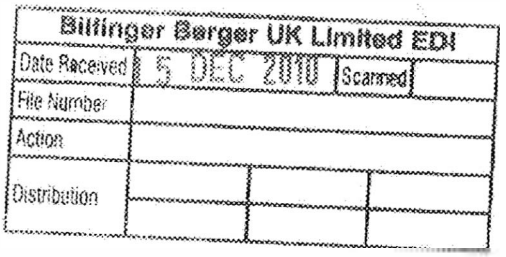

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15 December 2010

Dear Sirs

EDINBURGH TRAMS ADJUDICATION – APPROVAL OF SUB-CONTRACT TERMS

I enclose undercover hereof Mr Howie's reasons relative to his decision as Adjudicator in connection with the above mentioned Adjudication which was issued on 13 December 2010.

Yours faithfully

[redacted]

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EDINBURGH TRAM NETWORK

ADJUDICATION

This adjudication arises out of a dispute which has broken out between the employer in the Edinburgh Tram Network construction contract (hereinafter referred to as "the Infraco Contract"), tie Ltd, and the Contractor (hereinafter referred to as "the JV") about the basis upon which tie may withhold approval of the terms of a sub-contract which it is proposed be entered into in connection with a portion of the works contracted to the JV under the Infraco Contract.

The background to this dispute is a series of applications made to tie Ltd under clause 28.4 of the Infraco Contact asking it to approve the terms of proposed sub-contracts with three proposed Key Sub-Contractors, Barr ltd, John Graham (Dromore) Ltd and Border Rail and Plant Ltd. In each case, although tie was persuaded that the intended sub-contractor would be able to do the sub-contract works proposed to be sub-contracted, it withheld approval of the terms of proposed sub-contracts themselves. In the submissions made to me it is agreed that one reason was common to all the withholdings of approval: the appearance in each sub-contract of only one of the companies which are joint adventurers in the JV as the "Contractor" to which the proposed sub-contractor would be contractually engaged. It is maintained by tie that in each case it refused approval for other reasons in addition, albeit that the respective letters embodying the decisions to withhold approval (included in the JV's productions) would seem to read as though tie regarded the other matters as being items to be attended to in revisals to be made to the drafting, while it was the identity of the contractor which caused tie to withhold approval to the terms of the relevant sub-contract.

Following the refusal of approval by tie and some correspondence which showed that tie and the JV were clearly at odds over the construction to be placed on clause 28 of the Infraco Contact – and, therefore, whether tie was entitled to withhold approval on the basis that only one joint adventurer in the JV would enter the sub-contract – the JV referred to the Internal Resolution Procedure the questions whether tie had withheld approval without having any ground on which to do so and whether it had acted unreasonably in withholding such approval. The procedure failed to produce an agreed answer to those questions, as did later mediation. Accordingly, on 9th November, 2010, the JV referred the matter to adjudication.

<u>The Redress Sought.</u>

In the Referral to adjudication, the JV seeks two declarators: the first, a declaration that tie has "no entitlement to withhold its approval to the form of the proposed sub-contract... on the ground that not every Infraco Member is a party to the sub-contract", and the second a declaration that tie has "failed to act reasonably in withholding its approval...where such has been withheld on the ground that not every Infraco Member is a party to the sub-contract". Tie, for its part, in section 8 of its Response, invites me to declare that it is entitled to withhold its approval "where such approval has been withheld on the ground that not every member of the Infraco is a party to the sub-contract", and that it has acted reasonably in withholding its approval on that ground.

The first declarator sought by each side clearly relates to competency, and will depend on the correct construction of the Infraco Contract. The second also appears to approach matters on a generic basis, the JV's proposed declarator being to the effect that if this reason be advanced for refusing consent, there has *ipso facto* been an unreasonable withholding of approval, whilst that proposed by tie is to the effect that withholding of approval on that ground *per se* establishes reasonableness in the withholding of consent.

