



INTERNATIONAL  
CONSTRUCTION  
ARBITRATION  
MOOT

**THE PROBLEM**

2021

## THE PROBLEM TO THE ICAM'21 COMPOSED BY THE WORLD'S LEADING EXPERTS



### **Mr. Philip Bruner**

Mr. Bruner is one of the world's leading full-time arbitrators, mediators, and resolvers of construction, engineering, and infrastructure claims and disputes. Mr. Bruner is a distinguished member of the panels of neutrals of both JAMS and JAMS International, and is the director of JAMS Global Engineering and Construction Group.



### **Prof. Stefan Leupertz**

Prof. Leupertz is a former Judge of the German Supreme Court and known as one of the leading and prominent legal authorities on construction law in Germany.



### **Mr. Christopher Ennis**

Mr. Ennis, an Irish national resident in the UK, is a chartered quantity surveyor with over 45 years' experience in the construction industry. For the last 30 years Mr. Ennis has specialised as a quantum expert witness in major international construction disputes, and he practises extensively as a neutral mediator, adjudicator, DAB member and arbitrator.



### **Prof. Janet Walker**

Prof. Walker is an independent arbitrator with chambers in Toronto, London and Sydney, with 20 years of experience in commercial and investor-state arbitrations in a wide variety of fields from construction to M&A.



### **Mr. David Brown**

Mr. Brown is a Partner with Clyde & Co. Mr. Brown is a highly experienced international dispute resolution lawyer focusing on the construction sector.

The Contractor, from Civilia has been awarded a flood alleviation contract in a country town in Commonia, where the Employer is based. In the course of performing the works, unforeseen problems arise.

The works comprise construction of a 2.4m diameter concrete flood by-pass culvert 1.5 km long, starting from a flood storage area on open land at one end, passing under a busy 4-lane highway with residential housing on both sides, and discharging into a local river downstream.

The dispute arises from discovery, after commencement of construction, of an uncharted 150-year-old 1.07m diameter cast iron water main under the main road, crossing the line of the culvert a short distance above the upper level of the culvert, and the *casus belli* is the Contractor's entitlement to the additional time needed to design and install protection to it.

The information provided to the Contractor before commencement did not identify the water main, but it did disclose the existence of a similarly aged brick-built oval main sewer running under the road close to the position of the water main, but at a higher level. Some work would always have been necessary to stabilise the sewer, and the Contractor's price is deemed to include for this. The Contractor had intended to provide an in-situ fibre-glass liner within the sewer above and to either side of the new culvert position, but a different and more substantial solution is required to protect the water main from fracturing. It is common ground that the cast iron water main is brittle and susceptible to catastrophic failure if culvert construction below it causes any loss of support.

The existence of the water main is discovered in week 3 of construction of the culvert, after deployment of the TBM. It takes a further 3 weeks to survey and ascertain its exact position, during which time works are suspended apart from an (unsuccessful) attempt to install the intended lining to the brick sewer. It then takes 12 weeks to arrive at a solution acceptable to the statutory water authority and the local authority for securing the integrity of the water main – 7 weeks to prepare a design, and 5 weeks for approvals to be obtained. The solution identified is a horizontally augured contiguous piled supporting mat.

Before commencing this solution, the Contractor seeks a waiver from the Employer for any risk arising from this additional work. The Employer points to the fact that the Contractor bears the risk of ground conditions. The Contractor's contention is that it was not aware of the water main, nor could it have known, and the huge risks involved – including damage to many residential properties and potential loss of life – if the water main bursts, cannot be insured against by the Contractor, and thus cannot be deemed a risk that it is appropriate for the Contractor to bear.

The Employer refuses to give a waiver (at first) and further delays occur while this question is debated. This delays commencement of temporary works for the augured mat by a further 3 weeks, until the Employer reluctantly agrees that it must assume this risk instead of the Contractor.

The additional temporary works last 8 weeks before tunnel boring recommences.

The total delay to re-commencement of the tunnel boring works is 26 weeks.

Thankfully, there is no burst and no damage. However, the Employer disputes the Contractor's entitlement to time-related costs arising, and seeks a credit for the additional temporary works required, on the basis that:

- The Contractor was responsible for in-ground risks.
- Any delay arising is similarly the Contractor's risk.
- The Contractor's originally intended stabilisation works for the brick sewer proved not to have been effective, and thus to some extent a solution similar to that deployed for the water main would always have been necessary.
- The Contractor should not have delayed commencement until the Employer agreed to assume liability for the risk of the water main bursting.

The Contractor files a Request for Arbitration to the Russian Arbitration Center (RAC) to recover the time-related costs. The Parties' Contract contains the following arbitration agreement:

*The Parties agree to resolve all disputes that may arise between them by arbitration in Russian arbitral institution. The Parties agree first to take all reasonable steps to resolve the dispute amicably. Should they choose to arbitrate, they agree to make all efforts to prepare their claims and defences expeditiously and to present their respective cases at the hearing venue in an efficient manner.*

In its Answer to the Request for Arbitration, the Employer responds by re-affirming denial of liability for the Contractor's time-related costs, but also seeking credit for the temporary works that would always have been required for the brick sewer.

In the next procedural document, the Employer (Respondent) also challenges the jurisdiction of the arbitral tribunal on the basis that parties did not choose RAC as administering institution. However, even if the arbitration clause is valid the protracted dealings between the Parties on these issues cannot be considered steps taken to resolve the dispute amicably. The Respondent asks for the jurisdictional issue to be heard first to save the expense of preparing the claims and defences on the main issues until the Tribunal's jurisdiction has been established.

