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Raeesa Rawal
Of Counsel, Herbert Smith Freehills Kramer
Karim Ghaly KC
Barrister, 39 Essex Chambers
Nicholas Higgs
Barrister, 39 Essex Chambers
Daniel Waldek
Partner, Herbert Smith Freehills Kramer
Nick Oury
Partner, Herbert Smith Freehills Kramer
Jason Han
Senior Associate, Herbert Smith Freehills Kramer
Marc Wilkins
Senior Associate, Fenwick Elliott
James Doe
Partner, Herbert Smith Freehills Kramer
Anant Rangan
Associate, Herbert Smith Freehills Kramer
Zhou Yang
Trainee Solicitor, Herbert Smith Freehills Kramer

1. Editorial

Raeesa Rawal, Of Counsel, Herbert Smith Freehills Kramer

Welcome to the third edition of Construction Law Quarterly for 2025. This edition features a selection of papers examining recent developments in construction law, including legislative updates affecting the construction disputes sector, emerging market trends, and analysis of notable recent case law.

Our first paper addresses the reforms introduced by the Arbitration Act 2025 and its implications for construction disputes. It underlines how the legislation could enhance the efficiency, predictability, and responsiveness of arbitration, particularly within the construction industry. The commentary then examines the potential impact of these reforms on the popularity of arbitration in construction disputes and whether it can reclaim ground lost to adjudication over the past three decades.

Our second paper is an insightful exploration of the rapidly growing demand for data centres, driven by advancements in 5G, cloud computing, and generative AI. It highlights the pressing legal challenges including contractual risk allocation related to power demands, supply chain constraints, and evolving regulatory environments. The paper notes that as data centres emerge as a key asset class, understanding these challenges is essential for safeguarding investments in such a dynamic landscape.

Our third paper delves into the contentious construction law issues surrounding employers' rights to "descope" or terminate a contractor's scope of work. The paper emphasises the need for clear contractual language to permit such actions and the assistance that can be provided by well-drafted compensation mechanisms for losses.

Our fourth and final paper examines the Supreme Court's landmark judgment in *URS Corporation Ltd v BDW Trading Ltd.*[1] This judgment addresses the impact of remedial works on limitation periods in contribution claims under the Civil Liability (Contribution) Act 1978 as well as clarifying developers' rights to recover costs for remedial works on safety defects where "voluntariness" and/or proprietary interest are disputed.

As ever, should you have a short article or legal update that you would be interested in submitting for inclusion in a future issue please contact the journal editor at journals@icepublishing.com.

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2. Paper 1: The Arbitration Act 2025: revitalising arbitration in UK construction disputes?

Karim Ghaly KC, Barrister, 39 Essex Chambers; Nicholas Higgs, Barrister, 39 Essex Chambers

Introduction

The landscape of construction dispute resolution in the United Kingdom has been dominated by statutory adjudication since the Housing Grants, Construction and Regeneration Act 1996 (**HGCRA**)[4] introduced a rapid, interim-binding process to address cash-flow issues and maintain project momentum. Adjudication's 28-day resolution timeline and statutory mandate have made it the default mechanism for payment disputes, sidelining arbitration, which was once a cornerstone of construction dispute resolution. However, the Arbitration Act 2025 (the **Act**), enacted on February 24, 2025, introduces some significant reforms to modernise arbitration, aiming to enhance its efficiency, predictability, and responsiveness to the needs of the arbitration community, including the construction industry.

This article examines whether these reforms could revitalise domestic arbitration's popularity in construction disputes and potentially replace some statutory adjudications. We review the Act's key changes and consider their practical implications for construction disputes. The reforms signal a shift toward a more user-friendly arbitration process, raising the question of whether

arbitration can reclaim ground lost to adjudication over the past three decades.

Historical context: arbitration and adjudication in construction

Arbitration's traditional role

Arbitration has historically been valued in construction for its private, consensual nature, allowing parties to select arbitrators with expertise in technical matters like engineering or contract law. Its binding awards offer finality, and confidentiality protects sensitive commercial information. Arbitration's enforceability under the New York Convention also makes it appealing for international projects. However, its drawbacks—high costs, lengthy proceedings, and limited urgency—have reduced its use in domestic construction disputes, where rapid resolution is often critical.

The rise of statutory adjudication under the HGCRA

The HGCRA introduced statutory adjudication to address cash-flow issues in construction by mandating a 28-day resolution process for disputes, particularly payment-related ones. Adjudication's key features include:

- Speed: Decisions within 28 days, extendable by agreement.
- Cost-effectiveness: Lower costs compared to arbitration or litigation.
- Statutory mandate: Most construction contracts must include adjudication clauses.
- Interim nature: Decisions are binding but can be challenged in arbitration or litigation.

