SBC

CASE SUMMARY

PARTIES

MOTACUS CONSTRUCTION LIMITED
& PAOLO CASTELLI

DATE

22nd February
2021

ISSUE

The sole issue was whether the court had jurisdiction to determine the application in circumstances in which the construction contract conferred exclusive jurisdiction on the courts of Paris, France.

ANALYSIS & KEY POINTS (1)

The key part of the judgment — **1**;

The application therefore raises the apparently novel question whether the inclusion within a construction contract for works in England of an exclusive jurisdiction clause in favour of a foreign court precludes the English court from entertaining proceedings for breach of the term implied by paragraph 23 of the Scheme that the decision of an adjudicator binds the parties until the final determination of the dispute. This question has not previously been the subject of any authoritative decision of the courts and it is not considered in the leading work on the subject, Coulson on Construction Adjudication, 4th ed (2018) ('Coulson'). This may be because, in practice, it is rare for an English construction contract to contain a clause conferring exclusive jurisdiction on a foreign court.

ANALYSIS & KEY POINTS (2)

The key part of the judgment — **2**;

I hold that an application for summary judgment to enforce an adjudicator's decision is an interim measure of protection within art. 7 of the 2005 Hague Convention. The court is not required to suspend or dismiss these proceedings.

THE ANALYSIS

The Judge agreed that the court was being invited to grant an interim, rather than a final and conclusive, remedy. The position was consistent with the position under construction contracts containing arbitration clauses – see MBE Electrical Contractors Ltd v Honeywell Control Systems Ltd [2010] EWHC 2244 (TCC). Where a contract contains an arbitration clause, the "pay now, argue later" policy of the HGCRA requires the enforcement by the courts of the interim adjudicator's award before the final determination by the chosen forum. The purpose of the HGCRA is to ensure that the adjudicator's decision is binding until it is successfully challenged by arbitration or in court. The sum awarded by an adjudicator must be paid; and the paying party cannot seek to avoid payment by staying the enforcement proceedings for arbitration. A similar approach applied here, in the face of a foreign exclusive jurisdiction clause.

Neutral Citation Number: [2021] EWHC 356 (TCC)

Construction Contract – Adjudication - Enforcement - Summary Judgment - Whether jurisdiction of English court ousted by foreign exclusive jurisdiction clause - Housing Grants, Construction and Regeneration Act 1996, ss. 104, 108, 114 - 2005 Hague Convention, arts.6 (c), 7

Case No: HT-2021-MAN-000002

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
IN MANCHESTER
TECHNOLOGY AND CONSTRUCTION COURT

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Date: Monday 22 February 2021

Before :

HIS HONOUR JUDGE HODGE QC
Sitting as a Judge of the High Court

- -

Between :

Motacus Constructions Limited

Claimant

- and -
Paolo Castelli SPA

Defendant

- -
- -

Ms Jennifer Jones (instructed by **Hill Dickinson LLP**) for the **Claimant**
Mr Mischa Balen (instructed by **Bird & Bird LLP**) for the **Defendant**

Hearing date: Monday 15 February 2021

The following cases are referred to in the judgment:

Re Agrokor DD [2017] EWHC 2791 (Ch)
Babcock Marine (Clyde) Limited v HS Barrier Coatings Ltd [2019] EWHC 1659 (TCC), [2019] BLR 495

BN Rendering Ltd v Everwarm Ltd [2018] CSOH 45
Channel Tunnel Group Ltd v Balfour Beatty Construction Limited [1993] AC 334
Comsite Projects Ltd v Andritz AG [2003] EWHC 958 (TCC), (2004) 20 Const LJ 24
Donohue v Armco Inc [2001] UKHL 64, [2002] 1 All ER 749
The Eleftharia [1970] P 94
Fiona Trust v Privalov [2007] UKHL 40, [2007] Bus LR 1719
Re Henderson's Estate, Nouvion v Freeman (1889) 15 App Cas 1
Macob Civil Engineering Ltd v Morrison Construction Ltd (1999) 64 Con LR 1
MBE Electrical Contractors Ltd v Honeywell Control Systems Ltd [2010] EWHC 2244 (TCC), [2010] BLR 561
Spiliada Maritime Corporation v Consulex Ltd ('The Spiliada') [1987] AC 460
Re Stocznia Gdynia SA v Bud-Bank Leasing SP. ZO. O [2010] BCC 255
National Navigation Co v Endesa Generacion SA ('The Wadi Sudr') [2009] EWCA Civ 1397, [2010] 1 Lloyd's Rep 193

No additional cases were cited to the court or referred to in the skeleton arguments.

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.

.....

HIS HONOUR JUDGE HODGE QC

<u>Covid-19 Protocol</u>: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.00 am on Monday 22 February 2021.

JUDGE HODGE QC:

I: Introduction and overview

1. This is an application by a sub-contractor for summary judgment to enforce the decision of an adjudicator which awarded the claimant the sum of £454,678.65 together with VAT and interest. The adjudication took place under and in accordance with the provisions of the Scheme for Construction Contracts ('**the Scheme**'). The sole defence to the application is that the Court does not have jurisdiction to determine the application for summary judgment because it has been brought in breach of a clause in the construction contract which confers exclusive jurisdiction on the courts of Paris, France. The application therefore raises the apparently novel question whether the inclusion within a construction contract for works in England of an exclusive jurisdiction clause in favour of a foreign court precludes the English court from entertaining proceedings for breach of the term implied by paragraph 23 of the Scheme that the decision of an adjudicator binds the parties until the final determination of the dispute. This question has not previously been the subject of any authoritative decision of the courts and it is not considered in the leading work on the subject, *Coulson on Construction Adjudication*, 4th ed (2018) ('**Coulson**'). This may be because, in practice, it is rare for an English construction contract to contain a clause conferring exclusive jurisdiction on a foreign court.

