

CONSTRUCTION LAW INTERNATIONAL

FROM THE IBA INTERNATIONAL CONSTRUCTION PROJECTS COMMITTEE OF THE
ENERGY ENVIRONMENT, NATURAL RESOURCES AND INFRASTRUCTURE LAW SECTION (SEERIL)

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**Investor-state
disputes arising
from the pandemic**

**Differing site
conditions:
contrasting the
English and US
legal systems**

**Concurrent delay:
unliquidated
damages by
employer and
disruption claim
by contractor**



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FROM THE EDITOR

Dear readers,

While most of us continue to work remotely and increasingly rely on virtual meetings, we bring you a digital edition of *Construction Law International*. This is a truly global edition that, as always, considers important issues that have an impact on construction projects around the world.

For our FIDIC Around the World series, we are fortunate to have contributions from Bwalya Lumbwe, who discusses the application of FIDIC in Zambia, and Erin Rankin Miller and Samantha Lord Hill, who discuss in detail the use of the FIDIC forms in the United Arab Emirates.

In the Country Updates section, we have two contributions from South America. Federico Carbajales provides an update on amendments to Uruguay's construction defects decennial liability scheme. From Argentina, Santiago Barbarán considers the important role that renewable energy projects will play in the economic recovery from the impact of Covid-19. In Australia, Andrew Chew, Christine Covington and Louise Camenzuli discuss state-based legislation that provides a comprehensive reform package to target defective building work.

We are delighted to have a contribution from Italy, where Alessandro Paccione, Giada Russo, Marco Giustiniani and Giovanni Gigliotti provide an update on a recent Italian government decree, known as the Simplification Decree, which aims to simplify and streamline the administrative procedures that underpin the award of government contracts.

Moving to our feature articles, Joshua Paffey and Lee Carroll discuss the difficult balance between public health and corporate wealth in the context of investor-state disputes arising from the Covid-19 pandemic. JB Kim has provided us with two in-depth and well considered articles. The first focuses on differing site conditions, contrasting the English and United States legal systems in that context. His second piece discusses the perennial issues associated with concurrent delay.

Continuing with concurrency, Nicholas Cousino and Kemi Wood provide their insights into the increased use of virtual hearings and the challenges that they present with respect to expert evidence.

Lastly, Alex Wagemann Farfán and Claudio Inostroza Guajardo discuss the benefits to South American countries if dispute boards were more widely used on public sector projects.

We thank our contributors for their insightful articles and we hope you will enjoy reading this edition.

From country updates to feature articles, we invite you all to contribute your thoughts and insights to *CLInt* by submitting your articles to CLInt.submissions@int-bar.org.

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FROM THE CO-CHAIRS

Dear fellow International Construction Projects members,

As we write this, we are nine months into our term as Co-Chairs of the International Construction Projects Committee. At the start of the year, we had planned to attend our annual Working Weekend in beautiful Vevey, Switzerland, with a great working and social programme; the SEERIL Bi-annual Conference in Marrakesh, Morocco; and of course the IBA Annual Conference in Miami, United States.

None of these events were able to take place so we, in common with many others, have had to take stock and adjust to what very quickly became a 'new normal' with a heavy reliance on technology.

A McKinsey study suggests that, as a result of the pandemic, there has been five years' worth of consumer and business digital adoption in about eight weeks,¹ a quite astonishing statistic.

Looking back, we are proud of the ICP's achievements over this time, despite the changes we have been forced to make.

We ran a series of events, including an open discussion forum on the topic of construction in quarantine, and webinars on topics including construction disputes in pandemic times; unforeseen subsurface conditions; how risk allocation is a determining factor in a successful project; and the Society of Construction Law's Delay and Disruption Protocol.

We also launched our diversity project with the first webinar, titled 'Effective tools in managing diversity and inclusion challenges in the construction industry: multinationals' Approach to Policy'. This is an important topic for the construction industry. Recent research by McKinsey supports the business case for diversity and inclusion: 'Our latest analysis reaffirms the strong business case for both gender diversity and ethnic and cultural diversity in corporate leadership – and shows that this business case continues to strengthen. The most diverse companies are now more likely than ever to outperform less diverse peers on profitability.'² Traditional roles in construction are changing as the industry increasingly adopts technology and there is a need for a highly skilled workforce equipped to deal with this. Diversity is one factor in driving innovation which, given other challenges faced in construction, will be key going forward. Look out for more on this in the future.

We presented five sessions during the IBA's Virtually Together Conference in November on a range of topics and with contributions from around the globe, and held a networking session as the nearest thing possible to being able to meet each other in person.

All of this was only possible through the time and efforts made by ICP members to plan, prepare, present and participate in these sessions. Our officers have been very active over the year, not only with this but also looking forward to plan projects and topics for future sessions. We would like to thank each and every person who has contributed to the ICP over the year.

We are also working on the Toolkit for Construction Projects, a booklet collecting best advice about all stages of construction projects and key issues to be considered from initiation to completion and dispute resolution. Please do contact us if you would like to make a contribution or if you have other ideas for topics for sessions or other activities you would like to see within the ICP. We will be delighted to hear from you.

