* in accordance with clauses 93.2, 93.3, 93.4 (and 94.1 if specified in the Contract Data)."

6. Clause 94.1 provides for the parties to refer a dispute to adjudication at any time, where the United Kingdom Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act") applies. The Contract Data provides that the 1996 Act applies.

7. The Contract Data further provides that:

> "The *Adjudicator* is to be agreed by both parties or upon failure to be appointed by the chairman of the institute of arbitrators ...

> The *Adjudicator nominating body* is The Chartered Institute of Arbitrators (Scottish Branch)."

8. Clause 93.2 (1) provides:

> "The Parties appoint the *adjudicator* under the NEC Adjudicator's Contract current at the *starting date*. The *adjudicator* acts impartially and decides the dispute as an independent adjudicator and not as an arbitrator."

9. Clause 93.3(8) provides:

> "The *Adjudicator's* decision is binding on the Parties unless and until revised by the *tribunal* and is enforceable as a matter of contractual obligation between the Parties and not as an arbitral award. The *adjudicator's* decision is final and binding if neither Party has notified the other within the times required by this contract that he intends to refer the matter to the *tribunal*."

10. Clause 93.4 states:

> "A Party may refer a dispute to the *tribunal* if
>
> - the party is dissatisfied with the *Adjudicator's* decision
> - the *Adjudicator* did not notify a decision within the time allowed and a new adjudicator has not been chosen,
>
> except that neither Party may refer a dispute to the *tribunal* unless they have notified the other Party of their intention to do so not more than four weeks after the end of the time allowed for the *Adjudicator's* decision."

11. The Contract Data provides that:

> "The *tribunal* is Arbitration.
>
> If the *tribunal* is arbitration, the arbitration procedure is in accordance with the Scottish Arbitration Code, prepared by the Scottish Council for International Arbitration, The Chartered Institute of Arbitrators (Scottish Branch)."

12. Clause 12 (as amended by clause Z18) states:

> "12.1 This contract is governed by the law and statutes of the country where the *site* is.
>
> 12.2 No change to this contract, unless provided for by the *conditions of contract*, has effect unless it has been agreed, confirmed in writing and signed by the Parties.

> 12.3 This contract is the entire agreement between the Parties.…"

13. The *site* is identified in the Contract Data as HMNB Clyde, which is located in Scotland.

14. Clause Z2.1 states:

> "In the event of any discrepancy in the contract the documentation shall take precedence in descending order as listed:
>
> (a) Additional conditions
>
> (b) *Conditions of contract*, NEC 3 Engineering and Construction Short Contract (June 2005)
>
> (c) Contract Data
>
> (d) *Employer's* Invitation to Tender
>
> (e) *Contractor's* Tender Submission
>
> (f) Any other documents forming part of the contract."

The Variation Agreement

15. By an agreement dated 22 December 2016, signed and dated by the parties ("the Variation Agreement"), the parties agreed to revise the contract value to £1,070,056.11.

16. The Variation Agreement includes the following terms:

> "This revised value, less the provisional sum, relates to the following:
>
> "1) Full and final settlement of any claims relating to this contract in [its] present form with the sole exclusion of the extra over cost of treating the 6no. large Strongbacks. For the avoidance of doubt, claims for additional costs can only be made for events which may occur in the future, in accordance with the provisions of the NEC Short Contract dated 1st December 2014 which may lead to a Compensation Event."
>
> …
>
> 5) Confirmation of agreement to the original Contract dated 1 December 2014 and full acceptance of the terms and conditions contained therein.
>
> …

> Application for payment shall be submitted by the 15th of each month…"
>
> "This agreement shall be governed by and construed in accordance with the Laws of Scotland and any dispute which may arise between the parties concerning this agreement shall be determined by the Courts of Scotland in line with the original Contract dated 1 December 2014."