II: Background

2. The underlying dispute concerns a supply and installation agreement dated 23 May 2019 relating to the defendant's fitting out works to One Bishopsgate Plaza Hotel in London. The claimant was retained by the defendant to supply and install plasterboards, internal walls and partitions, false ceilings, conduit backboxes, raised flooring and related painting. Clause 19 of the contract reads:

> *"19. GOVERNING LAW & DISPUTE RESOLUTION*
>
> *This Agreement shall be governed by and construed in accordance with the laws of Italy.*
>
> *All disputes between the parties as to the validity, execution, performance, interpretation or termination of this Agreement will be submitted to the exclusive jurisdiction of the Courts of Paris, France, in accordance with the aforementioned laws."*

3. Part II of the Housing Grants, Construction and Regeneration Act 1996 ('**the 1996 Act**') applies to construction contracts regardless of whether or not the law of England and Wales (or Scotland) is otherwise the applicable law in relation to the contract: see s. 104 (7). Thus, Parliament has decided that the UK adjudication and payment provisions apply to foreign law contracts governing construction operations in England and Wales. (The claimant's representatives have consulted *Hansard* but they have been unable to find any discussion of its underlying intention.)

4. The right to enforce an adjudicator's decision is a right which derives from the parties' contract. Section 108 of the 1996 Act provides that a party to a construction

contract has the right to refer a dispute arising under the contract to adjudication. Section 108 (3) provides as follows:

> "*The contract shall provide [in writing] that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement. The parties may agree to accept the decision of the adjudicator as finally determining the dispute.*"

5. This contract did not comply with the requirements of s. 108 of the 1996 Act. In particular, and contrary to s. 108 (3), there was no provision by which the adjudicator's decision was to bind the parties until the dispute was finally determined, as required by s. 108 (3). In those circumstances, s. 108 (5) applies:

> *"If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply."*

6. Section 114 (4) of the 1996 Act provides that the provisions of the Scheme for Construction Contracts take effect as implied terms in the parties' contract:

> *"Where any provisions of the Scheme for Construction Contracts apply by virtue of this Part in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned."*

Paragraph 23 of the Scheme provides:

> *"The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties."*

7. Accordingly, pursuant to ss. 108 (3), 108 (5) and 114 (4) of the 1996 Act and para. 23 of the Scheme for Construction Contracts, it was an implied term of the contract that the decision of the adjudicator binds the parties until the final determination of the dispute.

8. A dispute arose as to sums due under the contract and the claimant issued a notice of adjudication on 27 October 2020. Both parties participated in the adjudication. At para. 7 of his decision, the adjudicator (Mr Philip Eyre) noted that the governing law was the law of Italy. At para. 11 (headed "Jurisdiction") he recorded that:

> *"No matters have been raised in the submissions relating to threshold jurisdiction."*

9. The adjudicator issued his award on 15 December 2020. He awarded payment of £454,678.65 plus such VAT as was due, plus interest of £4,085.88 up to the date of the award and accruing at £99.66 per day thereafter until payment was made. Payment was ordered to be made by 22 December 2020 but it has not yet been made. The adjudicator's fees were split equally between the parties.

10. An adjudication enforcement claim was issued on 12 January 2021. On the same day, HHJ Stephen Davies issued standard form directions in adjudication enforcement

proceedings giving the claimant permission to issue an application for summary judgment prior to service by the defendant of either an acknowledgment of service or a defence and giving directions to lead to the hearing of such an application remotely by Teams on 15 February 2021.

11. The evidence in support of the summary judgment application comprises a short witness statement dated 11 January 2021 from the claimant's solicitor, Mr Sam Beer (of Hill Dickinson LLP). The evidence in answer takes the form of a short witness statement dated 26 January 2021 from the defendant's solicitor, Mr Jonathan Speed (of Bird & Bird LLP). This simply challenges the jurisdiction of the English court in these proceedings on the basis that the contract between the parties contains an exclusive jurisdiction clause in favour of the courts of Paris, France. The defendant is said to have raised this point at the earliest opportunity in its Response to the Notice of Adjudication, submitting that, if the adjudicator were to make an award in the claimant's favour, then, pursuant to the exclusive jurisdiction clause in the contract, any such award should only be enforced in the courts of Paris. Mr Speed does not refer to, or provide any evidence of, either Italian or French law or procedure.

12. At the summary judgment hearing on 15 February the claimant was represented by Ms Jennifer Jones (of counsel). The defendant was represented by Mr Mischa Balen (also of counsel). Both counsel are from the same, respected specialist construction chambers (Atkin Chambers). Both counsel had produced informative and helpful written skeleton arguments. Whereas the electronic hearing bundle comprised only 158 pages, the joint electronic bundle of authorities extended to 557 pages. Both counsel addressed me in turn for about an hour; and Ms Jones then replied for about 10 minutes. The submissions, both written and oral, were clear and concise. At the end of the hearing, I announced that I proposed to grant summary judgment in favour of the claimant in the amount claimed for reasons to be given later in this written judgment. I then proceeded to award the claimant its costs, which I summarily assessed at £30,000.

III: Exclusive Jurisdiction clauses

13. The Civil Jurisdiction and Judgments Act 1982 **('the 1982 Act')** governs the jurisdiction of the English courts where there is a dispute over which national court should entertain jurisdiction over a dispute. The 1982 Act was amended by the Private International Law (Implementation of Agreements) Act 2020 (**'the 2020 Act'**) with effect from the end of the implementation period which followed the UK's departure from the European Union. In summary, jurisdictional questions are no longer determined by the Brussels Regulation but by the Convention on Choice of Court Agreements concluded on 30 June 2005 at the Hague (**'the 2005 Hague Convention'**). Section 1 (2) of the 2020 Act inserted a new s. 3D in the 1982 Act by which the 2005 Hague Convention has the force of law in the United Kingdom. For convenience of reference, the English text of the 2005 Hague Convention is set out in Schedule 3F to the 1982 Act. The European Union (and, through the EU, France) is also a contracting state.