Looking forward, we are committed to continuing to do all we can to deliver a great programme of activities for the ICP over the coming year. We are already working on the programme of topics for the postponed Working Weekend and for the Annual Conference scheduled to be held in Paris, France, in October 2021. We would welcome any suggestions for topics you would like to see included so please do send us your ideas.

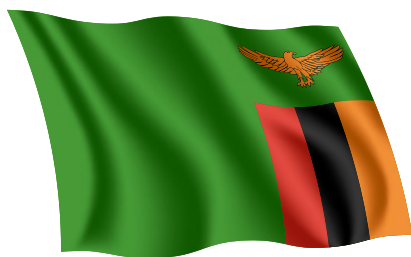
We wish you and your families, friends and colleagues well and trust that we can all look forward to better times in 2021.

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¹ Aamer Baig, Bryce Hall, Paul Jenkins, Eric Lamarre and Brian McCarthy, 'The COVID-19 recovery will be digital: A plan for the first 90 days' McKinsey Digital (14 May 2020) www.mckinsey.com/business-functions/mckinsey-digital/our-insights/the-covid-19-recovery-will-be-digital-a-plan-for-the-first-90-days accessed 18 September 2020.

² Sundiatu Dixon-Fyle, Kevin Dolan, Vivian Hunt and Sara Prince, *Diversity wins: How inclusion matters* McKinsey & Company (19 May 2020) www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters accessed 18 September 2020.



ZAMBIA

Bwalya Lumbwe, Lusaka

1. What is your jurisdiction?

Zambia

2. Are the FIDIC forms of contract used for projects constructed in your jurisdiction? If yes, which of the FIDIC forms are used, and for what types of projects?

FIDIC contract forms are used in Zambia, primarily for public procurement projects involving building and infrastructure works. Parties in private contracts or projects may choose the terms of their contract, including whether to adopt FIDIC forms. Zambia's Public Procurement Act No 19 of 2008 mandates the use of the 2010 version of the Pink Book in employer/contractor public procurement contracts for building and engineering works requiring open international bidding, while the White Book is used in private client/consultant services agreements. Although Zambian law does not compel the use of FIDIC model services forms, the Public Procurement Act requires parties to adopt forms that conform to World Bank standard service agreements.

The 1999 Red Book was applied in some private sector projects, such as the Lumwana copper mine and Chambeshi mine projects, and also in donor-funded public works, including the Lusaka water supply, sanitation and drainage project. This project involved at least six separate contract packages and was funded by foreign donors. The Silver Book was used in two internationally funded projects for

the development of the Kenneth Kaunda airport in Lusaka and Harry Mwanga Nkumbula International Airport in Ndola. The short form of contract was utilised in at least one contract for a rehabilitation project at the University of Zambia.

3. Do FIDIC produce their forms of contract in the language of your jurisdiction? If no, what language do you use?

The English versions of FIDIC forms are commonly available and used in Zambia, as English is the official business language.

4. Are any amendments required in order for the FIDIC Conditions of Contract to be operative in your jurisdiction? If yes, what amendments are required?

Certain terms are implied by the public procurement legislation and cannot be excluded by parties in public contracts. These statutorily implied terms include the requirement for the Attorney-General's approval before contract amendment; maximum variation limits; the pre-authorisation of the contract awarding authority for contract termination; and other terms that have an impact on project supervision and execution. It is pertinent to note that although some mandatory legislative terms for public procurement may (inadvertently) be omitted from certain FIDIC adopted contract forms, such statutorily omitted terms shall be implied and binding on contract parties by the operation of law. In this regard, it is advisable for parties in public project contracts to include or acknowledge the application of mandatory statutory terms in their contract.

5. Are any amendments common in your jurisdiction, albeit not required in order for the FIDIC Conditions of Contract to be operative in your jurisdiction? If yes, what (non-essential) amendments are common in your jurisdiction?

There are no common amendments in Zambia, except as stated in response to the previous question regarding implied or mandatory terms for public procurement contracts. The principle of freedom to contract entitles parties in private contracts to modify contract forms and terms to suit their objective, provided that such modifications do not violate Zambian law.

6. Does your jurisdiction treat Sub-Clause 2.5 of the 1999 suite of FIDIC contracts as a precondition to Employer claims (save for those expressly mentioned in the sub-clause)?

Employer claims are generally evaluated and processed according to terms agreed by the parties in both public and private contracts. Sub-Clause 2.5 of the 1999 suite of FIDIC contracts is applied without any change to its provisions in public contracts, except as may be pre-approved by the Attorney-General on a case-by-case basis. However, employer claims in private contracts may be modified to comply with terms pre-agreed by the parties.

7. Does your jurisdiction treat Sub-Clause 20.1 of the 1999 suite of FIDIC contracts as a condition precedent to Contractor claims for additional time and/or money (not including Variations)?

There is no legal obligation not to treat Sub-Clause 20.1 in the both the Red or Pink Book as condition precedent to Contractor claims involving time and/or money in public contracts. In other words, the Sub-Clause is applied as is unless it is modified with the Attorney-General's approval. Parties in private contracts may modify the terms as they may deem necessary.