Adjudication's rapid, interim process has made it the default for payment disputes, ensuring projects continue without financial delays. Its success has marginalised arbitration, which is often reserved for complex disputes requiring finality. However, the use of adjudication has spread for beyond the initial justification of improving cash-flow, and is commonly used for complex final account disputes, to bring claims for professional negligence against architects, engineers and other advisors and for high-value disputes under PFI projects, including not just the underlying construction disputes but the consequent non-availability deduction mechanisms. Thus the original scope for which adjudication was envisaged has been stretched, perhaps to the point where, with hearings commonly being held on larger disputes, the distinction from arbitration is becoming somewhat blurred. The use of arbitration as an alternative to adjudication has been resisted in the past due to some of the perceived barriers of cost or the length of time to obtain a decision. It may be that the changes introduced by the Arbitration Act 2025 could reduce some of those barriers, and encourage its use as an alternative to adjudication, in the right context.

Key changes in the Arbitration Act 2025

The Arbitration Act 2025 amends the Arbitration Act 1996[5] to address some of arbitration's criticisms, introducing reforms to enhance its appeal for users. Some of the key changes are as follows:

Governing law of arbitration agreements (Section 1)

Change: Unless expressly agreed otherwise, the arbitration agreement is governed by the law of the seat, defaulting to English law for domestic arbitrations in England and Wales, reversing the uncertainty from *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb*[2] (which suggested that the law of the contract would govern the arbitration agreement).

Implication: This reform provides legal certainty, reducing disputes over applicable law, which is critical in construction contracts with complex jurisdictional elements, such as those involving international subcontractors or cross-border projects.

Power to make summary awards (Section 7)

Change: Tribunals can dismiss claims or issues with "no real prospect" of success, akin to summary judgment in litigation.

Implication: This provision accelerates arbitration by eliminating frivolous claims early, addressing one of arbitration's primary criticisms—prolonged proceedings. In construction, where disputes often involve multiple claims (e.g. variations, delays, defects), summary awards can save significant time and costs. For example, a subcontractor's baseless claim for additional costs due to alleged employer instructions can be dismissed swiftly, reducing legal fees and expediting resolution. This efficiency makes arbitration more competitive with adjudication for disputes with clear outcomes, potentially attracting parties seeking cost-effective resolutions.

Framework for jurisdiction challenges (Section 5)

Change: The Act limits Section 67 challenges by restricting new evidence and rehearings unless justice requires, curbing tactical delays.

Implication: Jurisdiction challenges have historically delayed arbitration, increasing costs and disrupting the certainty which ought to be provided by a final arbitral award. By streamlining this process, the Act ensures faster proceedings, which is crucial for disputes involving time-sensitive issues like project delays or payment disputes. For instance, a contractor challenging an arbitrator's jurisdiction over a multi-party dispute can no longer exploit procedural loopholes to delay proceedings, making arbitration more reliable. This reform aligns arbitration closer to adjudication's efficiency in handling jurisdictional objections.

Enforceable powers for emergency arbitrators (Section 8)

Change: Emergency arbitrators can issue enforceable orders, such as interim measures, unlike their previous non-binding recommendations, with enforceability under the New York Convention now more certain.

Implication: This reform is a potential game-changer for construction disputes requiring urgent relief, such as preventing a contractor from abandoning a site or securing critical evidence like defective materials. For example, if a payment dispute threatens to halt a major infrastructure project, an emergency arbitrator can order

interim measures to maintain operations, offering a faster alternative to court applications. This capability enhances arbitration's practicality, potentially reducing reliance on adjudication for urgent matters and appealing to parties needing immediate, enforceable outcomes. Whilst similar emergency measures can be obtained from the courts, the confidential nature of arbitration, together with this reform and the international applicability, may make arbitration a more attractive choice.

Arbitrator duties and immunity (Sections 2 and 4)

Change: The Act codifies arbitrators' duty to disclose circumstances that might raise doubts about impartiality both before and after accepting appointment and extends to circumstances the arbitrator "ought reasonably to be aware of". As a counter, the Act extends arbitrator immunity from costs to resignations or court removal, except if unreasonable or in cases of bad faith.

Implication: These changes bolster trust in arbitration by ensuring transparency and protecting arbitrators from undue liability. This should provide greater comfort for both parties and arbitrators and make disclosure a more straightforward process. The Act codifies practice which was already present in various rules or policies including those of the LCIA and CIArb.

Clarification of Section 44 powers

Change: The Act confirms courts can grant orders against third parties in support of arbitration, such as for evidence preservation or document production.

