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MONDAY 11 JANUARY 2010

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ADJUDICATION

LOW FAT LEGAL PROCESS
Building January 2010
Author(s) ... Mullard, Ben
Explains how the costs of an adjudication can be affected by how a party approaches the process and what decisions it makes. The author advises on how costs can be controlled by deciding on such things as the issues which are to be adjudicated, what professional help may be required and what evidence adduced.

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SHAW V MFP FOUNDATIONS & PILING LTD.; 6 JANUARY 2010
[2010] EWHC 9 (CH)
CHANCERY DIVISION- MANCHESTER DISTRICT REGISTRY
Keywords: Adjudication Awards- Statutory Demands- Effect of Subsequent Arbitration Award
The appellants, Mr. and Mrs. Shaw, appealed against a decision by the district court refusing to set aside statutory demands served upon them by the respondent contractor, MFP, relating to an adjudication award made under the Housing Grants Construction and Regeneration Act 1996. The appellants argued that whilst the district judge had rightly decided that they were entitled to assert a genuine counterclaim which exceeded the amount claimed in the statutory demands, he had been wrong to exercise his discretion not to set aside the statutory demands on the basis that the appellants could afford to pay the statutory demands, there was no risk of them becoming bankrupt and therefore being unable to overturn the adjudication decision in subsequent arbitration proceedings.

The dispute concerned building works carried out by MFP at the East Lodge at Little Moreton Hall under an Architects and Surveyors Institute Minor Works form of contract. There was no provision of adjudication under the Act because the contract used pre-dated the 1996 Act. The appellants made payments of £102,421, but by 2008, there were delays, and appellants were also dissatisfied with the quality of the work. In February, MFP left the site, and each party maintained that the other had repudiated the contract. MFP issued a Notice of Adjudication, purporting to accept the appellants' repudiation, and seeking damages for breach of contract. The Notice stated:

"1. That the Responding Party pay the Referring Party damages of £86,713.24 or such sum as the adjudicator shall decide being the unpaid value of the works, pleaded by the Referring Party at the date of the Responding Party's breach of contract… "

The appellants did not take part in the adjudication, having been wrongly advised that the adjudicator did not have jurisdiction. In September 2008, the adjudicator decided that the appellants had wrongfully determined MFP's employment, and awarded the contractor £80,954.55. The appellants' adviser Mr. Wilson wrote to MFP's solicitor evaluating its claim and valuing the works done. His report valued the works at £113,619.45, and, taking into account the payments which the appellants had made, that left £11,199.47 outstanding. The appellants made no further payments, and MFP commenced proceedings in the Technology and Construction Court in Liverpool to enforce the adjudicator's decision. The appellants sought to resist this on the basis that the adjudicator had no jurisdiction. In the meantime, MFP also issued and served statutory demands on the appellants, claiming the sum awarded in the adjudication, plus judgement interest and costs. A day prior to this, Mr. Wilson had served a notice of arbitration on MFP, claiming repayment of the sums paid in excess of the valuation made of the works. The appellants also applied to have the statutory demands set aside, but this was delayed with the result that MFP issued bankruptcy petitions against the appellants.

On 31 July 2009, Mr. Bingham published his first arbitral award, which dealt only with whether MFP was in breach in relation to the quality of the stonework windows and stonework surrounds to the patio doors. He concluded that MFP was in repudiatory breach, and that the appellants were entitled to treat the contract as terminated.

The central focus of the appellants' appeal was that it was wrong and contrary to established law that the court should refuse to set aside a statutory demand simply because the debtor appears to have the means to pay, and sought to rely upon the subsequent decision in Remblance v Octagon Assets Ltd., [2009] EWCA Civ 581. Following this judgement, the judge ruled that the district judge had been wrong as a matter of law to have exercised his discretion on that basis. Having so concluded, it was necessary for the court to consider the cross appeal and whether or not the statutory demands should be set aside.

The judge considered the provisions of part 6.5(3) of the Insolvency Rules 1986, which provide that a court may grant an application to set aside a statutory demand in the following circumstances:

"(a) The debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt or debts specified in the statutory demand; or:

"(b) The debt is disputed on grounds which appear to the court to be substantial; or:

"(c) It appears that the creditor holds some security in respect of the debt claimed by the demand, and either Rule s6.1(5) is not complied with in respect of it, or the court is satisfied that the value of the security equals or exceeds the full amount of the debt; or:

"(d) The court is satisfied, on other grounds, that the demand order to be set aside."

In the court's view, there was no binding authority to support either of the party's arguments, and a bankruptcy court would have to decide each case on its own facts and the surrounding circumstances, and would not be limited in the exercise of its discretion.