In the terms in which it is drawn, I do not think I could grant the second declaratory sought by the JV. The issue of the reasonableness or otherwise of tie's actions in withholding consent on the ground which is contentious in this case can only arise if I consider that it is at least legally open to tie to withhold approval on that ground. The second declarator may be written on a "*separatim*" basis, but in truth it can only be an alternative to the first declarator arising on the hypothesis that the first is not granted, for if the first be granted, the second is itself incompetent as being hypothetical. In that event, reasonableness does not matter: withholding on this ground – however justified on the facts – is simply impermissible. Indeed, the JV's pleadings in paragraphs 5.3.9 and 5.3.15 of the Reply make it patent that its arguments on reasonableness are presented on a denied *esto* basis. But once it is accepted that it is open to tie as a matter of law to withhold approval on the basis that the sub-contractor is engaged by only one member of the JV and that the Infraco Contract does not make such withholding reasonable *per se* – so that one can ask whether it is nonetheless to fail to act reasonably to withhold consent to the terms of some proposed sub-contract on that ground – the question cannot be answered on a universal basis: refusal might be reasonable or it might not be. The question whether tie's consent is being unreasonably withheld is a question of fact **(Burgerking Ltd v Rachel Charitable Trust 2006 S.L.T. 224; Legal and General Assurance Society Ltd v Tesco Stores Ltd, 18th May, 2001, unreported)**. It follows that it cannot be said that where consent is refused on a competent ground that refusal is, *per se*, unreasonable.

The Farrans Sub-Contract.

In paragraph 4.5 of the Referral, the JV points out that, whatever tie may now say on the matter, it has in the past approved the form of a key sub-contract (that with Farrans Construction Ltd) in which only Bilfinger Berger appeared as the contractor. Tie does not dispute this, but asserts that it occurred through inadvertence and that it has since decided not to approve the terms of sub-contracts where all members of the Infraco do not appear as contractors. Tie also asserts that Farrans has not signed its sub-contract or entered into a promised collateral warranty which it was to give to tie. The JV replies that that last assertion is simply irrelevant to the issues raised in this adjudication.

With that reply I am disposed to agree, but another point made by tie seems to merit rather more attention. In paragraph 5.3.15 of the Response, it points to sub-clause 114.2 of the Infraco Contract, a sub-clause which provides that a failure by tie to object to any matter shall not prejudice its power "subsequently to take action under this agreement in connection therewith". This provision, tie goes on to argue, means that any approval given by it to the Farrans sub-contract does not bar it from taking issue with a failure to include all members of the JV as Contractors in a later and different sub-contract. That contention the JV disputes, and, I think, correctly so. What sub-clause 114.2 protects is tie's ability to take action "in connection *therewith*", that is, in connection with the failure to object to the absence of Siemens P.L.C. and CAF from the Farrans sub-contract. *Ex hypothesi* this dispute, tie has *not* failed to take the (assumedly meritorious) point about the identity of the contractor in the Border Rail and Plant Ltd, Barr Ltd or John Graham (Dromore) Ltd sub-contracts, and so the circumstances in which sub-clause 114.2 might apply have not arisen.

That said, I do not think that the Farrans sub-contract approval is a short answer to this dispute, and that for two reasons. Firstly, I suspect that tie has merely relied on the wrong sub-clause to support its argument that whatever it has done, or failed to do, in relation to the Farrans sub-contract does not trammel its freedom of action in regard to the different sub-contracts which lie at the root of this dispute. The third paragraph of tie's e-mail to me of 13th December tends to confirm my suspicion. If there be a right to withhold consent on account of the identity of the "Contractor" in a sub-contract, (as for this purpose, one assumes that there was), then the sub-clause to which tie may have intended to refer me is sub-clause 109.1, which holds that no failure to exercise a right

"shall operate as a waiver of it or *any other right*..." (my emphasis). That sub-clause would indeed support the argument tie makes in paragraph 5.3.15 of the Response.