The dispute

17. On 15 June 2018 Babcock served a notice of termination on HSBC.

18. On 21 June 2018 HSBC applied for a termination payment in the sum of £967,549.42 plus VAT.

19. On 19 July 2019 Babcock certified £NIL in respect of the termination assessment and made no payment.

20. On 10 September 2018, HSBC notified Babcock that it intended to refer the dispute to adjudication. Mr Donny Mackinnon was appointed as the adjudicator. The Scheme for Construction Contracts (Scotland) Regulations 1998 (as amended by the 2011 Regulations) ("the Scottish Scheme") applied to the extent that the terms of the contract did not comply with the 1996 Act.

21. On 14 November 2018 the adjudicator issued his decision ("the First Adjudication Decision"), deciding that HSBC was entitled to the sum claimed in full plus interest and fees by reason of Babcock's failure to issue a valid pay less notice. On 3 December 2018 the First Adjudication Decision was amended in respect of interest awarded.

22. Babcock paid the sum awarded to HSBC in accordance with the First Adjudication Decision.

23. Both parties issued notices of dissatisfaction in respect of the First Adjudication Decision.

24. On 7 February 2019 Babcock notified HSBC that it intended to refer to adjudication the dispute concerning the true value of the works. Mr Len Bunton was appointed as the adjudicator. The Scottish Scheme applied to the extent that the terms of the contract did not comply with the 1996 Act.

25. On 22 March 2019 the adjudicator issued his decision ("the Second Adjudication Decision"), deciding that the gross valuation of the works as at termination was £1,524,420.58 and directing that HSBC should pay to Babcock the sum of £613,338.03 (inclusive of VAT) plus interest and fees. Both parties also served notices of dissatisfaction in relation to this Decision.

26. HSBC failed to pay the sum awarded pursuant to the Second Adjudication Decision and wishes to challenge the validity of the same on grounds that the adjudicator failed to give reasons for his decision and failed to consider a defence advanced by HSBC.

The proceedings

27. On 17 April 2019 Babcock issued these proceedings to enforce the Second Adjudication Decision in the sum of £613,338.09 together with the adjudicator's fees and interest.

28. On 2 May 2019 Fraser J issued directions in the enforcement proceedings, including an oral hearing on 24 June 2019 for Babcock's summary judgement application.

29. On 14 May 2019 HSBC acknowledged service, stating that it wished to contest jurisdiction.

30. On 29 May 2019 HSBC issued an application seeking to set aside service of the claim form and particulars of claim, alternatively staying the proceedings based on a jurisdictional challenge.

31. On 7 June 2019 Pepperall J issued directions in respect of the jurisdictional challenge, including a hearing on 18 June 2019.

32. Both parties recognised that there was insufficient time between this hearing and 24 June 2019 for evidence to be served in the adjudication enforcement application. Therefore, that date was vacated and a provisional alternative date for that hearing has been fixed for 26 July 2019, subject to the Court's decision on jurisdiction.

Relief from sanctions

33. CPR 11(1) provides that a defendant who wishes to dispute the court's jurisdiction to try a claim may apply to the court for an order declaring that it has no such jurisdiction. CPR 11(2) provides that the defendant must first file an acknowledgement of service. CPR 11(4) provides that an application challenging jurisdiction must be made within 14 days after filing an acknowledgement of service. CPR 11(5) provides that if a defendant does not make an application within the 14 day period, he is to be treated as having accepted that the court has jurisdiction to try the claim.

34. It is common ground that in this case the acknowledgement of service was filed on 14 May 2019. Therefore, the jurisdictional challenge application should have been filed by 28 May 2019. The application was issued on 29 May 2019, one day late.

35. On 29 May 2019 HSBC applied for relief from sanctions pursuant to CPR 3.9.

36. The test applicable in respect of an application for relief from sanctions is well-established and set out in the Court of Appeal decision in *Denton v TH White Ltd* [2014] EWCA Civ 906.

37. In this case the failure to comply with CPR 11(4) was neither serious nor significant, given the short period of delay. The reason for the default was solicitor error. The circumstances of the case that the court should consider in order to deal justly with the application include the lack of any prejudice to Babcock, the absence of any impact on the conduct of the litigation and the disproportionate effect on HSBC's case of refusing relief by precluding any challenge to jurisdiction. Quite properly, the application is not opposed by Babcock. In those circumstances, the court grants HSBC's application for relief from sanctions and extends the time for issuing the application to challenge jurisdiction to 29 May 2019.