Implication: Construction disputes often involve multiple parties—main contractors, subcontractors, suppliers—making third-party involvement critical. This reform allows parties to ensure tribunals have access to third-party documents (e.g. supplier records for defective materials) without derailing the arbitration process. This enhancement reinforces arbitration's procedural utility, particularly for multi-party disputes common in large infrastructure projects.

Enhanced use of technology

Change: The Act encourages virtual hearings and bespoke procedural frameworks, aligning with post-pandemic practices and the rules of most of the arbitral institutions.

Implication: Virtual hearings reduce costs and logistical challenges, enabling faster scheduling for construction disputes involving geographically dispersed parties. This reflects what is now common practice: case management hearings are held virtually with a final hearing in person, although often with some virtual attendance. These changes, whilst not mandatory but rather by way of encouragement, have the potential to reduce cost and encourage tribunals to adapt to a more hybrid way of working, where they have not already done so.

The reforms introduced by the 2025 Act should, collectively, make arbitration faster, more predictable, and better equipped to handle the diverse needs of construction disputes, potentially challenging adjudication's dominance.

Impact on construction disputes

The Arbitration Act 2025's reforms enhance arbitration's suitability for construction disputes by addressing its traditional drawbacks—cost, delay, and lack of urgency.

Efficiency and cost reduction

Summary awards: The ability to dismiss unmeritorious claims early could be transformative for construction disputes, where parties often raise multiple claims, some speculative. For example, a subcontractor claiming additional costs for unauthorised variations can have their claim dismissed summarily, saving legal fees and expediting resolution. This efficiency reduces the financial burden of prolonged proceedings, making arbitration more competitive with adjudication for disputes with clear outcomes.

Streamlined jurisdiction challenges: By limiting tactical delays, the Act ensures arbitration proceedings align with project timelines and means decisions could be reached concurrently, rather than long after the project ends.

Urgent relief

Emergency arbitrators: Enforceable orders address urgent construction needs, such as preventing site abandonment or preserving evidence. For example, if a contractor threatens to halt work due to a payment dispute, an emergency arbitrator can order interim payments within days, maintaining project progress. This capability bypasses slower court processes, which can take weeks, and offers a binding alternative to adjudication's interim relief. The enforceability under the New York Convention also ensures compliance, even in cross-border disputes, enhancing arbitration's appeal for international construction projects.

Predictability and expertise

Governing law clarity: The Act's rule that arbitration agreements follow the seat's law provides stability, reducing legal wrangling over applicable law. For domestic projects, this ensures English law governs, simplifying contract drafting. In international projects, it minimizes jurisdictional disputes, encouraging arbitration clauses in contracts like FIDIC.

Arbitrator impartiality: Codified disclosure duties ensure arbitrators are unbiased, attracting experts in construction fields. In disputes involving technical issues, such as liability for structural defects, an arbitrator with engineering expertise can be invaluable for swiftly grasping the complexities underlying disputes. This expertise enhances arbitration's appeal for complex disputes, where precise technical understanding is critical.

Comparison with adjudication

Adjudication, mandated by the HGCRA, excels in speed (28-day resolutions) and cost, making it ideal for payment disputes critical to cash flow. Its statutory backing ensures universal access, and its

simplicity appeals to smaller contractors. However, its interim nature means decisions can be revisited, lacking the finality needed for high-stakes disputes. The Arbitration Act 2025 bridges this gap by enhancing arbitration's speed and urgency while retaining finality. Arbitration may be preferred for:

Complex disputes: Issues like contractual interpretation or technical defects benefit from arbitration's expertise and binding awards. Further, the more comprehensive rules of arbitral institutions (as opposed to the Scheme for Construction Contracts) ensure that parties enter any dispute with greater clarity as to the process, for example in how to deal with evidence. This should enable arbitral tribunals to make assessments based on the full range of evidence, something that is not always possible in the constrained timetable of an adjudication. Large infrastructure or PPP projects involving multiple stakeholders benefit from arbitration's ability to consolidate claims. Unlike adjudication, which is limited by privity, arbitration can join subcontractors and suppliers, streamlining resolution.

High-value disputes: Disputes involving significant sums, such as multimillion-pound contract breaches, warrant arbitration to avoid further proceedings. The finality and enforceability of arbitration reduce the likelihood of drawn-out enforcement proceedings for an adjudication decision, or the possibility of it being overturned at a later juncture.

Urgent non-payment disputes: Emergency orders address issues like site access, complementing adjudication's payment focus. Whilst the courts can, of course, also provide injunctive relief, the powers to do so via. an arbitral tribunal.