But secondly, and more fundamentally, I cannot identify from the Referral or the Reply the route by which that which the JV avers in paragraph 4.5 leads to the conclusion that the JV is entitled to either of its declarators. The approval of the terms of the Farrans sub-contract is not said by the JV to raise a waiver or personal bar against tie or to affect the construction of the Infraco Contract. If the JV seeks to argue that the prior approval enters into the reasonableness of tie's actions in withholding consent to the proposed sub-contracts in question, as its e-mail to me of 13th December suggests, I do not accept that argument. It is excluded both by the terms of clause 109 and what I believe to be the correct construction of clause 28.4 in so far as it bears on the question of reasonableness. To that matter I return later. If the JV's case be intended to be that suggested by its letter to tie dated 26th August, 2010 (Referring Party's Production 14), namely, that the withholding of approval of the sub-contracts now in view is contrary to "previous practice", as illustrated by the approval of the Farrans sub-contract, then I reject that argument. In light of the terms of clauses 109 and 114 of the Infraco Contract, "previous practice" cannot oblige tie not to do something which the Infraco Contract would otherwise allow it to do. If, then, one assumes that tie would otherwise have been entitled to withhold approval to forms of sub-contract put before it by the JV on the ground that only one of the members of the JV was named therein as the "Contractor", then previous practice could not change, or even affect, that. I believe, therefore, that the Farrans sub-contract approval is not, in the end, germane to the dispute which has been laid before me, and so I do not consider it further.

Arguments anent Sub-clause 28.4 of the Infraco Contract.

The central issue in this dispute is the correct construction to be given to sub-clause 28.4 of the Infraco Contract. Unsurprisingly, it is to that matter that the parties have directed the majority of their submissions.

There is a degree of common ground between the parties about clause 28.4, but there is a major divergence of view about the interpretation of the phrase, " ...the sub-contract does not in substance reflect the Infraco and the relevant Key Sub-Contractor as parties to such sub-contracts...". There appears to be agreement that this represents some sort of restriction on the ability of tie to withhold approval of some form of sub-contract which the JV lays before it for

approval, but the nature of that restriction is in dispute. The JV argues that that provision, read in the light of paragraph 3 of the Schedule Part I to the Infraco Contract, means that the restriction on refusal of approval comes into play if one of the members of the JV is named as being the Contractor in the proposed sub-contract, whereas tie maintains that the restriction does not apply unless all of the JV's members are so named.

The sheet-anchor of the JV's case is paragraph 3 of the Schedule, Part I (hereinafter, "paragraph 3"). The JV notes that the Recitals of the Infraco Contract state that Bilfinger Berger Construction UK Ltd, Siemens P.L.C. and CAF "shall together be "the Infraco"", and then turns to paragraph 3.

Read short, that paragraph provides that, "Where a Party comprises two or more persons...references to that Party include references to each and any of those persons". The JV argues that, since the Infraco is a Party (see the definition given to that word in paragraph 1 of the Schedule, Part I), comprising two or more persons, the reference to "the Infraco" in sub-clause 28.4.1 includes a reference to any of the persons comprising the Infraco. As a result, the restriction operates because in none of the contentious contacts is it the case that the contract "does not in substance reflect any of the Infraco Members...as parties to such sub-contract...": Bilfinger Berger Construction UK Ltd appears as the "Contractor" in each one of them.

Tie, of course, disagrees, and argues that paragraph 3 has the effect that unless "each" of the members of the JV is reflected in the proposed sub-contract as a contractor, the restriction does not apply. It points out that the term actually used in sub-clause 28.4.1, "the Infraco", is a collective term, and that the phrase "Infraco Member" had been created in the Infraco Contract and was available as a defined term for use in sub-clause 28.4.1 if it had been intended in that sub-clause to provide that the restriction on refusal of approval would apply if but one of Bilfinger Berger, Siemens and CAF were named as the Contractor in a sub-contract. The inference tie draws from the use in sub-clause 28.4.1 of the phrase "the Infraco" rather than the words, "Infraco Member" is that the intent of the contact is that all of the members of the JV must be named as Contractors in the sub-contract in question if the restriction is to apply.

A Subsidiary Issue on Sub-clause 28.4.1: the Words "In Substance".

There is a subsidiary issue between the parties about the meaning and significance to be accorded the words "in substance" where they appear in sub-clause 28.4.1. Tie contends that, given that in

ordinary English usage, the words mean "in essentials", their appearance in sub-clause 28.4.1 imports that if the sub-contract "does not with regard to its essential points reflect the Infraco as party to it", the restriction does not operate. Since the identity of the parties to a contract is one of its essential points, tie argues that if the members of the JV are not collectively party to the sub-contract, tie is entitled to exercise its discretion to withhold approval (see paragraphs 5.4.4 – 5.4.7 of the Response). The JV, on the other hand, contends that that to be reflected is "the Infraco", and it repeats its earlier argument about paragraph 3 (see Reply, paragraphs 5.4.4 – 5.4.7). In the initial Referral, it also argued that the words "in substance" actually referred to the second limb of sub-clause 28.4.1, which is concerned with drafting which has to feature in the sub-contracts about certain subjects listed in the second portion of Part 38 of the Schedule to the Infraco Contact.