There was a clear distinction between the enforcement of an adjudicator's decision and trying to use that decision upon which to base bankruptcy proceedings, even if a substantial cross claim existed. Whilst MFP sought to emphasise the 'pay now, litigate later' ethos behind the Construction Act, there was nothing in either the Act or the Scheme which showed that they were intended to displace the provisions of personal or corporate insolvency legislation.

On the evidence, the appellants' counterclaim was a genuine and substantial one, and one which exceeded the sums claimed in the statutory demand. Where a statutory demand is founded on an adjudicator's decision, if a debtor can demonstrate that he has a substantial cross-claim, the insolvency regime does not contemplate that he should be prevented from raising those issues in bankruptcy proceedings because they had not been raised in the ad itself. In the present case, the appellants had not taken part in the adjudication because they had been wrongly advised that the adjudicator did not have jurisdiction, not because they doubted the merit of their claim.

The dispute which had been referred to adjudication by the MFP had been a claim for damages for the appellants' repudiatory breach of contract; it did not include a claim in respect of the final account independent of the claim for damages for breach of contract. Since Mr. Bingham had decided in the first arbitral award that the appellants had not been in repudiatory breach of contract, this was a final determination that the MFP did not have a claim for damages for repudiatory breach. From the date of the publication of the arbitral award, the adjudicator's decision was no longer binding, so that the appellants would be entitled to apply to have the enforcement judgement set aside. Under those circumstances, it could not be right for the statutory demands to stand.

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ARBITRATION

BOWEN CONSTRUCTION LTD. -V- KELCAR DEVELOPMENTS LTD.; 16 OCTOBER 2009
[2009] IEHC 467
HIGH COURT OF IRELAND

Keywords: Arbitration- Privity of Contract

The dispute concerned works carried out on cottages at the Blarney Golf Resort, which were owned by Messrs. Frank and Derek McCarthy who were shareholders in Kelcar Developments. Bowen undertook the works under a contract with Kelcar. Kelcar transferred ownership of the cottages to a number of other parties under a number of development agreements, and Bowen executed collateral warranties which gave the transferees of the buildings similar rights to sue for defects as were contained in that agreement. The development agreements also contained warranties by Kelcar as to the quality of the buildings. In addition, Bowen executed collateral warranties under seal in favour of the private investors, who owned the clubhouse and the hotel at the resort. This conferred on them the right to pursue the contractor for defects.

In the case of the cottage owners, however, the warranties were not executed. Bowen maintained that it was willing to do so, but was ever called upon to provide them. This was not contested by Kelcar.

A dispute under the contract as referred to arbitration, and the arbitrator sought directions from the court on a number of questions of law arising under section 35 of the Irish Arbitration Act 1954. The issue was whether an employer under a building contract could counterclaim or set-off the costs of remedying defects where the losses had been incurred by someone who had not been party to the contract. Although Kelcar was the employer under the contract, it had no interest in the cottages or the resort, since the cottages were owned by associated persons or companies and the resort were owned by a subsidiary company, BGR Ltd. When the matters came to the arbitrator's attention, he gave Kelcar leave to amend its points of defence and counterclaim. However, he rejected Kelcar's application to join BGR as a party to the arbitration.

Bowen challenged Kelcar's entitlement to make such claims for alleged serious defects in the buildings, particularly in the construction of the roofs. BGR maintained that it would have to close the resort during the remedial work, and would lose business as a result. Although Bowen denied that the buildings were defective, for the purposes of the present action, it was assumed that the defects existed and that they would give rise to at least some of the losses claimed. Bowen relied upon the doctrine of privity of contract i.e. that only a party to a contract can sue for a breach of it, and a claimant can only recover losses which it has sustained or will sustain.

Kelcar argued that the present case came under an exception to the privity rule in that clauses 21(A) and 21(B) of the contract applied to losses sustained by third parties, and authorised the employer to make a claim in respect of them. Section 21(B) related to insurance against damage to property or persons, and 21(A) imposed a liability on the contractor to indemnify the employer against any loss or damage to personal property arising "out of or in the course of or by reason of the execution of the works".

The court rejected this interpretation of the contract. Those provisions were intended to apply to quite a different situation from the present one, dealing principally where there was damage during the works due to the negligence of the contractor or one of its subcontractors.