14. Article 1(1) provides that *"This Convention shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters"*. Article 1(2) provides that a case is international unless (amongst others) *"the parties are resident in the same Contracting State"*. In the present case, the claimant is

resident in the United Kingdom whilst the defendant is resident in Italy so this is clearly an *"international case"*. *"Exclusive choice of court"* agreements are defined in article 3. The choice of court agreement in this case is such an agreement because clause 19 of the construction contract in this case designates the courts of Paris, France to the exclusion of the jurisdiction of any other court. The requirements of article 3(c) (concerning the formalities for concluding or documenting the exclusive choice of court agreement) are satisfied in the present case because the contract was concluded in writing.

15. Article 6 of the 2005 Hague Convention provides that a court of a contracting state (in this case the UK) other than that of the chosen court (in this case Paris, France):

> *"... shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless –*
>
> *(a) the agreement is null and void under the law of the State of the chosen court;*
>
> *(b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;*
>
> *(c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;*
>
> *(d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or*
>
> *(e) the chosen court has decided not to hear the case."*

16. It is common ground that articles 6 (a), (b), (d) and (e) are not engaged in the present case; but the claimant relies upon article 6 (c). The claimant also relies upon article 7, which provides that:

> *"Interim measures of protection are not governed by [the Hague] Convention. [That] Convention neither requires nor precludes the grant, refusal or termination of interim measures of protection by a court of a Contracting State and does not affect whether or not a party may request or a court should grant, refuse or terminate such measures."*

17. *"Interim measures of protection"* is not a defined term in the 2005 Hague Convention; but art. 4 (1) defines *"judgment"* as meaning *"... any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment."*

18. The court was also referred to art. 21 which permits contracting states to make declarations to the effect that they will not apply the 2005 Hague Convention with respect to specific matters. There has been no such declaration in respect of construction contracts.

19. The court was taken to the Explanatory Report on the 2005 Hague Convention and specifically to the commentaries on the two limbs of the exception in art. 6 (c) at paras 151-2 *('manifest injustice')* and 153 *('public policy')* and on article 7 at paras 160-163. The former paragraphs emphasise that the phrases *"manifest injustice"* and *"manifestly contrary to the public policy of the State of the court seised"* in art. 6 (c) are deliberately intended to set a high threshold or standard and that these provisions do *"... not permit a court to disregard a choice of court agreement simply because it would not be binding under domestic law"*. Para. 160 reads:

> *"Article 7 states that interim measures of protection are not governed by the Convention. It neither requires nor precludes the grant, refusal or termination of such measures by a court of a Contracting State, nor does it affect the right of a party to request such measures. This refers primarily to interim (temporary) measures to protect the position of one of the parties, pending judgment by the chosen court, though it could also cover measures granted after judgment that are intended to facilitate its enforcement. An order freezing the defendant's assets is an obvious example. Another example is an interim injunction preventing the defendant from doing something that is alleged to be an infringement of the plaintiff's rights. A third example would be an order for the production of evidence for use in proceedings before the chosen court. All these measures are intended to support the choice of court agreement by making it more effective. They thus help to achieve the objective of the Convention. Nevertheless, they remain outside its scope."*

Para. 161 makes it clear that:

> *"A court that grants an interim measure of protection does so under its own law. The Convention does not require the measure to be granted but it does not preclude the court from granting it ..."*

Para. 163 states that:

> *"If, after the chosen court has given judgment, proceedings are brought to recognise and enforce that judgment in a Contracting State in which interim measures were granted, the requested State would be required under Article 8 to rescind the interim measures (if they were still in force) to the extent that they were inconsistent with the obligations of the requested State under the Convention ..."*

IV: The claimant's submissions

20. Ms Jones emphasises that the only issue before the court is the effect of an exclusive jurisdiction clause in favour of the courts of Paris in this construction contract between the parties. She submits that notwithstanding the parties' choice of the courts of Paris, this court should accept jurisdiction and enforce the adjudicator's decision in the claimant's favour. If the claimant is right about this, then the defendant raises no further objection to enforcement.

21. Ms Jones accepts that in principle clause 19 is capable of applying to issues concerning adjudication. The meaning of the choice of law clause is probably, strictly speaking, a matter of Italian law: see e.g. *Dicey & Morris on the Conflict of Laws*,

15th edn, at para. 12-103; but the claimant does not seek to argue that Italian law is any different from English law on this point. In *Fiona Trust v Privalov* [2007] UKHL 40, [2007] Bus LR 1719 at [13] Lord Hoffmann made it clear that when construing an arbitration clause, the starting point is the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of their relationship to be decided by the same tribunal. In those circumstances, Ms Jones does not submit that disputes concerning adjudication are excluded from the scope of this jurisdiction clause as a matter of principle.

22. The claimant's case is that this court should accept jurisdiction and enforce the adjudicator's decision, notwithstanding the exclusive jurisdiction clause, in light of the provisions in either art. 6(c) or art. 7 of the 2005 Hague Convention. Ms Jones submits that it would be manifestly contrary to the public policy enshrined in the 1996 Act, or alternatively it would be manifestly unjust, to refuse to enforce an otherwise enforceable adjudicator's decision in reliance on clause 19 of the contract. In any event, the enforcement of an adjudicator's decision is the enforcement of an interim measure of protection. It falls outside the scope of the 2005 Hague Convention and so the defendant cannot rely on its provisions.

23. Ms Jones addressed the old law prior to the end of the Brexit implementation period because the available case law had been decided under the old regime. Before the final completion of the United Kingdom's departure from the European Union, the present issue would have been resolved by reference to the Brussels Regulation. This did not have the same structure as the 2005 Hague Convention, particularly as regards arts 6 and 7 (although public policy did come into play at the later stage of the enforcement of an extant judgment). Ms Jones also considered it to be helpful to point out (because it appears in the case law) that the allocation of jurisdiction as between the courts of different parts of the UK (in particular England/Wales and Scotland) is governed by s. 16 and sch. 4 of and to the 1982 Act. This used to be broadly analogous to the Brussels Regulation regime and is now broadly analogous to the 2005 Hague Convention regime.