Legislative framework

38. The Civil Jurisdiction and Judgments Act 1982 ("the 1982 Act") contains provisions for the jurisdiction of courts and tribunals in the United Kingdom. The principle purpose of the 1982 Act is to give effect to the 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, now the recast Brussels I Regulation ("the Regulation"). However, it also provides for the allocation of civil jurisdiction as between different jurisdictions within the UK.

39. These proceedings concern civil and commercial matters in respect of which the domicile of the parties, the site and the place of performance of the contract are all within the UK. There is no international element. There is no issue of jurisdiction between the courts of the UK and any other EU member state. Therefore, the Regulation is not engaged.

40. The issue between the parties is the internal allocation of the claim between the courts of Scotland and the courts of England and Wales.

41. Section 16 of the 1982 Act provides that the rules for the allocation of jurisdiction of proceedings within the UK to the courts in each part of the UK are set out in Schedule 4 to the 1982 Act.

42. Rule 1 of Schedule 4 enshrines the principle that courts of the defendant's domicile have jurisdiction:

> "Subject to the rules of this Schedule, persons domiciled in a part of the United Kingdom shall be sued in the courts of that part."

43. Rule 2 of Schedule 4 provides for exceptions to that general rule:

> "Persons domiciled in a part of the United Kingdom may be sued in the courts of another part of the United Kingdom only by virtue of rules 3 to 13 of this Schedule."

44. Rule 3 of Schedule 4 confers special jurisdiction in relation to contract claims and other specified matters:

> "A person domiciled in a part of the United Kingdom may, in another part of the United Kingdom, be sued –
>
> (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question…"

45. Rule 12(1) of Schedule 4 recognises and gives effect to agreements on jurisdiction by the parties:

> "If the parties have agreed that a court or the courts of a part of the United Kingdom are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, and, apart from this Schedule, the agreement would be effective to confer

> jurisdiction under the law of that part, that court or those courts shall have jurisdiction."

46. Section 49 of the 1982 Act preserves the doctrine of *forum non conveniens* in internal UK domestic cases (as jurisdiction in such cases is not determined by the Conventions):

> "Nothing in this act shall prevent any court in the United Kingdom from staying, sisting, striking out or dismissing any proceedings before it, on the grounds of *forum non conveniens* or otherwise, where to do so is not inconsistent with the 1968 Convention or, as the case may be, the Lugano Convention or the 2005 Hague Convention."

Summary of the parties' positions

47. HSBC's position is that the English Courts do not have, or should not exercise, jurisdiction in respect of this matter on the following grounds:

    i) the Variation Agreement incorporated a choice of court clause into the Contract, namely, the Scottish courts, and that choice of jurisdiction should be respected in accordance with rule 12(1) of Schedule 4;

    ii) alternatively, the place of performance, whether performance of the underlying contractual obligations or payment of the adjudication award, was Scotland, giving the Scottish courts special jurisdiction in accordance with rule 3(a) of Schedule 4;

    iii) alternatively, this court should stay the current proceedings on the ground that the Scottish courts are the most appropriate forum for resolution of this matter.

48. Babcock's position is that the Court should refuse a stay and determine the adjudication enforcement application on the following grounds:

    i) the choice of court clause in the Variation Agreement conflicts with the arbitration agreement in the Contract, which has priority; in any event the choice of court clause is limited to disputes under the Variation Agreement and does not apply to adjudication enforcement;

    ii) Rules 12 and 3 of Schedule 4 do not displace Rule 1 and the Court should not interfere with Babcock's choice to sue HSBC in its place of domicile;

    iii) the Court's discretion should be exercised in favour of Babcock and no stay should be imposed.

Jurisdiction clause

49. The Contract provides for a disputes resolution regime that includes: (a) adjudication in accordance with the 1996 Act and (b) arbitration in accordance with the Arbitration (Scotland) Act 2010 and the Scottish Arbitration Code. Subject to the Variation Agreement, the Contract does not contain a choice of court clause that is alternative or supplementary to those provisions.