Cost: One key difference between adjudication and arbitration that is not addressed in the 2025 Act is the cost of arbitration. In adjudication the parties will typically bear their own costs, and in arbitration the default is that costs follow the event. S60 of the Arbitration Act 1996 provides that an agreement that one party bears all or part of the costs of the arbitration irrespective of outcome will be unenforceable unless made after the dispute has arisen. This therefore prevents parties from agreeing beforehand that they will each bear their own costs in any arbitration. The position is unchanged by the 2025 Act. For swift dispute resolution without the threat of cost sanction for the losing party adjudication is likely to therefore remain the preferred choice for most construction disputes.

Challenges and limitations

Despite its promise, the Arbitration Act 2025 faces challenges in revitalising arbitration for construction disputes:

Cost concerns: Arbitration's tribunal fees and legal costs remain significantly higher than adjudication's, potentially deterring smaller contractors. While summary awards reduce costs, the perception of expense persists.

Cultural inertia: The construction industry's entrenched preference for adjudication, reinforced by three decades of HGCRA practice, may slow arbitration's adoption. Smaller firms, accustomed to adjudication's simplicity, may resist arbitration's perceived formality.

Complexity risks: Arbitration's procedural flexibility, while an asset, can invite strategic delays or over-lawyering, particularly in high-stakes disputes. Parties may exploit procedural options to prolong proceedings, undermining efficiency gains.

Institutional support needs: The success of reforms like emergency arbitrators and summary awards depends on arbitration institutions (e.g. LCIA, CIArb) promoting their use. Limited awareness or inconsistent adoption could hinder uptake, especially among smaller firms unfamiliar with arbitration processes.

Conclusion

The Arbitration Act 2025 brings welcome clarity and modernisation to England's arbitration regime. For construction disputes, it introduces features—summary disposal, emergency arbitrators, streamlined challenges—that could make arbitration more attractive for domestic users.

However, it is unlikely to displace adjudication as the primary mechanism in the short term. Instead, arbitration may increasingly be used as an alternative where finality, complexity, or procedural robustness outweigh adjudication's speed. It may also serve as a preferred final forum post-adjudication.

Ultimately, the reforms signal a shift towards a more user-friendly, efficient arbitration process. Whether this leads to a revival in domestic construction arbitration will depend not only on the legal framework but on how practitioners, institutions, and parties respond. If arbitration can deliver finality with the same agility as adjudication, it may indeed reclaim some of the ground it has lost over the past three decades.

The two mechanisms are poised to coexist, with parties increasingly adopting tiered dispute resolution clauses that leverage adjudication's speed for interim relief and arbitration's expertise for definitive resolutions. The Act's reforms mean that parties should once again consider including domestic arbitration as the default final dispute resolution stage in their construction contacts.

3. Paper 2: Constructing the digital future: legal challenges in data centre projects

Daniel Waldek, Partner, Herbert Smith Freehills Kramer; Nick Oury, Partner, Herbert Smith Freehills Kramer; Jason Han, Senior Associate, Herbert Smith Freehills Kramer

The global demand for data centres has surged in recent years, driven by the increasing need for 5G, cloud computing, and other digital services. The rapid growth of generative AI is now

supercharging that demand, calling for a new generation of data centres capable of handling the high-performance computing workloads of increasingly sophisticated AI tools.

As a result, data centres have become a key asset class for investors, with global market revenue reaching an estimated $400 billion in 2024. However, this explosive growth comes with significant challenges, particularly for companies trying to find a home for their facilities.

In this edition of Inside Arbitration, we delve into some of the key legal challenges in data centre development. First, we look at how the immense power demand of data centres influences contractual risk allocation. Next, we explore the impact of global supply chain constraints on development costs. Finally, we consider how geopolitics is shaping the regulatory environment.

The energy challenge

Delivering data centre projects on time and within budget requires a robust approach to procurement and contract administration, much like any other construction project. However, data centre projects face unique challenges, particularly regarding power limitations.

The immense power demand of data centres is a significant obstacle for developers. Whilst capacities are starting to exceed 100 MW, energy supply in leading markets like Singapore continue to remain constrained. The lengthy timelines for bringing new supplies online and grid infrastructure upgrades often conflict with the aggressive construction schedules required for many data centre projects, making site procurement a significant project risk.

Power reliability is another major concern. Every minute of outage can cause severe disruptions for users, so having a reliable power supply and avoiding a single point of failure is critical. The Uptime Standards — performance criteria which classify data centres by these measures — have become a key point of differentiation. As a result, these standards often underpin the design and performance requirements of projects. Nevertheless, non-compliance with design and construction standards remains a common cause of outages, the financial and reputational impacts of which can be severe for developers, and which can, in turn, lead to significant disputes.

Procurement challenges

Whilst concerns about energy consumption and the need for reliability are not new, these issues are more pressing than ever as demand continues to outstrip supply. This makes it essential to clearly define contractual risk allocation, requiring careful consideration depending on the procurement model used.