24. The point on art. 6 (c) of the 2005 Hague Convention is said to turn on the very well established principles which govern the enforcement of adjudicators' decisions. Parliament enacted the 1996 Act to remedy problems with cashflow in the construction industry. Chapter 1 of *Coulson* references the Latham Report and the reasons behind the introduction of construction adjudication and the other payment provisions. Ms Jones draws the court's attention to the extract from Lord Ackner's influential contribution to the debate in the House of Lords on 22 April 1996 (reproduced at para. 1.31 of *Coulson*) stressing the need for the adjudication process to produce a *"quick, enforceable, interim decision"*. That is what Parliament legislated for, and it is what, in this jurisdiction, has been achieved. The emphasis on the need for timely, quick enforcement is said to be beyond doubt. The claimant refers to Dyson J's decision in *Macob Civil Engineering Ltd v Morrison Construction Ltd* (1999) 64 Con LR 1 at [14], stressing that Parliament's intention in enacting the 1996 Act was plainly

> *"... to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement ... Parliament has not abolished arbitration*

> *and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved."*

25. Ms Jones submits that there can be no real doubt that to fail to enforce an otherwise enforceable adjudicator's decision would be manifestly contrary to public policy, and also unjust, in the light of the parliamentary intention so clearly set out and understood by the construction industry and this court. Parliament has decided that in order to address cash flow problems in the construction industry, and the shortcomings of the traditional litigation process in serving the needs of the construction industry, there should be a short-form process of adjudication producing binding, and readily enforceable, decisions. Indeed, Ms Jones's submission that the failure to enforce an adjudication decision would be manifestly contrary to public policy, or otherwise unjust, is said to be consistent with s. 104 (7) of the 1996 Act, which applies the compulsory adjudication provisions to foreign law contracts. It is hard to imagine that Parliament intended that parties to foreign law contracts should be able to avoid the effective (i.e. timely) implementation of the 1996 Act by electing for the exclusive jurisdiction of a foreign court. Thus the exception in art. 6(c) clearly applies.

26. As to art. 7, it is similarly well known and established that an adjudication decision is a temporary remedy only. Section 108(3) of the 1996 Act and para. 23 of the Scheme both make it clear that an adjudicator's decision is only temporarily binding, as was recognised in *Macob*. Ms Jones also refers the court to authority on the issue of what else may be an interim remedy. *Dicey, Morris & Collins on the Conflict of Laws*, 15th edn, discusses when a foreign judgment may be enforced at Rule 42, paras 14R-020 to 14-025. As a matter of English common law, foreign judgments will not be recognised unless they are *"final and conclusive"*: see para. 14-023. The test is one of finality i.e. is the decision such as to make the point res judicata between the parties: see *Re Henderson's Estate, Nouvion v Freeman* (1889) 15 App Cas 1, where a preliminary or *"remate"* decision of a Spanish Court was not enforceable because it was open to what was, in effect, a re-hearing. There is nothing in the enforcement of an adjudicator's decision that makes the substance of the decision res judicata between the parties. Indeed the reverse is true; by the operation of the 1996 Act and the Scheme, an adjudicator's decision is not final and binding.

27. There is also said to be a parallel with the position under construction contracts containing arbitration clauses. *MBE Electrical Contractors Ltd v Honeywell Control Systems Ltd* [2010] EWHC 2244 (TCC), [2010] BLR 561 is authority for the proposition that where a contract contains an arbitration clause, the *"pay now, argue later"* policy of the 1996 Act requires enforcement by the courts of the interim adjudicator's award before final determination by the chosen forum (in that case, arbitration): see [30] - [32]. The whole purpose of the 1996 Act is to ensure that the adjudicator's decision is binding until it is successfully challenged by arbitration or in court. Thus, in the ordinary case, the sum awarded by an adjudicator must be paid, and the paying party cannot seek to avoid payment by staying the enforcement proceedings for arbitration. *Coulson* endorses that analysis at para. 3.47; and Ms Jones submits that it is an analysis that also assists when considering the operation of art. 7 of the 2005 Hague Convention.

28. Ms Jones therefore submits that adjudication and its enforcement can, and should, be treated as interim measures of protection within the meaning of art. 7 of the 2005 Hague Convention, and this court should accept jurisdiction, and enforce the adjudicator's decision, leaving the parties to litigate the underlying dispute in the courts of Paris. Whilst summary judgment is clearly a final and conclusive remedy, the reality of this summary judgment application is that the court is being invited to grant an interim, rather than a final and conclusive, remedy. What is before this court is not the underlying dispute but whether an interim procedure and remedy have been followed and granted.

29. Ms Jones submits that there is no good reason to depart from that analysis. Although there is some relevant case law, all of it was decided under the Brussels regime; and none of it is said to assist the defendant on a proper analysis. First, there is the decision of Judge Kirkham in *Comsite Projects Ltd v Andritz AG* [2003] EWHC 958 (TCC), (2004) 20 Const LJ 24. That was a case where it was argued that there was an Austrian choice of law clause. At [21] the judge made it clear (albeit obiter) that even if the Austrian Court were the appropriate forum for determining the substantive dispute, that would not stop an English court from granting the interim relief sought by enforcing the adjudicator's decision. This case is said to favour the claimant's position (although it was decided under the Brussels regime, which does not have the equivalent of arts 6 and 7 of the 2005 Hague Convention).