On this subsidiary matter, I am inclined to agree with the JV's initial argument. Contrary to submissions made elsewhere by tie, I think that this *is* a place where, in Lord Hoffmann's phrase, "something must have gone wrong with the language" (**Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 W.L.R. 896**). As written in the Infraco Contract, set between the *chapeau* of clause 28.4 and sub-clause 28.4.2, sub-clause 28.4.1 does not make grammatical sense. If the words "in substance" are intended to qualify both limbs of sub-clause 28.4.1, then, at the very least, the comma should be absent from the sub-clause and replaced by the word "or". While I accept what tie says about adopting the ordinary meaning of language when interpreting contracts (that is often the beginning and the end of the search for the meaning of a contractual provision, as **Bank of Scotland v Dunedin Property Investment Co. Ltd 1998 S.C. 657**, citing Lord Mustill in **Charter Reinsurance Co. Ltd v Fagan [1997] A.C. 313** reminds us), and, indeed, I accept the meaning given in the Shorter Oxford English Dictionary to the phrase "in substance", which is cited by tie, I do not think that that meaning can be attached to the words in issue here in the way that tie seeks to do.

Tie's error, as I think, is to move in its argument from the essentials – as opposed to the details- of the *sub-contractors* to discussing the essentials of the *sub-contract*. The phrase "in substance" bears to qualify the former rather than the latter. It is likely that the contracting entities in any given sub-contract will be limited liability companies. To allow the sub-contract to provide drafting which identifies a limited liability company in general, but not in detail, seems to me to make but little sense, and to be unlikely to be the intention of the parties who drafted sub-clause 28.4.1. The parties will have wanted accurate (and therefore detailed) identification of the contracting parties – diligence, for example, were it ever to become necessary, would otherwise become needlessly

hazardous, if not impossible. The "in substance" phraseology, therefore, seems to be out of place in relation to the first part of sub-clause28.4.1, but to perform a quite understandable function in relation to the second. The intention would seem to be to secure that the substantive requirements of the listed matters in Pat 38 appear in the sub-contacts without there being a need to repeat the very words in which those matters are recorded in the listed clauses. I do not therefore consider that the words "in substance" assist tie's argument – they are simply misplaced from the second part of sub-clause 28.4.1, and, as the JV argues, they do not relieve one of the necessity to determine what is meant by the words "the Infraco" where they appear in sub-clause 28.4.1.

The Cardinal Issue.

The drafting of sub-clause 28.4.1 is not such as commands my admiration, and I have not found it entirely easy to construe. Obviously, like any contractual provision, it needs to be construed in the light of the contract as a whole and the factual matrix in which that contract was entered into. In this case, the contractual context includes clause 120 of the Infraco Contract, which imposes on each Infraco Member joint and several liability for "the performance and discharge of all obligations ... arising from or in connection with this Agreement", and clause 118. The latter clause provides that whenever the contract calls for a party to give any approval, "that Party shall act fairly and reasonably within the terms of this Agreement (save where this Agreement expressly states that tie is to have absolute discretion) and having regard to all the circumstances".

As tie submits in its Response and Retort, the Infraco Contract falls to be construed in accordance with the ordinary canons of construction save insofar as clause 1 of the Infraco Contract and Part I of the Schedule may serve to modify those canons or their application in relation to this contract. So the *eiusdem generis* rule is excluded by paragraph 2.8 of Part I of the Schedule, and a list of definitions will usually take the place of the ordinary meanings of the words therein defined. But, *quoad ultra*, the ordinary canons apply. One must seek, therefore, to find an interpretation of sub-clause 28.4.1 which is consistent with the drafting of the rest of the contract, which accords meaning to all the provisions and which avoids duplications or redundancy. The Infraco Contract is a formally drawn and professionally drafted document, and so it seems even more probable than usual that the parties did not intend to produce any duplicatory or redundant drafting, and that words were chosen correctly to convey the parties' intended meaning- albeit that where the words do not make sense (as with the words discussed in the section of this decision immediately above), something

may still go wrong (cf **City Wall Properties (Scotland) Ltd v Pearl Assurance P.L.C. 2004 S.C.214; Caledonian Environmental Services P.L.C. v Degremont S.A. and Another [2010] CSOH 73**).