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Turning to the "exception" argument, Kelcar was proposing that, on the agreed assumption that there were defects in the works, Bowen would be allowed to escape liability for its wrongdoing. Having reviewed the English authorities, the court concluded that they did not support a deviation from the general privity rule in order to enable a party to an arbitration to claim losses incurred by other parties where they had their own legal right to claim for any losses sustained. In building contract cases, the exception to the privity rule applied where there was a "legal black hole" i.e. where a party which sustains a loss would otherwise be without any remedy at law and the party suing could not prove substantial losses, so that the party in breach would escape liability. If the party suffering the loss has a right of action, the exception does not apply. The present case did not fall within the exception to the privity rule.

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JIANGSU HANTONG SHIP HEAVY INDUSTRY CO. LTD. FORMERLY KNOWN AS HANTONG SHIP MACHINERY EQUIPMENT (TONGZHOU) CO. LTD. AND ANOTHER V SEVAN PTE LTD.; 22 DECEMBER 2009
[2009] SGHC 285
HIGH COURT OF SINGAPORE
Keywords: Arbitration- Crystallisation of Dispute

The parties' dispute concerned a contract for the construction of a ship by Hangtong. Under the contract, Sevan had to make progress payments within 5 banking days of receiving Hangton's invoices. Hantong maintained that Sevan owed it $2,854,829.50, and commenced legal proceedings. Sevan applied to have the proceedings stayed in favour of arbitration in London as provided for by clause 34 of the contract.

Clause 34 provided:

"Any dispute arising out of or in connection with this Contract, including any questions regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the London Maritime Arbitrators Association (LMAA), which rules are deemed to be incorporated by reference into this Article. The arbitration shall be held in London, England, and the language of the proceedings shall be English."

Hantong opposed the granting of a stay, arguing that there was no "dispute" between the parties capable of being referred to arbitration because, according to Hantong, Sevan had already admitted liability for the sum Hantong was claiming, and did not have a valid counterclaim. The stay was granted and Hantong appealed.

The court referred to se. 6 of the Singaporean International Arbitration Act 2002, (Cap 143A, 2002, Rev Ed) , which states:

"Enforcement of international arbitration agreement

"6. - (1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.

"(2) The court to which an application has been made in accordance with subsection "(1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed."

When determining whether there was a dispute for the purpose of an application for a stay of proceedings under the Act it was immaterial that the defence or counterclaim of the party seeking a stay appeared to be weak. If a defendant makes a positive assertion that he is going to defend a claim, then there is a dispute.

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Sevan contended that Hangtong had breached the contract in a number of ways, and it intended to counterclaim in respect of them. Some of the breaches alleged were delays, and Hantong's inability to perform its contractual obligations. Sevan also denied that it had admitted liability for the outstanding progress payments. Hantong had relied upon the minutes of a meeting and correspondence to show that Sevan had never expressly challenged Hantong's demands for payment. The court should not be astute in looking for the admission of a claim, and should only find that a claim is not admitted in the clearest of cases.

Taking all the above into account, the court concluded that there was a dispute between the parties, which should be resolved in accordance with the arbitration clause. The stay was upheld.

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ARCHITECTS

A NEW DESIGN FOR EUROPEAN ARCHITECT LAW
[2010] I.C.L.R. 16
Author(s) ... Van Gulijk, Stephanie
The position of European architects in the construction process is weakening. In addition to the traditional design contracts, new market models have been developed (for example, turnkey contracts and design and build contracts). These contracts enable other service providers such as contractors, other consultants or other technical advisers, and real estate and project managers, to take charge of design activities in the construction industry. Furthermore, engineering and consultancy firms may take care of the design and then team up with other professionals to do the actual construction work. Sophisticated clients may have their own design teams and hire a building contractor to do the work. These new market models no longer fit the traditional design contract, which usually bases itself on the idea that an architect designs the building.

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BUILDING BUSINESS

COUNTRY FOCUS: IRELAND
Building January 2010
Author(s) ... Fitzpatrick, Richard
A review of the Irish construction and property markets, looking at how it has been affected by the recession, its future prospects and tender prices.

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DAVIS LANGDON PROFIT FALLS 55% IN EUROPE AND GULF
Building January 2010
Davies Langdon has reported a 55% fall in profits in Europe and the Middle East despite a 6% increase in revenue. The figures have been blamed partly on the adverse conditions in commercial and retail development which accounted for a third of the company's fees. In contrast, the company expects its global results to show a 20% growth in turnover.

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RICS DELAYS CIC DEPARTURE FOR THREE MONTHS
Building January 2010
The Royal Institution of Chartered Surveyors has postponed making a decision on whether or not to withdraw from the Construction Industry Council for three months. There has been considerable pressure from members to get the RICS to change its mind about the move.