30. The other English case is *Babcock Marine (Clyde) Limited v HS Barrier Coatings Ltd* [2019] EWHC 1659 (TCC), [2019] BLR 495, a decision of O'Farrell J, citing from an earlier Scottish case on a similar point, *BN Rendering Ltd v Everwarm Ltd* [2018] CSOH 45, a decision of Lord Bannatyne, sitting in the Outer House of the Court of Session. In *Babcock Marine*, the question was whether the English Court would enforce an exclusive jurisdiction clause in favour of Scotland by staying adjudication enforcement proceedings in England in favour of the courts of Scotland. O'Farrell J decided that she would. However, Ms Jones submits that the position was not analogous to that in the present case. First, it was decided under the old law (i.e. under the old sch. 4 to the 1982 Act, which was analogous to the Brussels Regulation, rather than the Hague Convention). Secondly, it is said to be highly material that *Babcock Marine* (and also *BN Rendering*) both concerned the courts of England and Scotland i.e. both cases concerned countries that provide for, and recognise, construction adjudication and the timely enforcement of adjudicators' decisions. It appears from paragraph 66 of O'Farrell J's decision in *Babcock Marine* that she considered the availability of enforcement in the chosen country to be a material factor. As she stated:

> *"... 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."*

That tension did not apply in *Babcock Marine* and so the judge did not need to resolve it. It does apply in this case; and Ms Jones submits that it should be resolved in the claimant's favour, for the reasons set out above. In the circumstances, Ms Jones submits that *Babcock Marine* does not touch upon the points that fall for decision in the present case and so provides little assistance on the resolution of the point at issue here.

31. I note that in *Babcock Marine*, at [63] O'Farrell J cited (without comment) the *"obiter comments"* of Judge Kirkham in *Comsite Projects* at [21]. Earlier (at [62]) O'Farrell J recorded the submission:

> *"... 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 ..."*

32. Ms Jones recognises that the claimant's application will ultimately be resolved by reference to the relevant statutory provisions of the 1982 Act as amended by the 2020 Act. However, she points out that the court may be assisted by considering two approaches of the common law in other circumstances where issues have arisen around which court has jurisdiction to determine a dispute.

33. The first is what approach the court might take at common law if it were to be exercising its discretion in the absence of an exclusive jurisdiction clause. Ms Jones submits that the court would apply the principles of *forum non conveniens* (although of course these are displaced by the 1982 Act and need only be considered in the present context if the analogy is thought helpful). Relevant guidance is set out in *Spiliada Maritime Corporation v Consulex Ltd ('The Spiliada')* [1987] AC 460, where the House of Lords held that the court must identify in what forum the case could most suitably be tried for the interests of all the parties and for the ends of justice: see pp 476 - 484 in the speech of Lord Goff. There are two stages to this analysis: the first is to ask what is the natural forum for the case; and the second involves considering all the circumstances of the case.

34. Here, the natural forum is England. That is the location of the construction site and the project works, and it is also the location of both the Act of Parliament that gives rise to the adjudication remedy and the courts that have a process for enforcing that remedy. The only feature that might detract from that is the exclusive jurisdiction clause. However, staying proceedings by reason of that clause would have the disadvantage, identified above, of depriving the claimant of a timely interim remedy that Parliament has legislated for it to have. Other features are said to be neutral: the parties are resident in two different jurisdictions so that is unlikely to be decisive. Similarly, the choice of law and the choice of jurisdiction do not coincide and so that would not take matters too much further. The circumstances of the case more generally include the public policy considerations in favour of enforcing the adjudication decision. Ms Jones submits that a court would, and should, enforce on *Spiliada* grounds if that were the test it was applying.

35. Secondly, Ms Jones suggests that it is perhaps relevant that even under common law (i.e. not under the 2005 Hague Convention) in exceptional circumstances a court may disregard an exclusive jurisdiction clause. The authority for this proposition is *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All ER 749 at [24], in the speech of Lord Bingham, referring to *The Eleftharia* [1970] P 94 at 99-100 in the judgment of Brandon J. Ms Jones accepts that there can be no doubt that very good reasons would be required to disregard an exclusive jurisdiction clause at common law (accepting that the test is not the same as under the 2005 Hague Convention); but she suggests that a key reason would be fairness. Ms Jones submits that even under the common law principle, if it were to be used as a type of sense-check, it would be open to a claimant to argue that an English court should accept jurisdiction in circumstances such as these so as to permit the enforcement of an adjudicator's decision. The point is said to be even stronger under the statutory regime that in fact applies to this case.

36. For all of these reasons, Ms Jones invites the court to enforce the adjudicator's decision and to grant summary judgment in the claimant's favour.

37. At the end of her oral opening I drew Ms Jones's attention to the fact that neither party had adduced any evidence of Italian or French law or court procedure. Her response - correctly - was that had there been such evidence, and had it been disputed, the court would have been in no position to resolve that dispute on an application for summary judgment. Ms Jones submitted that France did not have a process of construction adjudication. She suggested that it was unlikely that the courts of Paris would have the procedures or the processes in place to deal with the enforcement of the adjudicator's decision as quickly and efficiently as the courts of England and Wales. She invited the court to infer that it was unlikely that the courts of Paris would have the processes in place to enforce an unfamiliar regime such as construction adjudication.

38. I decline that invitation. Foreign law, and court processes, are a matter for evidence and not something of which judicial notice can be taken. I can make no assumptions about how quickly, or effectively, the courts of Paris might enforce this adjudication decision. As Ms Jones rightly observed in her oral reply, the defendant had the opportunity, and might have elected, to put in evidence of Italian (or French) law or procedure, but it chose not to do so. The same goes for the claimant. Absent such evidence, the presumption is that the foreign law is the same as English law.