Clause 28 makes necessary the approval of tie at two stages in the exercise of sub-contracting part of the Infraco Works to a Key Sub-Contractor. By virtue of clause 28.3, tie's approval is needed in relation to the identity of the Key Sub-Contractor and to the sub-contracting of the particular work which it is proposed should be sub-contracted to him. That approval cannot be unreasonably withheld or delayed unless tie (acting reasonably, as is required by clause 118) considers that the sub-contractor's safety record is unacceptable, or finds that it can obtain neither a collateral warranty in the approved form referred to in clause 28.7 from the proposed Key Sub-Contractor nor the warranty from the JV referred to in clause 28.10. In these cases, clause 28.3 allows tie a veto, even if the exercise of that veto is unreasonable (note the words "so withheld", which refer back to the adverb "unreasonably" and amount to the express grant of absolute discretion which excludes the demands otherwise made by clause 118).

Clause 28.4 then requires that the terms of any proposed sub-contract are approved by tie. Tie is required to approve those terms within ten Business Days of a request for such approval, "which approval may only be withheld by tie acting reasonably if" the contingencies set out in sub-clauses 28.4.1 and 28.4.2 are met. The words "acting reasonably", it may be noticed, do not form a parenthetical clause. Were those words absent from clause 28.4, this drafting would appear to import a discretion in tie to withhold approval only if one or more of the contingencies applied, and that discretion would have to be exercised fairly and reasonably, as stipulated by clause 118. But that construction has, in the event, to be rejected, not only because the words "acting reasonably" *are* present, but because of the commercially implausible result the construction would bring about if no grounds for withholding existed beyond the occurrence of the second contingency. In such a case, which might be of the greatest concern to tie, would that company be obliged to grant approval because once the right to withhold consent had opened up through the occurrence of the second contingency, there was no further reason on the basis of which to exercise it, so that withholding would by definition be unreasonable? This result, which seems to me to be one which the parties are unlikely to have intended, is avoided, and meaning and purpose are given to the insertion in the *chapeau* of the otherwise redundant words "acting reasonably", by reading clause 28.4 as assuming the existence of the need for reasonableness which is created by clause 118, and stating that reasonableness of action in withholding approval of sub-contract terms is established only if one or other of the contingencies in sub-clause 28.4 is shown to obtain and is the ground for

the withholding in question. In short, contrary to the JV's argument in paragraph 5.4.15 of the Reply, the contingencies are not suspensive conditions of the opening of the right to withhold to withhold approval on reasonable grounds, but rather a statement of the grounds for withholding approval which will be accounted reasonable for the purposes of sub-clause 28.4, and therefore valid as a compliance with clause 118. As the use of the word "may" indicates, tie is under no obligation to withhold approval if a contingency is established, but if it choose to do so, that choice cannot be quarrelled by the JV.

The Meaning of "the Infraco".

Since the question whether tie can legitimately withhold approval of the terms of a sub-contract depends on whether one of the contingencies is made out, there arises sharply the issue of the meaning which should be given to the words "the Infraco" in sub-clause 28.4.1.

As noted above, the central argument presented by the JV turns on paragraph 3, and in particular, sub-paragraph 3.2. This argument presupposes that the Infraco is in fact a "Party" to the Infraco Contract, because the defined term "Party" used in sub-paragraph 3.2 refers to one who is a party to that contract. Given that it would appear that the Infraco is not a legal *persona*, one might question whether it can be a "party" to the Infraco Contract, and therefore whether the provisions of sub-paragraph 3.2 can apply to it at all. As the instance of that contract and paragraph 2 of Schedule 1 to the Minute of Variation by which CAF joined the Infraco betoken, the entities engaged to tie in the Infraco Contract are Bilfinger Berger, Siemens P.L.C. and CAF. If that be correct, then sub-paragraph 3.2 is irrelevant to the matters in hand for each "Party" is but a single person.