In this regard, the choice of procurement model, and related contractual arrangements, will depend on a range of factors including the nature of the client (e.g. colocation v hyperscale), preferred technology as well as the scale or any constraints of its supply chain. There is no one-size-fits all approach, although complex and large-scale projects developed by established players are more likely to involve a disaggregated model, with the client retaining more control and coordination risk compared to alternatives such as a single point Engineering, Procurement and Construction or Design and Build only models.

When using a disaggregated procurement model, contractual 'gap risk' can emerge across the various design, supply, construction and commissioning contracts if they are not fully aligned, such as on matters relating to design and performance criteria. This risk is particularly relevant on data centre projects using an OFCI (or owner furnished contractor installed) model, where integrating key owner-supplied plant and equipment into the contractor's works involves a high degree of coordination between different parties. Further, interfacing various contract packages brings about programming challenges, making it imperative to allocate time-related risks and provide, if possible, for appropriate remedies on a 'back-to-back' basis with any upstream revenue contracts.

Supply chain constraints

Alongside the procurement challenges, the sector is also grappling with a shrinking labour market and recent hyperinflation in material costs. Data centre projects in 2024 experienced an average year-on-year cost increase of 9% globally, and according to a survey conducted in 2024, almost 80% of survey respondents reported delays to manufacturing or delivery of critical equipment.

The situation is not surprising, as data centre projects are vying for materials and labour not only with each other but also with other energy and infrastructure projects worldwide. In particular, the procurement of power equipment is a significant project risk, with unprecedented lead times for items such as transformers, power distribution units and power backup solutions. The impact of these shortages is especially severe in regions like the Middle East and Southeast Asia — regions with ambitious energy transition goals and rapidly growing populations. Further strains are anticipated, with U.S. President Trump proposing 100% tariffs on Taiwanese-made chips, just as the industry is preparing to significantly increase capacities.

These inflationary pressures have placed contractors in a difficult position as they now face significantly higher costs to complete the same scope of work, and will no doubt be looking to relief from developers.

Regulatory uncertainties

Issues such as the geographical location of data centre facilities and whose data they are processing add further layers of complexity. Given the strategic importance of data centres, an increasing number of national governments are legislating for data centres, with some

recent developments potentially impacting the feasibility of such projects and, in turn, giving rise to risk of related claims.

For instance, the UK has designated data centres as critical national infrastructure, which means that operators can now expect greater government support in relation to critical incidents (such as cyberattacks or extreme weather events). Whilst it remains to be seen whether the UK will further classify data centres as Operators of Essential Services (**OES**) under the Information Systems Regulations 2018,[3] such designation could become fertile ground for change in law claims from operations & maintenance contractors, as data centre operators come under further financial strain in complying with the mandatory risk management obligations placed on OES.

Similar trends can be seen in other markets. In Singapore, the Ministry of Communications and Information has announced plans to introduce a new Digital Infrastructure Act (**DIA**). While the DIA is currently a work in progress, it is intended to address a broader set of resilience risks beyond cybersecurity, including technical misconfigurations and physical hazards such as fire and cooling system failures. Similarly, in the UAE, a first intergovernmental meeting took place in February 2025 to explore the impact of data centres on the local energy sector, triggering a discussion around regulating these facilities as part of national infrastructure planning.

Conclusion

Although the number of data centres is expected to continue to increase to meet the growing global demand for digital services, investors in this industry face a major task in ensuring their investments remain adequately protected. The challenges around energy and supply chains are expected to persist, and regulatory changes seem inevitable, particularly in light of geopolitical tensions, environmental pressures and concerns about cyber security and the safety of data centre infrastructure.

These challenges and risks will undoubtedly continue to give rise to disputes between developers and their procurement supply chain. Consequently, and given the rapidly evolving market and regulatory landscape, it will be essential for companies involved in the development of data centres to adopt a procurement strategy that allows for flexibility as well as contractual mechanisms that enable the parties to address unexpected risks, should they arise.

4. Paper 3: Can an employer descope at its convenience?

Marc Wilkins, Senior Associate, Fenwick Elliott

Every now and then we are asked to advise clients who have had their contracts terminated or the remainder of their work under a contract removed part way through a job, not because of any actual or alleged wrongdoing on their part or because the project has been abandoned or unavoidably put on hold, but simply because the work is being given to an alternative contractor who is able to offer a more competitive price. Are employers entitled to "descope" or terminate at their convenience in order to secure a better bargain elsewhere? As is so often the case, it depends on what the contract says.