50. Ms Jones, counsel for HSBC, submits that the Variation Agreement constituted an effective variation to the contract, which served both to vary the contract sum and payment provisions and also to incorporate a choice of court clause, no court having been chosen in the original contract. There is no inconsistency between the choice of the Scottish Courts in the Variation Agreement and the arbitration agreement in the Contract. The two provisions can and do operate comfortably together. Arbitration remains the chosen means of final dispute resolution. The insertion of the choice of court clause gives the Scottish courts supervisory jurisdiction over any arbitration in accordance with the Arbitration (Scotland) Act 2010. The choice of court clause applies to adjudication enforcement; the adjudication provisions in the 1996 Act do not override the jurisdiction provisions in the 1982 Act.

51. Ms Chambers, counsel for Babcock, submits that there was no variation to the Contract to incorporate a choice of court clause. The purported choice of the Scottish Courts in the Variation Agreement is inconsistent with the arbitration agreement in the Contract. That discrepancy is resolved by clause Z2.1 which provides that the Contract Data (containing the arbitration agreement) takes precedence over the Variation Agreement (containing the choice of court clause). At best, the choice of court clause is limited to the Variation Agreement and does not affect any dispute in respect of the Contract. In any event, an express jurisdiction clause providing for the final settlement of disputes in the courts of another country would not preclude the English Court from enforcing an adjudication decision which is binding on an interim basis.

52. The principles applicable to the interpretation of contracts are now well-established and set out in *Arnold v Britton* [2015] UKSC 36 at paragraphs [15] – [20] and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 at paragraphs [10] – [13]. It is unnecessary to repeat those passages in this judgment.

53. On a proper construction of the document dated 22 December 2016, it was a variation to the Contract. It is clear from the face of the document that the primary purpose of the agreement was the settlement of claims made by HSBC then outstanding. However, it is also clear that the settlement of those claims gave rise to an agreed revised contract price such that it amended the Contract. The words: *"This revised value ... relates to … Confirmation of agreement to the original Contract dated 1 December 2014 and full acceptance of the terms and conditions contained therein"* indicate that the revised Contract Price should apply to, and be subject to, the other terms of the original Contract. Further, the Variation Agreement also changed the payment terms under the Contract. The formal requirements for a variation in clause 12.2 were satisfied. Thus, it amounted to a contract variation and must be construed as part of the amended Contract.

54. The words used in the disputed clause in the Variation Agreement are:

    i) "this agreement shall be governed by and construed in accordance with the Laws of Scotland"

    ii) "any dispute which may arise between the parties concerning this agreement"

    iii) "shall be determined by the Courts of Scotland"

    iv) "in line with the original Contract dated 1 December 2014."

55. There is no difficulty with the first part of the clause. It confirms the proper law of the Variation Agreement as Scottish law in line with the proper law of the original Contract.

56. The plain and natural meaning of the second phrase "*any dispute which may arise between the parties concerning this agreement*" is that it covers disputes as to the interpretation of the Variation Agreement together with other disputes that are, or may be, affected by the terms of the Variation Agreement. This would include a dispute as to the termination valuation that raised issues regarding the scope of the settled claims.

57. Such dispute resolution clauses must be construed widely and generously with the presumption that parties acting commercially intend that similar claims should be the subject of consistent jurisdiction clauses: *Premium Nafta Products Ltd v Fili Shipping Company Ltd* [2007] UKHL 40 per Lord Hoffmann at paragraphs [6] – [13].

58. I reject Babcock's narrower interpretation that the clause was limited to disputes directly under the Variation Agreement. Such interpretation would be inconsistent with the express words used, "*concerning this agreement*", and could give rise to procedural and substantive difficulties. The narrow interpretation would mean that any dispute as to the scope or impact of the Variation Agreement arising during a termination account arbitration would fall within the scope of the choice of court clause and require separate litigation to determine the question. Not only would this result in disruption, delay and additional cost to the parties but could result in inconsistent findings in arbitration and litigation. It is unlikely that the parties intended that consequence.