V: The defendant's submissions

39. For the defendant, Mr Balen submits that this court does not have jurisdiction to determine the claimant's request for summary judgment, which has been brought in breach of the exclusive jurisdiction clause agreed between the parties as set out at clause 19 of the construction contract. Pursuant to art. 6 of the 2005 Hague Convention, this court must *"suspend or dismiss"* these proceedings. The relevant question for this court is whether the enforcement of the defendant's alleged breach of the term implied by para 28 of the Scheme should take place in England (or Wales) or in France. The answer to this question is said to be straightforward. The parties agreed in clause 19 of the contract that all disputes arising out of their contract must be settled by the courts of Paris, France. As to this: (1) Clause 19 is drafted in wide terms. It does not seek to restrict the scope of the disputes to be referred to the courts of Paris, France and nor can it reasonably be interpreted as doing so. (2) The practice

of the English courts is to give such clauses, as between the parties to them, *"a generous interpretation"*: see Lord Bingham in *Donohue v Armco Inc* at [14]. (3) In a case where there is a single jurisdiction agreement (such as this), the presumption is in favour of a *"one-stop shop"*. Any argument that the parties intended any degree of fragmentation in the forum of dispute resolution is said to be inherently difficult: compare Lord Bannatyne in *BN Rendering* at [68] - [69]. For these reasons, it is said that the 2005 Hague Convention requires this court to give effect to the parties' agreement, expressed in clause 19, that these proceedings must be heard in the Courts of Paris. Judge Kirkham's remarks in *Comsite Projects* were obiter and do not bind this court. They have, in any event, been overtaken by changes in the relevant legislation. This court must apply the 2005 Hague Convention and can therefore only refuse to suspend or dismiss these proceedings if giving effect to the exclusive jurisdiction clause would be *"manifestly contrary"* to UK public policy.

40. Mr Balen submits that there is nothing in the 1996 Act which dilutes the articles of the 2005 Hague Convention; and if Parliament had intended to qualify the Convention by carving out a policy-based exception for adjudication enforcement proceedings, it could have done so, either in the 2020 Act or by way of a declaration under article 21, disapplying the 2005 Hague Convention to construction contracts. This article enables a contracting state to make a declaration that it will not apply the Convention *"where a State has a strong interest in not applying this Convention to a specific matter"*. Mr Balen took me to the commentary at para. 234 of the Explanatory Report. Parliament has elected not to do so. Insofar as the claimant suggests that it would be contrary to public policy for this court not to hear the summary judgment application, it cannot be contrary to public policy (let alone *"manifestly"* so) to require the claimant to enforce its award in France. This outcome is said to be consistent with the very policy which Parliament recently enacted in the 2020 Act. The clear intention of Parliament was for the courts to dismiss claims brought in breach of an exclusive jurisdiction clause.

41. Mr Balen further submits that *"manifestly contrary to public policy"* is a high threshold to meet. He refers to the high threshold set by para. 153 of the Explanatory Report accompanying the 2005 Hague Convention, explaining that the meaning of the *"manifestly contrary to public policy"* exception

> *"... refers to basic norms or principles of that State; it does not permit the court seised to hear the case simply because the chosen court might violate, in some technical way, a mandatory rule of the State of the court seised. As in the case of manifest injustice, the standard is intended to be high: the provision does not permit a court to disregard a choice of court agreement simply because it would not be binding under domestic law."*

Similarly, in the context of the recognition of foreign judgments, *Dicey, Morris & Collins* discusses the meaning of *"manifestly contrary to public policy"* at para. 14-225, where they conclude:

> *"... The public policy exception is to operate only in exceptional circumstances ...Before it may find recognition contrary to public policy, the court addressed must conclude that recognition would conflict, to an unacceptable degree, with the legal order in the State of recognition because it would infringe a fundamental principle, or would involve a manifest breach of a rule of law which is regarded as fundamental within that legal order."*

42. Mr Balen says that it is clear that the policy of enforcing adjudicator's awards on an interim basis so as to facilitate cash flow in the construction industry does not meet this high threshold. It is not a basic norm of the British state. The parties should be held to the bargain that they freely made when they incorporated clause 19 into their contract.

43. Mr Balen points to the fact that the phrase *"manifestly contrary to public policy"* has been considered by the English courts, primarily in the context of the Cross-Border Insolvency Regulations and the recognition of foreign judgments under Brussels I/Brussels Recast, in which it has been repeatedly made clear that this is a high threshold to overcome. Thus, in *Re Agrokor DD* [2017] EWHC 2791 (Ch), Judge Paul Matthews said (at [109]) that:

> *"The inclusion of the word 'manifestly' must mean something more than mere contrariness or incompatibility. So it should be harder to demonstrate that something is* ***manifestly*** *contrary to public policy than that it is simply contrary to it. What is not clear is how much harder ... Where there is any doubt or any confusion as to whether it is contrary to or incompatible with public policy, there cannot be anything 'manifestly' contrary to public policy."*

In *Re Stocznia Gdynia SA v Bud-Bank Leasing SP. ZO. O* [2010] BCC 255 (cited in *Re Agrokor DD*) Mr Registrar Baister said (at [27]):

> *"The fact that foreign proceedings may differ from those of this country, as they invariably do, even in relation to creditors' rights in respect of priorities, would not of itself be a reason to refuse relief ...".*

In *National Navigation Co v Endesa Generacion SA ('The Wadi Sudr')* [2009] EWCA Civ 1397, [2010] 1 Lloyd's Rep 193 (where the issue was whether a Spanish court decision should be recognised in England under the Brussels I Judgments Regulation) it was argued that the public policy of enforcing arbitration clauses was so strong that it came within the art. 34(1) exception of Brussels I (permitting the refusal to recognise a decision made by a foreign court on the ground the decision was *"manifestly contrary to public policy in the Member State in which recognition is sought"*). That argument was rejected by Waller LJ at [62] and by Moore-Bick LJ at [125] - [126] (with Carnwath LJ agreeing with both judgments).