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UK SET TO ANNOUNCE R3 OFFSHORE WIND VICTORS
Recharge 3 January 2010
Author(s) ... Stromsta, Karl-Erik
The winning contractors for the £3 offshore wind farm project are to be announced this week. The anticipated value of the project is £100bn by 2020, and the project will be a blueprint for future schemes. The government is hoping that it will also create a UK-based renewables industry, which will have long term benefits.

Aberdeen-based offshore contractor Sea Energy and Portuguese utility EDPR are expected to be awarded Scotland's Moray Firth zone, while Dublin-based Mainstream Renewable Power has reportedly won the Hornsea zone. Other winners are understood to include E.ON, Centrica and DONG.

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UNIVERSITIES PLAN TO SLASH BUILDING PROGRAMMES
Building January 2010
More universities have begun to review their building programmes following the announcement of capital funding cuts by the government of over half. Some universities, such as Imperial College, London and Bristol are to reduce their programmes by 40%. Some universities are investigating ways of making up the shortfall by using private money. Cambridge, for example, is planning a bond issue.

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WORK STARTS AT STALLED £1.5BN LONDON GATEWAY PORT
Building 5 January 2010
Author(s) ... Ahira, Kate
Work on the essential infrastructure has restarted on the suspended London Gateway Project, the £1.5bn combined deep sea port and logistics scheme. Promoter DB World, which has been suffering from financial problems, had reviewed is options in the light of the current recession and has decided to go ahead, having purchased the extra land needed and bought out Royal Dutch Shell. The London Gateway project is one of the main drivers for the Thames Gateway and the Prime Minister has welcomed the news.

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BUILDING CONTRACTS

CLANDESTINE COMMUNICATIONS
Building January 2010
Author(s) ... Bingham, Tony
Reviews the decision in Peter Morris Edwards v Bruce & Hyslop (Brucast) Ltd., [2009] 47 BLISS 9, which concerned allegations of bias where a single joint expert witness communicated with one party, but not the other.

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EIC'S GUIDE TO THE FIDIC CONDITIONS OF CONTRACT FOR DESIGN, BUILD AND OPERATE PROJECTS
[2010] I.C.L.R. 36
Author(s) ... Broman, Hakan; Kehlenbach, Frank
A critical assessment of the FIDIC Gold Book, based on the EIC Contractor's Guide to the FIDIC "Gold Book", published in May 2009.

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FIDIC CONDITIONS OF CONTRACT FOR DESIGN, BUILD AND OPERATE PROJECTS, FIRST EDITION 2008

[2010] I.C.L.R. 36

Author(s) ... Jaeger, Axel-Volkmar; Hok, Gotz Sebastian

Today three basic types of contracts or procurement methods may be identified in conjunction with construction works, ordinary build contracts (Construction), design and build contracts (D & B) and design, build and operate contracts (DBO). Two of the aforementioned types of contract are already covered by FIDIC, known as the new Red Book and the new Yellow Book and its complementary book, the Silver Book (EPC). A simple construction contract presupposes that the design has been prepared by the employer (by himself or by engaging a consultant). This has been a normal contracting format in the world until today. By contrast a design and build contract presupposes that the design has been prepared by the contractor. A design, build and operate contract comprises an operation and maintenance phase. One of the basic principles of this type of contract is that the contractor assumes the responsibility for the operation and maintenance of plant before the facility is finally handed over. The article discusses the provisions of the new FIDIC Gold Book.

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GLOBALISATION AND CONTRACT PRICE IN THE INTERNATIONAL PUBLIC WORKS AGREEMENTS IN THE EGYPTIAN STATE PROCUREMENT LAW

[2010] I.C.L.R. 92

Author(s) ... Ismail, Mohamed

The traditional theory of the administrative contract is nowadays facing many challenges and difficulties. The change in raw materials prices in the Egyptian construction industry used to be, and still is, constant before and after the global economic crisis. The Egyptian Parliament is facing these changes by amending and modifying State Procurement Law provisions. Meanwhile, the Ministry of Finance is modifying its executive regulations. The main aim of these amendments is to promote contractual equilibrium between the employer (state administration) and the contractor, because public works contracts are complex and long-term agreements.

To maintain stability of the contract price, the Egyptian legislator created certain mechanisms in 2005 and 2008 instead of the customary parameters of the traditional theory of the administrative contract. These mechanisms changed considerably some of the leading principles of administrative contract theory which have existed since the establishment of the Egyptian Conseil d'état (State Council), in 1946. The traditional theory of the State Council, which is mainly found in the Supreme Administrative Court judgments and in the General Assembly for Legal Opinion (Fatwa) as well as the Legislation Department, had certain stipulations about the maintenance of stable contract prices during the contract, and until its final completion. The new amendments in the Egyptian legislation created new mechanisms to change contract prices on a regular basis.