59. The third phrase of the clause is a clear jurisdictional choice of the Scottish Courts. This raises the potential difficulty of a conflict between the choice of court clause in the Variation Agreement and arbitration in the original Contract. I reject Babcock's submission that this apparent discrepancy could be dealt with by the order of priority set out in Clause Z2.1 because the clear intention of the parties in executing the Variation Agreement was to vary the Contract. Therefore, if and to the extent that there is a conflict between the choice of court provision and the arbitration provision, both provisions are contained in the Contract Data, as amended by the Variation Agreement.

60. One potential solution would be to read the choice of law clause in the Variation Agreement as substituting litigation in the Scottish Courts in place of arbitration. It could be argued that the Variation Agreement was a clear intention to change the terms of the Contract and sets out the final position of the parties as to jurisdiction. However, such a dramatic departure from the detailed dispute resolution regime set out in the original Contract would require very clear words deleting the arbitration agreement. Such clear words are not found in the Variation Agreement. Indeed, the last part of the clause: "*in line with the original Contract dated 1 December 2014*" indicates that the parties did not intend to change the original dispute resolution provisions, including the arbitration agreement. Rather, it indicates that the parties understood that the choice of court clause could be operated with the other dispute resolution provisions in the original Contract.

61. On balance, therefore, I accept Ms Jones' submission that the choice of law clause in the Variation Agreement is intended to sit alongside the adjudication provisions and the arbitration agreement in the Contract. It is applicable to supplemental, supervisory and enforcement matters in respect of those procedures. The choice of court clause in the

Variation Agreement must be read subject to the dispute resolution provisions in the other parts of the Contract.

Entitlement to adjudication enforcement

62. Babcock's case is that the Scottish choice of court clause does not affect the English Court's right to enforce the adjudication decision. Ms Chambers submits that adjudication is a *sui generis* system of dispute resolution which is in many respects unique. The primary aim of adjudication is the swift temporary resolution of the question of the dispute pending the final determination of the issues between them. In adjudication the need to have the right answer is subordinate to the need to have a swift answer and the courts have laid down special procedures to achieve that result: *South Coast Construction Ltd v Iversen Road* [2017] EWHC 61 (TCC) per Coulson J (as he then was) at paragraphs [19] and [27] – [30]:

> "…a party such as the claimant, who has a decision in its favour from an adjudicator, is in a much better position than most to argue that the court should exercise its discretion to continue to an enforcement hearing."

63. Reliance is placed on the *obiter* comments of HHJ Kirkham in *Comsite Projects Limited v Andritz AG* [2003] EWHC 958 (TCC), in which the English Court enforced an adjudication decision despite the existence of an Austrian jurisdiction clause, at paragraph [21]:

> "I accept [Comsite's] submission that, even if the Austrian court did have exclusive jurisdiction, that would not prevent the English court from exercising jurisdiction to enforce the decisions of an adjudicator, or to decide matters relating to the enforcement of such a decision, such decisions being of a temporary nature… Ultimately, a dispute may be determined by arbitration, but that does not prevent enforcement of the temporary decision of an adjudicator … whilst ultimately the Austrian court may be the appropriate forum in which the substantive dispute or disputes between Comsite and AAG should be settled (to adopt the wording of article 23) that does not prevent the English court enforcing the temporary decision of an adjudicator properly made in relation to the Building Services sub-contract. The agreement that the Austrian court have jurisdiction is not undermined or ignored by the conclusion that the interim decision of an adjudicator can be enforced by an English court. Enforcement of such a decision is without prejudice to the final merits and determination by the Austrian court. The agreement that the Austrian court have jurisdiction does not prevent the court considering this part 8 application by Comsite…"

64. Ms Jones submits that the 1996 Act does not displace the 1982 Act. Effect should be given to the Scottish jurisdiction clause. Reliance is placed on the decision of Lord Bannatyne in *BN Rendering Ltd v Everwarm Ltd* [2018] CSOH 45, a case in which the

Scottish Court stayed adjudication enforcement proceedings in recognition of an express exclusive jurisdiction clause in favour of the English Courts:

> "[13] … In *Ballast Plc* v *Burrell Co (Construction Management) Ltd* [2001] SLT 1039. Lord Reed noted:
>
> > "It appears from the cases cited to me that different views have been taken as to the appropriate legal framework within which to address the issues raised by adjudicators' decisions: in particular whether the adjudicator is to be regarded as a decision-maker, albeit one whose statutory powers and duties have been clothed in contractual form (the approach adopted by Lord Macfadyen in *Homer Burgess Ltd* v *Chirex (Annan) Ltd*, as I understand his opinion), or whether adjudication should be regarded as a contractual procedure (as Dyson J appears to have regarded it in, for example, *Macob Civil Engineering Ltd* v *Morrison Construction Ltd* [1999] BLR 93)."
>
> Lord Reed decided to approach the issues raised by adjudication within a contractual framework; noted that his contractual approach differed to that adopted by Lord Macfadyen in *Homer Burgess*; and thus did not treat the adjudicator as a "statutory decision maker". At paragraph 29 Lord Reed explained that the adjudication process flowed from the parties' contract and was subject to the express and implied terms of the contract:
>
> > "Each party to the contract is therefore to be regarded as having a contractual right to refer a dispute to adjudication; and each party equally has a contractual duty to comply with the adjudicator's decision. These rights and duties only exist, however, within limits which are set by the terms of the contract. The right to refer a dispute, for example, is confined to disputes arising under the contract: paragraph 1(1) of the Scheme. Since adjudication has a contractual basis, the construction and effect of paragraph 23(2), and in particular words – 'The decision of the adjudicator shall be binding on the parties, and they shall comply with it' – depends on the construction of the express and implied terms of the contract."
>
> …
>
> [77] …Both companies are domiciled in Scotland and the effect of the clause is that both companies will have to raise court actions in England (as the defender has presently done). Thus the effect of the clause is equal on both parties. It was argued that in the circumstances of the present case the pursuer is the party who has been successful at the adjudication and it will now have to

> raise an action in England. However, I do not see how this imposes any extra obligations on the pursuer. An action to enforce the decision of the adjudicator can be raised as easily in England as in Scotland. It was argued by Mr Massaro that the unfairness of this in the circumstances of enforcement of an adjudication decision was illustrated by a scenario where the country to which jurisdiction had been prorogated did not have a knowledge of the 1996 Act and did not appreciate its nature. This does not assist the pursuer's argument. The English court has a full understanding of adjudication.
>
> [78] The final argument advanced by the pursuer in support of its construction was based on this: adjudication is a *sui generis* system of dispute resolution created by section 108 of the 1996 Act. It is thus statutorily based and is conceived in the benefit of contractors such as the pursuer. Thus it is not covered by the clause.
>
> [79] The above argument is I believe misconceived. The right to go to adjudication is a contractual right in terms of clause 8. In my judgement it cannot be looked upon as being independent and separate from the contract from which it arises. It is not a standalone right. I accept the analysis of the structure of adjudication as set out by Lord Reed in *Ballast plc v Burrell Co."*

65. There is nothing in the 1996 Act that prevents parties to construction contracts, which relate to the carrying out of construction operations in England, Wales or Scotland, from agreeing foreign jurisdiction clauses. If the requirements of section 108 of the 1996 Act are not satisfied, section 114(4) provides that the statutory scheme, including provision for adjudication enforcement, is implied. Those implied terms must be interpreted in accordance with the proper law of the contract on the same basis as any other terms of the contract.

66. An interesting issue may arise where there is a tension between the statutory right to adjudicate a dispute under the 1996 Act and a conflicting regime imposed by choice of law or jurisdiction provisions agreed by the parties. However, that does not arise in this case. It is not suggested by HSBC that the dispute resolution provisions mandate arbitration or litigation in another jurisdiction so as to disapply the 1996 Act and preclude Babcock from seeking to enforce the Second Adjudication Decision. It is common ground that the 1996 Act is applicable and Babcock is entitled to seek to enforce the adjudication decision in the UK. The issue is whether Babcock should bring those adjudication enforcement proceedings in England or in Scotland.