44. Mr Balen points to the absence of any evidence as to why enforcement cannot proceed in the courts of Paris, France. The policy of the English courts of enforcing adjudication decisions pending the final resolution of the dispute is not a *"basic norm or principle"* of the British State; nor would dismissing this application infringe a *"fundamental principle"* of the English legal order or constitute a "*manifest breach of a [fundamental] rule of law"*.

45. It follows, so Mr Balen submits, that the application of the 2005 Hague Convention, recently incorporated into domestic UK law by the 2020 Act, compels this court to suspend or dismiss these proceedings. It was irrelevant to consider what the court might have done had the common law applied because the court was required to apply the 2005 Hague Convention; but in *Donohue v Armco Inc* at [24] Lord Bingham had made it clear that a court might disregard an exclusive jurisdiction clause only in exceptional circumstances:

> *"... the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it".*

46. Mr Balen had not addressed the potential effect of art. 7 in his written submissions but he did so orally. He identified the issue as whether an application for summary judgment to enforce an adjudicator's decision was an interim measure of protection within art. 7. He submitted that it was not because it was not a measure intended to preserve the status quo, such as a freezing injunction or a search and seizure order. Such relief was directed to preserving the position of the parties to litigation pending the substantive resolution of their dispute so as to prevent the interests of justice being frustrated by an intervening event. Paragraph 160 of the Explanatory Report explains that art. 7 *"... refers primarily to interim (temporary) measures to protect the position of one of the parties, pending judgment by the chosen court"*. That is not the function of an adjudicator's decision. Mr Balen referred to the analogy that had been drawn with the court's supervisory powers over the conduct of arbitrations. He referred me to the decision of the House of Lords in *Channel Tunnel Group Ltd v Balfour Beatty Construction Limited* [1993] AC 334 and specifically to observations in the speech of Lord Mustill at 365 B that:

> *"The purpose of interim measures of protection ... is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute. Provided that this and no more is what such measures aim to do, there is nothing in them contrary to the spirit of international arbitration."*

That was not what the claimants were seeking to do in the present case. Rather, they were acting in direct breach of clause 19 of the contract.

47. Mr Balen submitted that the application for summary judgment in the present case was in no way analogous to applications for freezing relief or for a search and seizure order or for an order for the interim preservation of property. Here there was no question of property being damaged or destroyed. There was no reason why enforcement proceedings could not have been brought in the courts of Paris and thus there was no need for any order enforcing the adjudicator's decision to be made by this court. Summary judgment in the claimant's favour would not render any more effective any order which the courts of Paris may ultimately make in terms of preserving property, evidence, or the status quo. Properly construed, this was not an interim measure of protection within art. 7.

48. As for the argument that in order for the doctrine of res judicata to apply so as to render a judgment final and conclusive for the purposes of recognition and enforcement, Mr Balen points out that a default judgment is final and conclusive unless and until it is set aside. Similarly, an adjudicator's decision is final and conclusive until it is set aside in later litigation.

49. Mr Balen also submits that the fact that the contract is subject to Italian law is highly relevant. It is correct that the terms implied by the 1996 Act cannot be excluded simply because the parties select an applicable law other than the law of England & Wales or Scotland: see s. 104 (7). But the terms thereby implied, including the term

implied by para. 23 of the Scheme, must be construed by reference to Italian law, because they are implied terms of the contract and the terms of the contract are governed by, and must be construed in accordance with, the laws of Italy: see clause 19. Any doubt over this conclusion is settled by *Babcock Marine* in which O'Farrell J held (at [65]) that:

> *"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."*

50. Mr Balen reminds the court that there is no expert evidence of Italian law before it. Therefore, there is no evidence as to how a court tasked with applying Italian law should construe the implied terms, and how it should approach the claimant's application for summary judgment. There is no evidence as to what defences might be available to the enforcement claim or whether any counterclaim might be available to the defendant. Mr Balen submits that that is sufficient to dispose of this application. However, even if there were such evidence, it would be inappropriate to conduct a *"mini trial"* to determine the correct application of Italian law to the contract; and it would be inappropriate to grant summary judgment where the outcome turns on expert evidence: see *Civil Procedure 2020*, volume 1, para. 24.2.3. The proper approach was to set the matter down for trial so that expert evidence of foreign law could be obtained and heard.

51. I reject this submission for the reasons I have given at [38] above. Absent any evidence of foreign law, the presumption is that it is the same as English law.

52. In her brief response to Mr Balen's submissions, Ms Jones submitted that it is not necessary for a rule to form one of the *"basic norms"* of the United Kingdom for art. 6 (c) to be engaged. That was to put the matter too high. She contrasted the language of paras 152 and 153 of the Explanatory Report; and she submitted that the first limb of the article 6 (c) exception *("manifest injustice"*) was not restricted to such *"basic norms"*.

53. Ms Jones also submitted that the concept of an interim measure of protection was not restricted to measures intended to preserve the position of the parties pending a final judgment. It extends to any decision that is not a final and conclusive decision on the substantive merits of the case. She referred me to the statement at para. 163 of the Explanatory Report that:

> *"If, after the chosen court has given judgment, proceedings are brought to recognise and enforce that judgment in a Contracting State in which interim measures were granted, the requested State would be required under Article 8 to rescind the interim measures (if they were still in force) to the extent that they were inconsistent with the obligations of the requested State under the Convention. For example, if a court other than that chosen grants an asset-freezing order to protect a right claimed by the plaintiff but the chosen court rules that the plaintiff has no such right, the court that granted the asset-freezing order*

must lift it where the judgment of the chosen court is subject to recognition under the Convention and the court that granted the asset-freezing order is requested to recognise it."

Ms Jones submitted that the interactions between interim measures and final judgments is more consistent with an interim measure of protection being given a broader meaning than that for which Mr Balen contends.