Generally speaking, a contractor who is engaged to carry out works not only has an obligation to complete those works but also a corresponding "right" to complete them. There are of course circumstances where that right may be lost; for example where the contract includes express provisions entitling an employer to omit work from the scope (e.g. where the employer's requirements in respect of certain elements of the work have changed or where the works are simply no longer required) or to terminate the contractor's employment such as where there has been a material breach or in the event of contractor insolvency. Such provisions serve an important purpose. However, whilst such contractual rights to omit works or terminate provide some flexibility over the scope of works and the opportunity to exit contracts where necessary, they may also provide employers with opportunities to swap contractors part way through a project simply to take advantage of a more competitive price being offered by another contractor for the remaining works.

Omission of work

As a starting point, there is no general right to omit work from the scope contained within a construction contract. Generally speaking therefore, an employer would not simply be able to omit some or all of the remaining scope of work in order to give it to an alternative contractor — if he has entered into a bad bargain, then that is the bargain he should be stuck with.

That position is, generally speaking, supported by the courts. Whilst contracts will often include express provisions entitling the employer to vary the scope of the contractor's work in order to adapt to changes in the requirements of the particular project, for an employer to be entitled to omit work, the contract must expressly say so. Even then, the law imposes limitations on such entitlement. There are two principal bases on which even an express right to omit work may be limited. They are: (i) the amount of work which can be omitted, and (ii) the ability to redistribute omitted work to others.

The amount of work that can be omitted

As a general principle, an employer cannot remove all the remaining work from a contractor's scope or omit such a large element of it that the omission would change the fundamental characteristic of the works. This goes back to the fundamental principal that the "basic bargain" struck between the employer and the contractor must be honoured, and that the employer cannot use the omissions clause to escape from what he considers to be a "bad bargain" so as to get a better bargain with another contractor. Therefore, where a significant amount of work remains to be carried out and all of the remaining work is omitted, a court is likely to find that such a large omission violates the parties' basic bargain.

The ability to redistribute omitted work to others

The question of whether a contract entitles an employer to omit work for the purpose of giving it to another contractor has been the subject of recent cases before the English and Scottish courts, and the current guidance from the courts can be summarised as follows:

A contract for the execution of work confers on the contractor not only a duty to carry out the work but a corresponding right to complete the work which it contracted to carry out.

Clear words are needed if the employer is to be entitled to remove work from the contractor in order to have it done by somebody else.

There are circumstances where work may be omitted and given to others provided the contractual provisions relied upon are wide enough to permit the omission. The employer's motive or reason for instructing the omission of the work is irrelevant.

Termination

Where the variation provisions of a contract do not provide an employer with the right to omit the remainder of the work in circumstances where it wants to exit what it might see as a bad bargain, contractors may find employers look to operate the termination provisions of the contract as an alternative means of removing the contractor instead. There is no general right to terminate "at will" or "for convenience". To be able to do so, the contract must provide (in clear terms) an unqualified right to terminate without any cause or reason, on giving notice. In such circumstances, termination will be at the sole discretion of the employer.

The courts will normally uphold well-drawn termination at will clauses — they will generally be seen as part of the commercial bargain reached between the parties which the court will be reluctant to interfere with. However, there are limited circumstances in which the courts may not give effect to a termination for convenience provision, such as where the contract does not provide for the original contractor to be compensated for loss of profit and overhead contributions it would have received on the balance of the work. Although where both parties are commercial entities and have freely negotiated and concluded a contract, the courts would be unlikely to interfere in the bargain reached unless the complainant suffered from bargaining weakness which put it at a serious disadvantage, and where the contract in question is oppressive. That would be a high threshold to get over.

Comment

Whilst there are reasons why an employer may reasonably require the flexibility to descope work, whether by omission or termination for convenience, from a contractor's perspective it is important to understand (i) the scope and implications of the variation or termination provisions in contracts they are signing up to and, in particular, whether the bargain being entered into is capable of being changed significantly at the employer's sole discretion and at potentially very short notice, and (ii) whether there is any protection afforded to the contractor by way of clear provisions for the valuation of omissions, or in the event of termination at will, which provide for the contractor to be compensated for losses such as loss of profit and overhead contributions that would have been earned on the balance of the work.

5. Paper 4: URS v BDW: an analysis of the supreme court's decision

James Doe, Partner, Herbert Smith Freehills Kramer; Anant Rangan, Associate, Herbert Smith Freehills Kramer; Zhou Yang, Trainee Solicitor, Herbert Smith Freehills Kramer

On 21 May 2025, the Supreme Court handed down its much-anticipated judgment in *URS Corporation Ltd (Appellant) v BDW Trading Ltd (Respondent) [2025] UKSC 21*, which is expected to be the landmark construction case of 2025. The Supreme Court's confirmation of the expansive scope of the Building Safety Act 2022 (**BSA**) and the Defective Premises Act 1972 (**DPA**) and its findings in relation to contribution claims under the Civil Liability (Contribution) Act 1978 (**CLCA**) are expected to have a significant impact on the construction industry.