It is difficult, however, to conceive of the circumstances in which a " Party" as defined in the Schedule Part I would consist of two or more persons, and so paragraph 3 would appear to be a place where the defined meaning of "Party" would not apply because the "context otherwise requires". If the text of the paragraph is to make sense, a "party" would there require to mean "an unincorporated association comprising two or more Parties". That would encompass the Infraco, which would be the expected subject of paragraph 3. From the tenor of the submissions, I take the parties to have proceeded on the unspoken assumption that this must indeed be the meaning of "Party" in paragraph 3.

I return, then, to the leading argument of the JV that paragraph 3 allows one to read sub-clause 28.4 in the terms laid out in paragraph 5.3.5 of the Referral, so that if one of the members of the JV appears as the Contractor in the proposed sub-contract, the contingency in sub-clause 28.4.1 is excluded. I accept that sub-paragraph 3.2 would allow such a reading of sub-clause 28.4.1, and I am not inclined to accept tie's counter that if the sub-clause had been intended to be read in that way, the defined term "Infraco Member" would have been used rather than "the Infraco". With hindsight, most, if not all, clauses which come to be disputed on a question of construction could have been more clearly drafted, but that truth does not often help me to arrive at the correct construction of that which has been drafted. The same criticism can be made of the JV's use of the same argument in reverse in paragraph 5.1.5 of the Reply.

What, as it seems to me, is a much greater difficulty facing the JV's contention is that paragraph 3 declares that a reference to the composite entity "includes references to *each and* any of those persons". So, just as the JV can, and does, re-write sub-clause 28.4.1 to refer to a failure to "reflect any of the Infraco Members and the relevant Key Sub-Contractor as parties to the sub-contract", so tie could with equal justice, and under reference to the same paragraph 3, re-write sub-clause 28.4.1 so as to refer to a failure to "reflect *each of* the Infraco Members and the relevant Key Sub-Contractor as parties to the sub-contract" (my emphasis). Just as the JV's re-write would demonstrate that in the instant circumstances the contingency would not be met because a single Infraco Member named as "Contractor" in the sub-contract would serve to exclude it, the alternative re-writing would demonstrate with no less force that the contingency had occurred because there is not a reference to each member in the sub-contract unless *all* are there named as contractors.

I should perhaps add, in passing, that I do not think that tie's acceptance that the JV can, in the first instance, delegate the actual performance of its obligations in relation to a given sphere of operations to one of its members (paragraph 5.3.4) precludes it from arguing this point. The ability to delegate derives from the right available at common law to any contractor to decide for itself how to do the work. In the case of a contractor which was a consortium, that would include the right to delegate actual performance of some obligation to one of its members, albeit that every member of that consortium would ultimately be jointly and severally liable to perform that obligation. It is not necessary to postulate paragraph 3 in order to call the ability to delegate into existence. Nor more is it necessary to create some implied term in the interests of business efficacy. I therefore reject the JV's contention that paragraph 3 is the source of the ability to delegate. It follows that I reject also the JV's assertion that the "logical extension" of tie's argument is that all Infraco Members must be

involved in performing all the obligations of the Contractor under the Infraco Contract and tie's claim that a business efficacy implied term allows delegation.

The problem, I think, is that the phrase, "includes references to each and any of those persons" which appears in paragraph 3 is inherently self-contradictory. "Each and any" is not a composite phrase with a single meaning, and if it be read distributively, so as to denote both "each of" and "any of", it contradicts itself. Paragraph 3 is not qualified, as is paragraph 1 of the same part of the Schedule, by the words "unless the context otherwise requires", so that it does not direct one to alter the effect of its wording by reference to the surrounding drafting. That is not very serious in itself, for at common law one can apply different meanings to words according to the context in which those words appear – **Charter Reinsurance Co. Ltd v Fagan** cited above affording a dramatic example. But I doubt whether one can look to the textual and commercial context to alight on the meaning to be given to an interpretation clause and not a substantive one. As an interpretation clause, paragraph 3 is itself a clause which is seeking to give a uniform meaning (perhaps a somewhat artificial one) to wording which could appear in different clauses of the Infraco Contact, clauses which may themselves have different commercial and textual contexts. Yet the true interpretation of paragraph 3 (whatever that be) is to apply to all of them. That is clear from clause 1 of the Infraco Contract, which declares that the contents of the Schedule, Part I are to "govern all matters of interpretation", and so implies that they are to be of universal import and, in relation to those matters of which they treat, to rule interpretation, rather than being themselves modified or restricted by other criteria – such as commercial or textual context.