67. In summary, I find that the Variation Agreement expressed the parties' intention that, subject to the other dispute resolution provisions, including adjudication and arbitration, disputes would be determined by the Scottish Courts. The Contract, as amended by the Variation Agreement, contains a valid choice of court provision in respect of the Scottish Courts.

Schedule 4 to the 1982 Act

68. Schedule 4 is based on, but does not replicate, the provisions of the Regulation. The Court is required to have regard to the EU rulings and jurisprudence on interpretation but is not bound by them.

69. Rule 1 provides that a defendant shall be sued in his place of domicile. HSBC is domiciled in England. This gives the English court jurisdiction but it is made subject to the other rules in Schedule 4.

70. Rule 2 provides that rules 3 to 13 may give a court jurisdiction.

71. Rule 3(a) provides that the place of performance may give jurisdiction. The place of performance is Scotland.

72. Rule 12 provides that where the parties have an agreed jurisdiction clause, that court shall have jurisdiction. The choice of court clause in the Variation Agreement gives the Scottish Courts jurisdiction.

73. Schedule 4 provides gateways for the courts within the UK to have jurisdiction. None of the above rules in Schedule 4 is stated to be overriding or gives exclusive jurisdiction to any part of the UK. This can be contrasted with the position under the Regulation, where a jurisdiction clause in the prescribed form confers exclusive jurisdiction. Rule 11 of Schedule 4 confers exclusive jurisdiction in respect of specified types of proceedings but does not include the matters in rules 1, 3 or 12.

74. Babcock has established a right to sue HSBC in England as the place of the defendant's domicile. However, schedule 4 is subject to section 49 of the 1982 Act, which preserves the discretion of the English Court to stay proceedings in favour of a more suitable alternative jurisdiction. HSBC's case is that Scotland is the most appropriate forum.

Forum non conveniens

75. The relevant principles for the exercise of such discretion are set out in *Spiliada Maritime Corporation v Consulex Ltd* [1987] AC 460 (HL) per Lord Goff at pp.476 – 478:

> "In my opinion, having regard to the authorities (including in particular the Scottish authorities), the law can at present be summarised as follows.
>
> (a) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.
>
> (b) … in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay…
>
> (c) The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, ex hypothesi,

> founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established … In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum…
>
> (d) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum… to adopt the expression used by my noble and learned friend, Lord Keith of Kinkel, in The Abidin Daver [1984] A.C. 398, 415, when he referred to the "natural forum" as being "that with which the action had the most real and substantial connection." So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see Crédit Chimique v. James Scott Engineering Group Ltd., 1982 S.L.T. 131), and the places where the parties respectively reside or carry on business.
>
> (e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay ...
>
> (f) If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this enquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions… "

76. Both the Scottish and English Courts are competent jurisdictions for the proceedings.

77. The burden rests on HSBC to persuade the Court that the case may be tried more suitably in Scotland for the interests of both parties.

78. Babcock has established an entitlement to issue the proceedings in the English Court based on HSBC's domicile in England. The Court will not lightly disturb that choice of forum and HSBC must establish that there is another forum which is clearly or distinctly more appropriate than the English forum.

79. Factors pointing in the direction of Scotland as the more appropriate forum are that the project is in Scotland, the place of performance is Scotland, the parties have chosen

Scottish Law and the parties have chosen the Scottish Courts. Of significance in this case, the adjudication rules are set out in the Contract to which Scottish Law applies, supplemented where necessary by the Scottish Scheme. Although the English Court could receive evidence as to the relevant provisions and principles of law, it would be more appropriate for the Scottish Court, familiar with its own rules and caselaw, to decide such matters.

80. I recognise that this application by HSBC has already caused unsatisfactory delay to these proceedings but there is provision for expedited determinations of adjudication enforcement hearings in Scotland.

81. Taking into account all the circumstances of the case, Scotland is the most appropriate forum to determine the adjudication enforcement proceedings.

82. For the above reasons, the Court will grant HSBC's application to stay the current adjudication enforcement proceedings.