Background to the dispute

BDW Trading Ltd (**BDW**, the Developer) engaged URS Corporation Ltd **(URS**, the Consultant) to provide structural design services in connection with several of its medium and high-rise developments, including two high-rise residential developments in which BDW no longer had any proprietary interests (the Developments). Practical completion for the Developments was certified between 2005 and 2012. Following the Grenfell Tower disaster in June 2017, BDW undertook widespread investigations of its developments and uncovered that the Developments had various design defects allegedly arising from URS' failure to exercise reasonable skill and care in the performance of its services. Certain defects were also deemed to present health and safety risks. Following this discovery, BDW carried out remedial works on the Developments and, before the BSA had come into force, commenced proceedings in negligence against URS, seeking to recover the costs of and associated with the remedial works.

Notably, at the time BDW discovered and remedied the defects, (i) it was not itself facing any claims, or the threat of any claims, in respect of the relevant defects, which in any event would have been time-barred under the Limitation Act 1980, and (ii) it no longer owned or had any proprietary interests in the Developments. This gave rise to the preliminary issues in the dispute.

Procedural history

The Technology and Construction Court (**TCC**) addressed two preliminary issues, on assumed facts: the scope of URS' duties and the recoverability of BDW's alleged losses in tort. The TCC found, among other things, that (i) the heads of loss claimed by BDW — being the costs of investigation, repair, etc, but excluding

reputational damage — were within the scope of URS' duties and were recoverable in principle and (ii) the losses were not too remote, being in the contemplation of both parties when they entered into the appointments.[4]

After the BSA came into force, which extended the limitation period to 30 years for claims by virtue of or related to s. 1 of the DPA, BDW also successfully applied to the TCC to amend its case to (i) bring new claims against URS under the DPA and the CLCA and (ii) delete its previous admissions that any liabilities it had to third parties in respect of the defects was time-barred.

The Court of Appeal dismissed URS' appeal in respect of these decisions.[5] It found that BDW did not need to be under an enforceable legal obligation to remedy defects or to have a proprietary interest in the Developments at the time of remedying the defects for URS' scope of duty to extend to cover BDW's claimed losses. The Court of Appeal also found that the BSA's extension of the limitation period had retrospective effect on claims that are related to s.1 DPA rather than only on claims brought thereunder. Significantly, it also found that commercial developers could be owed a duty under the DPA and that contribution claims under the CLCA were not contingent on third-party claims.

The Supreme Court's decision

There were four grounds of appeal, on which the Supreme Court found as follows:

Ground 1: In relation to BDW's negligence claim against URS, did BDW suffer actionable and recoverable damage of is the damage outside the scope of duty of care and/or too remote because it was voluntarily incurred? If the damage is outside the scope of duty of care or too remote, did BDW have an accrued tortious cause of action when it sold the Developments?

The Supreme Court held that there is no "voluntariness principle" in relation to incurred losses that operates as a bright line rule to render such losses as those incurred by BDW too remote or outside the scope of the duty of care in the tort of negligence. It noted that the most natural place for considering the impact of a voluntarily incurred loss in such a claim is in relation to determining matters of causation and mitigation, where questions of the reasonableness of actions arises.

Notably, on three key aspects of the assumed facts, the Supreme Court stated that BDW's decision to remediate the defects was arguably not "voluntary" in any "true sense". First, the defects could cause the death of or personal injury to the homeowners, for which BDW could then be liable under the DPA or in contract, and for which different limitation periods apply. Second, BDW risked reputational damage if it did nothing to remedy the defects after becoming aware of the potential danger to homeowners. The court noted that there was also "general public interest" in and "moral pressure" on developers like BDW to take steps to avoid this danger. Third, BDW had a liability to the homeowners in respect of the defects regardless of the claims being time-barred at the time it undertook the repairs. This is because of the well-established legal principle that limitation acts as a defence barring remedy in relation to a cause of action, but it "does not extinguish the right". The court found that these factors, taken together, indicated that BDW was "not exercising a sufficiently full and free choice so as to be regarded as acting voluntarily in effecting the repairs".

The Supreme Court noted that one of the underlying policies of the law is to ensure that there is a "fair and reasonable allocation of the risk of the loss" between parties. On the assumed facts, the court stated that it was fair and reasonable that the risk of loss should sit with URS for failing to exercise professional skill and care in the provision of its services. Further, the court also noted that its conclusion as to the correct legal position is consistent with the policy objective of incentivising developers such as BDW to carry out remedial works and remove any danger to homeowners.