VI: Decision: Article 6 (c)

54. On the issue of the application of art. 6 (c), I prefer the submissions of Mr Balen to those of Ms Jones. The burden rests on the claimant to persuade the court that one or other (or both) of the two limbs of that particular exception is engaged. In my judgment, for the court to give effect to the exclusive jurisdiction clause in this construction contract would not lead to any *"manifest injustice"*; nor would it be *"manifestly contrary to the public policy"* of the United Kingdom. In my judgment, for the reasons given by Mr Balen, the claimant has not exceeded the high threshold required for this exception to be engaged. If Parliament considers that the cashflow problems affecting the construction industry, and the consequent need to address this problem by way of a speedy mechanism for settling disputes in construction contracts on a provisional, and interim, basis, warrant a derogation from the binding character accorded to an exclusive jurisdiction clause in favour of a foreign court so as to enable an adjudicator's decision to be enforced in the English and Welsh (or Scottish) courts, then it will need to make a declaration in respect of construction contracts under and in accordance with art. 21 of the 2005 Hague Convention. The claimant has not satisfied me that it would be contrary to public policy, or unjust, (let alone manifestly so) to require the claimant to enforce its adjudication award in the courts of Paris, France. There is no good reason why the parties should not be held to the bargain that they freely made when they incorporated clause 19 into their construction contract.

55. In the present case, there is a total absence of any evidence as to why enforcement cannot proceed effectively in the courts of Paris, France. In a future case, an issue may arise where, on undisputed evidence, there is a tension between the statutory policy of affording the parties a speedy mechanism for settling disputes in construction contracts on a provisional, and interim, basis, and the contractual right, enforceable by statute, afforded to contracting parties, to confer exclusive jurisdiction on a foreign court. However, that issue does not arise in the present case, where there is no evidence that the adjudicator's decision cannot be enforced in a timely and effective manner in the courts of Paris.

VII: Decision: Article 7

56. On the issue of the application of art. 7, I prefer the submissions of Ms Jones to those of Mr Balen. As Lord Ackner recognised in his contribution to the debate in the House of Lords (cited at [24] above), the underlying purpose of the adjudication remedy is to address the need to produce a *"quick, enforceable, interim decision"*. As Dyson J explained in the passage from his judgment in *Macob* also cited at [24] above, Parliament's intention in enacting the 1996 Act was plainly *"... to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis and requiring the decisions of adjudicators to be enforced pending the*

final determination of disputes by arbitration, litigation or agreement ...". In the passage from her judgment in Babcock Marine cited at [31] above O'Farrell J described adjudication as *"... 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."*

57. I accept Ms Jones's submission that the concept of an interim measure of protection is not as tightly confined as Mr Balen would seek to contend. I do not consider that it is restricted to measures intended merely to *preserve* the position of the parties pending a final judgment. I note that para. 160 of the Explanatory Report (relied upon by Mr Balen) explains that art. 7 refers primarily to interim (temporary) measures "to protect" the position of one of the parties – the authoritative French text uses the phrase *"les mesures provisoires destinées à protéger la situation de l'une des parties"* - pending judgment by the chosen court (although I also note that the paragraph heading refers to "*Mesures provisoires et conservatoires"*). In my judgment, the categories of *"interim protective measures"* are not closed but are capable of expansion as national courts devise new interim remedies (or measures) to protect the interests of litigants pending the final, substantive resolution of their dispute. The concept extends to any decision that is not a final and conclusive decision on the substantive merits of the case. The adjudication process is *"sui generis"* in the sense that it is the only one of its kind. But it may be considered analogous to an order for the interim delivery up of goods or other property, or a mandatory interim injunction to allow an occupier of property back into possession pending the final determination of the substantive dispute between the parties. In my judgment, the concept of an interim protective measure extends to a decision of an adjudicator which, by the operation of the 1996 Act and the Scheme, is not final and binding on the parties. The function of the adjudicator's decision is to protect the position of the successful party on an interim basis pending the final resolution of the parties' dispute through the normal court processes (or by arbitration). Whilst summary judgment is clearly a final and conclusive remedy, I accept Ms Jones's submission that the reality of this summary judgment application is that the court is being invited to grant an interim, rather than a final and conclusive, remedy. What is before this court is not the underlying dispute between these parties but whether an interim procedure and remedy have been followed and granted.

58. Such an analysis is consistent with the position under construction contracts containing arbitration clauses (as explained at [27] above). Where a contract contains an arbitration clause, the *"pay now, argue later"* policy of the 1996 Act requires the enforcement by the courts of the interim adjudicator's award before the final determination by the chosen forum. The whole purpose of the 1996 Act is to ensure that the adjudicator's decision is binding until it is successfully challenged by arbitration or in court. Thus, in the ordinary case, the sum awarded by an adjudicator must be paid; and the paying party cannot seek to avoid payment by staying the enforcement proceedings for arbitration. In my judgment, a similar approach is mandated, in the face of a foreign exclusive jurisdiction clause, by art. 7 of the 2005 Hague Convention.

59. In my judgment, there was no need for the British Government to make any declaration in respect of construction contracts under and in accordance with art. 21 of

the 2005 Hague Convention because the enforcement of an adjudicator's decision is already permitted by art. 7. For all of these reasons, I hold that an application for summary judgment to enforce an adjudicator's decision is an interim measure of protection within art. 7 of the 2005 Hague Convention. The court is not required to suspend or dismiss these proceedings.

VIII: Conclusion

60. For the reasons set out above, I hold that the exception in art. 7 (but not art. 6 (c)) of the 2005 Hague Convention applies. I therefore enter summary judgment for the claimant in the sum of £454,678.65 together with (1) such VAT as may be properly due in law, (2) interest of £4,085.88 to the date of the adjudicator's decision (15 December 2020) and (3) further accrued interest of £6,079.26 to the date of judgment (15 February 2021) and continuing at the rate of £99.66 per day thereafter until the date of payment. Payment is to be made by 8 March 2021. The defendant shall also pay the claimant's costs, which are summarily assessed on the standard basis at £30,000 by 8 March 2021.