In light of the restrictions on travel and gatherings during the pandemic, the Tribunal recommends that the Parties hold the preliminary hearing on jurisdiction by videoconference. The Respondent objects, saying that it is entitled under the arbitration agreement and the RAC Rules to an in-person hearing at the hearing venue. Despite this objection, the Tribunal decides to order a videoconference hearing to determine jurisdiction.

Three days before the hearing on jurisdiction, Claimant's counsel's spouse contracted Covid-19, and Claimant's counsel said that the obligation for the family to isolate together in their small apartment prevented him from attending the video hearing and there was no time to retain and instruct another advocate.

With no other timeslot available between then and the main hearing, the Tribunal indicated to the Parties that granting the adjournment could result in the jurisdictional challenge being heard at the outset of the main evidentiary hearing. The Claimant maintained its application to adjourn the hearing and the jurisdictional challenge was left to be determined at the main evidentiary hearing.

Respondent has added to its claims a claim for wasted costs, both for the delay in the jurisdictional determination and for the preparation of the main evidentiary hearing if the Tribunal finds itself without jurisdiction.

At the Pre-hearing teleconference, the Tribunal confirms with the Parties that the issues for the hearing will be:

1. Whether there is a valid arbitration agreement between the parties?
2. Did the Claimant take the reasonable steps to resolve the dispute amicably?
3. Is the Respondent entitled to recover the costs associated with preparing for the jurisdictional hearing that was adjourned?
4. Is the Respondent entitled to a complete indemnity for the costs of preparing for and presenting its defences on the merits of the claim if the Tribunal finds itself without jurisdiction?
5. The Parties agree that the Contractor is entitled to recover its time-related costs consequent upon discovery of the old water main relating to Investigating the exact location of water main and for the time needed to execute the additional temporary works. But is the Contractor entitled to recover time-related costs for the following periods of time:
  - a. Identifying an acceptable temporary works engineering solution?
  - b. Negotiating with the Employer/Owner to indemnify Contractor for relief from liability

in the event of water main failure?

c. Mobilising the temporary works solution?

6. The Parties agree that the Employer is liable to reimburse the Contractor for the costs of the temporary works required, but is the Employer entitled to a credit for the less extensive temporary works that would always have been required to support the brick sewer?

## SELECTED CONTRACT TERMS

### Extract from Particular Conditions (taking precedence over General Conditions)

**PC 21** The Contractor shall be responsible for having obtained all necessary information, within reason, from the Employer or otherwise, with respect to the form and nature of the Site, and particularly with respect to sub-surface conditions, and including relevant data regarding all possible physical or man-made structures on or in the vicinity of the Site, which the Employer could and/or should have provided to the Contractor during the tender stage. The Contractor is not entitled to assume that details of sewers provided by the Employer relate to the only sewers or similar structures at the Site for the purposes of **GC21**.

### Extract from General Conditions.

**GC 21** The Contractor shall be responsible for interpreting all data referred to under GC 23 below [Site Data and Items of Reference]. To the extent which was practicable (taking account of cost and time), the Contractor shall be deemed to have obtained all necessary information as to risks, contingencies and other circumstances which may influence or affect the Tender or Works. To the same extent, the Contractor shall be deemed to have inspected and examined the Site, access to the Site, its surroundings, the above data and other available information, and to have been satisfied before submitting the Tender as to all matters relevant to the execution of the Works, including:

- (a) the form and nature of the Site, including sub-surface conditions;
- (b) the hydrological and climatic conditions, and the effects of climatic conditions at the Site;
- (c) the extent and nature of the work and Goods necessary for the execution of the Works;
- (d) the Laws, procedures and labour practices of the Country; and
- (e) the Contractor's requirements for access, accommodation, facilities, personnel, power, transport, water and any other utilities or services.

**GC 22** The Contractor shall be deemed to:

- (a) have satisfied himself/herself as to the correctness and sufficiency of the Accepted Contract Amount; and
- (b) have based the Accepted Contract Amount on the data, interpretations, necessary information, inspections, examinations and satisfaction as to all relevant matters described in Clause GC 21 above. Unless otherwise stated in the Contract, the Accepted Contract Amount shall be deemed to cover all the Contractor's obligations under the Contract and all things necessary for the proper execution of the Works in accordance with the Contract.

**GC 23** In this Clause, "physical conditions" means natural physical conditions and physical obstructions (natural or man-made) and pollutants, which the Contractor encounters at the Site during execution of the Works, including sub-surface and hydrological conditions but excluding climatic conditions at the Site and the effects of those climatic conditions. If the

Contractor encounters physical conditions which the Contractor considers to have been unforeseeable and that will have an adverse effect on the progress and/or increase the Cost of the execution of the Works, the following procedure shall apply.

**(a)** the Contractor shall give a Notice to the Engineer, which shall: (1) be given as soon as practicable and in good time to give the Engineer opportunity to inspect and investigate the physical conditions promptly and before they are disturbed; (2) describe the physical conditions, so that they can be inspected and/or investigated promptly by the Engineer;(3)set out the reasons why the Contractor considers the physical conditions to be Unforeseeable; and (4) describe the manner in which the physical conditions will have an adverse effect on the progress and/or increase the Cost of the execution of the Work.

**(b)** the Engineer shall inspect and investigate the physical conditions within 7 days, or a longer period agreed with the Contractor, after receiving the Contractor's Notice. The Contractor shall continue execution of the Works, using such proper and reasonable measures as are appropriate for the physical conditions and to enable the Engineer to inspect and investigate them.

**(c)** the Contractor shall comply with any instructions which the Engineer may give for dealing with the physical conditions. The Engineer may take account of any evidence of the physical conditions foreseen by the Contractor by the Contract Date, which the Contractor may include in the supporting particulars for the Claim but shall not be bound by any such evidence.