This article has three parts: first, the traditional theory of administrative contracts and its leading stipulations to maintain price stability are set out; secondly, modifications and enhancements of Egyptian State Procurement Law and its executive regulations since 2005 are described, and, thirdly, current changes to the Egyptian State Procurement Law introduced in 2008 and their significance as a result of globalisation, as well as their impact on the administrative contract are discussed.

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UPDATE ON THE NETHERLANDS- RECONSTRUCTING CONSTRUCTION
[2010] I.C.L.R. 114
Author(s) ... Van Wassenaer, Arent
A review of developments in the construction industry in the Netherlands, including: a new chapter on contracting law in the Dutch Civil Code; certain new forms of contract (DNR–2005, UAV–Gc 2005 and standardised DBFM contracts); developments in Dutch procurement law following the publication of the procurement Directives and the aftermath of the construction fraud affair and project development; developments in the field of unsolicited proposals; developments regarding construction arbitration, adjudication and mediation.

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A YEAR OF CORRECTION IN THE UAE
[2010] I.C.L.R. 128
Author(s) ... Al Saadoon, Omar
Examines how Abu Dhabi is attempting to recover from the recession which has hit the UAE by implementing more energy projects, and discusses whether there are likely to be more arbitrations there, given the number of cancelled and suspended projects.

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CONTRACT

BAILLIE ESTATES LTD. V DU PONT (UK) LTD.; 30 DECEMBER 2009
[2009] CSIH. 95
COURT OF SESSION (INNER HOUSE) (SECOND DIVISION)
Keywords: Contracts- Incorporation of Terms
Baillie Estates bought a large printing machine from Du Point, which was delivered in January 2007. Baillie complained that there were problems with the machine from the outset. In the present action, apart from a declaration as to the quality of the machine, Baillie also sought a declaration that the terms and conditions of sale which had been sent to them by e-mail were not incorporated into the parties' contract because they had been sent too late because the parties had concluded a binding contract before 20th November 2006. There had been a good deal of correspondence between the parties about price, culminating in an e-mail on 16 November 2006, in which Du Point's Mr. Lewis offered to supply the machine at £112,000. The e-mail contained a detailed specification of what was to be provided, plus a monthly payment schedule, and concluded:

"Target installation date: 4 December 2006 (to be confirmed following survey)".

Baillie's Mr. Minto had e-mailed back, "Go ahead".

Mr. Lewis had visited the site the next day and had inspected the machine's proposed location, and said that an engineer would be sent to inspect it. He also e-mailed Mr. Minto the company's standard terms and conditions, noting that they were also reproduced on the back of all the company's invoices.

Baillie's position was that as at 20 November 2006, there was no concluded contract because two conditions had not been satisfied: there had been no satisfactory site survey and there had been no completed credit check on them. They maintained that a contract had been concluded during the e-mail exchange between Mr. Lewis and Mr. Minto which had included all, or, at the latest, when Mr. Lewis had e-mailed "it's on the way" on 19 November.

In the court's view, there had been nothing ambiguous or informal about the proposal made by Mr. Lewis, and although Mr. Minto's response - "go ahead"- had been brief, it was unambiguous, and apt. There was no requirement that the language of contract should be formal. Many contracts were concluded in such an informal way, particularly after detailed discussion and negotiation had taken place. The parties' communications of 17 November were therefore capable of concluding an unconditional contract, and must also be held to have been intended to do so.

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None of the e-mails contained anything about the terms and conditions being qualified by reference to any standard terms and conditions, or that the conclusion of the contract was conditional upon obtaining a site survey or credit check.

Du Point had provided their standard terms and conditions too late. They could only form part of a contract by virtue of silence and acquiescence when it has been proposed that they should be part of the contract before the contract is concluded. In the present case, the deal had been struck and the terms already agreed. In addition, some of Du Point's standard terms conflicted with some of the terms in their proposal. Consequently, Du Point's terms were not incorporated.

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ROADS

TOLL-ROAD FUNDING ALTERNATIVES ENERGE FROM THE SHADOWS
[2010] I.C.L.R. 4
Author(s) ... Chew, Andrew; Storr, David
The global toll-road industry is facing new challenges, arising partly from a shortage of long-term debt and equity funding following the global financial crisis, and partly from a re-evaluation of traffic and other risks in the sector. The convergence of capital market instability, refinancing commitments, reduced traffic volumes from the economic downturn and business and consumer sentiment will cause a bumpy road ahead for new toll-road projects. This article discusses traditional direct user fees and some possible new debt and equity funding models in Australia in the context of the current difficulties.

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