Ground 2: Does s.135 BSA apply in the present circumstances and, if so, what is its effect?

The Supreme Court held that the effect of the retrospective extended limitation period introduced by s.135 (3) BSA extends to claims which are dependent on the limitation period in s.1 DPA but are not themselves actions brought under s. 1 DPA. This includes claims in negligence and for contribution, which BDW sought here.

The court found that both the meaning of words used in s.135 (3) BSA, which refers to "an action by virtue of" rather than 'under' s. 1 DPA, and the purpose of the BSA do not point to restricting the application of s.135 (3) BSA to only claims made directly under s. 1 DPA. The court noted that such a restrictive application would be contrary to the law's purpose of ensuring those directly responsible for building safety defects are held accountable and responsible developers are not penalised for proactively investigating and remedying building safety defects. The court noted that restricting the application of the BSA in the way argued for by URS would create an incoherent split regime: a developer's liability to a homeowner for the negligent actions of its contractor or a consultant would be subject to a 30-year limitation period, but its claims against the negligent contractor or consultant would be subject to a much shorter limitation period.

Notably, the Supreme Court noted that the purpose of the legislation was not to 'penalise' responsible developers" for proactively investigating and remedying defects.

However, the Supreme Court was careful to note that the retrospective effect of s.135 (3) BSA does not mean that it is to be treated as always having been in force "for all purposes". It was sufficient that BDW was able to establish that it applied in "in the present

circumstances", concerning claims in negligence and contribution claims dependent on s. 1 DPA. Lord Legatt in his concurring judgment sets out two criteria guiding the extent of the retrospective effect. The first is that it should only be capable of altering the law, and not the other facts which were dependent on what the law was at a given time. The second is that it would not be appropriate where it is not justified by reference to the purpose of the legislation.

Ground 3: Did URS owe a duty to BDW under s.1 (1)(a) DPA and, if so, are BDW's alleged losses of a type which are recoverable for breach of that duty?

The Supreme Court held that, taking into consideration the purpose and wording of s.1 DPA, developers can be owed a duty under s.1 (1)(a) DPA while also owing a duty to the homeowner thereunder. Once again, this is likely to be an important decision for developers as it gives them a right of action under the DPA alongside the benefit of its extended 30-year limitation period.

In arriving at this decision, the court noted that the wording of the section was wide enough to cover those who never acquire a proprietary interest in the dwelling, though it would most obviously cover situations involving first owner developers to whose "order" the dwelling is originally provided. Therefore, it did not matter here that BDW no longer had any proprietary interest in the Developments at the relevant time.

Ground 4: Is BDW entitled to bring a claim against URS pursuant to s.1 CLCA notwithstanding that there has been no judgment or settlement between BDW and any third party and no third party has ever asserted any claim against BDW?

The Supreme Court held that the right of party A to recover contribution from party B under the CLCA arises when 1) damage has been suffered by a third party for which both parties A and B are liable or could be found liable, and 2) party A has paid or been ordered or agreed to pay compensation in respect of the damage. Crucially, the court found that undertaking remedial works would be sufficient to satisfy the second requirement because such works constitute payment in kind. The court found that a contribution claim does not require that the amount of compensation must have been established by a judgment, admission, or settlement agreement.

Conclusion

This decision will be of particular interest to developers who have carried out, or expect to carry out, remedial works on their developments in response to the Government's emphasis on addressing serious safety defects in medium- and high-rise developments across the country in the aftermath of the Grenfell Tower disaster.

The Supreme Court confirmed that developers can recover costs even if they undertake remedial works "voluntarily", or preemptively, (i.e. without any immediate enforceable legal obligation to do so) in a claim for negligence and/or under the DPA. This will be the case even where a developer no longer has a proprietary interest in the development. The Supreme Court also confirmed that a party can bring a contribution claim under the CLCA — absent a judgment, admission of liability, settlement, or even a claim having been brought against it — if it has carried out remedial works to address defects for which it and another party are both liable.

Following this decision, developers are likely to be (re)assessing their potential rights against contractors and consultants in respect of remediation costs incurred on existing and historical developments. Conversely, contractors, consultants and their professional indemnity insurers may be prompted to review their risk exposure across existing and historical contractual arrangements.

REFERENCES

1. URS Corporation Ltd v BDW Trading Ltd [2025] UKSC 21.
2. Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38.
3. Network and Information Systems Regulations 2018.
4. URS Corporation Ltd v BDW Trading Ltd [2021] EWHC 2796 (TCC).
5. URS Corporation Ltd v BDW Trading Ltd [2023] EWCA Civ 772.