I am therefore disposed to think that – perhaps unusually – in relation to paragraph 3, arguments about background and the flouting of commercial common sense are misplaced. There is no commercial purpose to an interpretation clause –save, perhaps, to assist in affording certainty – and as it is to be generally applicable, then, rather like a clause in a standard form contract, it ought to have a meaning which is independent of the factual and commercial context of the various clauses it may come to affect. Paragraph 3 has to stand or fall on its own terms. In my opinion, the contradiction inherent in the words "each and any" – to say nothing of the fact that, because paragraph 3 merely includes references to the persons making up the JV, it does not exclude reference to the basic meaning of the words "the Infraco" as the shorthand phrase created in the Recitals to the Infraco Contract and correlative Minutes of Variation to denote the three adventuring companies collectively – makes paragraph 3 of no assistance in attempting to ascertain the true interpretation to be placed on the words "the Infraco" in sub-clause 28.4.1. I therefore reject the

arguments of the JV which are based on the assertion that for the purposes of the sub-clause, paragraph 3 causes those words to denote any single joint adventurer in the JV.

But that is not the end of the matter. Both parties present other arguments. In support of the contention that the proposed sub-contracts are intended to be entered into in the name of each of the members of the JV, tie points to the form of collateral warranty in the Schedule. Each member of the JV is mentioned in the collateral warranty, and tie states that the parties to the warranty would be expected to reflect the contracting parties in the sub-contract in support of which the collateral warranty is granted. It argues further that the construction it urges makes commercial sense because it would serve to protect tie from both reputational damage and the risk of the loss of important supplier chains if the Infraco member contracting with a given sub-contractor were to become insolvent, but the other members of the JV were to remain solvent. The JV retorts that that is not so: contractual protection for tie in that kind of situation being already provided by clause 90 of the Infraco Contract and the step-in rights created by the sixth clause of the collateral warranty. Rather, says the JV, there are practical commercial reasons why the construction to be given to the words "the Infraco" should be that for which the JV contends. These are concerned with problems of procurement and administration where different parties are skilled in different areas of engineering are involved in work in common, problems which are obviated if but one member of the JV is appointed as the party to contract with a given sub-contractor.

While I agree with the JV's observation that the meaning to be given to the words "the Infraco" ought not to be decided by the terms of the collateral warranty, as tie counters in the Retort, that document (or at least the template therefor) forms part of the Infraco Contract and is cross-referred to in clause 28.7. It may therefore be said to cast a sidelight on what the parties meant when they used the phrase, not least because the Infraco Contract and its Schedule are meant to be read as a *unum quid* (cf clause 4.2). I am prepared to accept that the reason why Infraco companies execute the collateral warranty is to consent to provisions therein (one paragraph of the warranty says as much), but I am not persuaded that the inference tie seeks to draw from the appearance in the warranty of each member of the JV is one which should be drawn. It seems to me that for the purposes of the present discussion, there is probably nothing to be drawn from the fact that all the members of the JV are taken as consenters to the warranty. The reason for that being done which is advanced by tie might explain why all the JV members are named, but another, and one which is consistent with the JV's argument, is that at the time when the template was drawn up, it was not known which joint adventurer would in any given case be "the Infraco", and so all were taken as

consenters in order to ensure that the correct one was covered. I would therefore see this point as being neutral.

The practical reasons advanced by the JV as support for its contention do not strike me as being of real weight. Each of them, on the face of it, would apply to the Infraco Contract itself (to which each joint adventurer is assuredly party), and , as they have been solved in the Infraco Contract, so could they be similarly solved in relation to sub-contracts, even if all the joint adventurers in the JV were party to each of the sub-contracts.

The commercial reasons advanced by tie for favouring its proposed construction and the JV's reply thereto have been noticed above. There is clearly some merit in the JV's reply, but it does not entirely remove the force of tie's original point. There is no guarantee that a sub-contractor will grant a collateral warranty in the form set out in Part F, and, indeed, that may be the position in the Border Rail and Plant case. Tie may have to make do with a clause 28.10 warranty given by the JV so as to obviate the veto which would otherwise effeir to tie by virtue of sub-clause 28.4.2. Such a warranty would have no step-in provision: it would simply be concerned with the standards of work and materials employed and the liability therefor (i.e., a replication of paragraphs 2, 3 and 8 of the form of collateral warranty, together with any necessary definitions). No more will there exist any provision for assignation to tie of the sub-contract, such as sub-clause 90.8.2 relies upon, and tie may thus be exposed to disputes as to whether the sub-contract is assignable or, if it is, as to whether, and, if so, on what terms, the liquidator of the insolvent adventurer may be prepared to assign it. While the other joint adventurers would be liable to tie for the procurement of another sub-contract in replacement of the first and for the performance of the sub-contract works, tie might still be exposed to delays in obtaining the completion of the Infraco works and consequent criticism, if not financial loss. It is understandable that tie, with its public sector background, would want to avoid that. By comparison, if all members of the JV were party to the sub-contract, the insolvency of one would not necessarily give the sub-contractor occasion to stop work, and tie could expect work to continue under the aegis of the remaining joint adventurers without delay. Tie's construction, that the reference to "the Infraco" in clause 28.4 calls for all the Infraco Members to be party to the sub-contracts cannot therefore, be dismissed, as the JV might hope to do, on the footing that it "flouts business common sense".

The upshot of the above is that I find that I have no basis in the submissions and the materials put before me for departing in relation to clause 28.4 from the meaning accorded the words "the Infraco

"in the Recitals to the Infraco Contract (as amended) namely, that they are a shorthand description of Bilfinger Berger, Siemens P.L.C. and CAF, collectively. As the JV itself observes, consistency of drafting in a formal contract such as this is to be expected, and one therefore expects the meaning of a defined term to be the same throughout the document. In view of that, it is perhaps worthy of note that in clause 28.1, "the Infraco" is barred from sub-contracting the whole of the works. The natural expectation would be that any such sub-contracting (were it not prohibited) would be would be done by all the joint adventurers (one could not imagine CAF, say, being able qua principal, to sub-contract all of the joint works), so that the prohibition would be directed against the potential sub-contractor, viz., the three joint adventurers, acting jointly. The term used to describe the object of that prohibition is "the Infraco".

I therefore consider that on its true construction, the contingency in sub-clause 28.4.1 eventuates where either or both (a) the terms of the sub-contract in hand do not substantially reflect the demands of the clauses of the Infraco Contract which are listed in Part 38, Part II of the Schedule to the Infraco Contract; and (b) not all of the joint adventurers in the JV are named as parties to that sub-contact as the contractor engaging the proposed Key Sub-Contractor. Accordingly, I propose to refuse the JV's first declarator.

The Requirement to Act Reasonably.

As my consideration of the construction to be given to clause 28.4 will no doubt have betrayed, this is an issue I can deal with shortly. I have already rejected the submission of the JV that the eventuation of the contingencies, or either of them, opens up a right to withhold, which right has to be exercised reasonably. In my opinion, when clause 28.4 inserts the words "acting reasonably" it is not indulging in repetitious drafting rendered redundant by clause 118, but providing that, in the situation in which that clause applies, the reasonableness of action demanded by clause 118 will be satisfied only by showing that one of the contingencies in sub-clauses 28.4.1 and 28.4.2 obtains and is (though this will be presumed) the ground for withholding approval. Once these are established (by proof or by failure on the part of the JV to rebut the presumption, as the case may be), however, the reasonableness requirement in clause 28.4 is automatically established too. In short, refusal to approve on the ground that not all Infraco Members are party to the sub-contract, if genuine, and not cover for some collateral reason for the refusal) is *ipso facto* reasonable for the purposes of clause 28.4.

It follows from that construction of the contract, my belief that the contingency in sub-clause 28.4.1 is made out as having eventuated and the absence of any contention that tie's refusal was other than genuine that tie has not failed to act reasonably in withholding approval of the terms of the three sub-contracts in issue in this case on the ground that all the joint adventurers were not party to each of the sub-contracts. Not only do I refuse the JV's second declarator, therefore, but I grant the two declarators sought by tie.

Fees and Expenses

In the light of the decision at which I have arrived on the merits of the dispute, I direct that my fees and expenses for the conduct oft his adjudication should be borne by the JV.

[redacted]

Edinburgh,

15th December, 2010.