8. Does your jurisdiction treat Sub-Clause 20.1 of the 1999 suite of FIDIC contracts as a condition precedent to Contractor claims for additional time and/or money arising from Variations?

See the response to question 7.

9. Are dispute boards used as an interim dispute resolution mechanism in your jurisdiction? If yes, how are dispute board decisions enforced in your jurisdiction?

Dispute boards are used under the FIDIC Pink, Red and Silver Books. Generally, disputes are resolved according to contract terms. Zambian courts respect the sanctity of parties' contract and will refuse to litigate where there is a valid arbitration or dispute resolution clause in the contract; in such instance, the court will require parties to adopt the contractual dispute resolution procedure.

There is no known legal precedent to enforcement proceedings; hence, it is not known how Zambian courts will react. Zambia is a common law country and English law and decisions of common law jurisdictions are likely to have persuasive effects on Zambian courts. Therefore, it is likely that Zambian courts will adopt the decision in *Peterborough City Council v Enterprise Managed Services Limited* [2014] EWHC 3193 (TCC), a case that supports the use of dispute boards. For disputes resolved by arbitration, the Arbitration Act No 19 of 2000 outlines the process for recognition and enforcement of awards based on the New York Convention.

10. Is arbitration used as the final stage for dispute resolution for construction projects in your jurisdiction? If yes, what types of arbitration (ICC, LCIA, AAA, UNCITRAL, bespoke, etc) are used for construction projects? And what seats?

Arbitration is often used as a final dispute resolution process both under public procurement and private contracts. The FIDIC Pink Book form, which is mandated in public procurement projects, has a two-tier dispute resolution process – dispute board and finally arbitration, a standard feature in all FIDIC forms.

The Pink Book provides for international arbitration proceedings

to be administered: (1) by an arbitral institution designated in the contract and conducted under the arbitration rules of such institution; or (2) if so specified in the contract, in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL); or (3) where neither an arbitration institution nor the UNCITRAL arbitration rules are specified in the contract, then in compliance with proceedings administered by the International Chamber of Commerce (ICC) and conducted under the ICC Rules of Arbitration.

The mandated public procurement form of contract for small works construction also provides for arbitration as the final tier. Local procedural rules will usually apply in smaller contracts or projects; the only available local rules are those of the Zambia Branch of the Chartered Institute of Arbitrators. Where the contract is awarded to an international contractor or has international dimensions, disputes arising therefrom are often resolved in accordance with the UNCITRAL Rules, or ICC Rules or the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. Public parties or employers often prefer to adopt the Zambian Arbitration Act as the preferred law for dispute resolution of a project; this is usually stated as a pre-condition for tendering before the contract award. Public procurement also mandates the consultant's contract forms to use arbitration as the final tier for dispute resolution using the UNCITRAL rules.

Lusaka, the capital of Zambia, is the implied seat of arbitration for non-international contracts. International contract seats are likely to be determined in accordance with the adopted rules of procedure. There is no specialised arbitration tribunal for construction contracts.

11. Are there any notable local court decisions interpreting FIDIC contracts? If so, please provide a short summary.

There is no known domestic judicial decision interpreting FIDIC contracts in Zambia.

12. Is there anything else specific to your jurisdiction and relevant to the use of FIDIC on projects being constructed in your jurisdiction that you would like to share?

The Public Procurement Act ascribes criminal liability for violation of some of its provisions. For instance, contractors and administrators involved with public projects may be held criminally liable for failing to comply with the procurement legislation, terms of contract and other instruments. In addition, parties to a public project may be criminally liable for failing to constitute a dispute board. A contract administrator may also be criminally liable for failing to advise a client on the dispute board provisions in the procurement legislation. The penalties for these criminal liabilities range from a fine to imprisonment or both.

Bwalya Lumbwe is a civil engineer and a chartered constructions manager, auditor and FIDIC adjudicator and arbitrator in Zambia. He can be contacted at arbitratorzambia@gmail.com



UNITED ARAB EMIRATES

Erin Miller Rankin and Samantha Lord Hill,¹ Dubai

1. What is your jurisdiction?

United Arab Emirates (UAE).

2. Are the FIDIC forms of contract used for projects constructed in your jurisdiction? If yes, which of the FIDIC forms are used and for what types of projects?

The use of FIDIC forms of contract is common in the UAE for projects involving international parties. The 1987 and 1999 FIDIC Red Books, in particular, are used across a range of sectors including infrastructure, rail and energy-related construction projects. However, the approach varies depending on the identity of the contracting parties and the applicable law.

For example, the Emirate of Abu Dhabi has its own FIDIC-based construction contract templates that are mandatory when the private sector is contracting with the government of Abu Dhabi. The Abu Dhabi government passed Law No 21 of 2006 and the Abu Dhabi Executive Chairman's Decision No 1 of 2007, which introduced two forms of construction contracts for public construction projects, a construction works contract based on the FIDIC 1999 Red Book and a design-and-build contract based on the FIDIC 1999 Yellow Book.

In contrast, in the Emirate of Dubai, Law No 6 of 1997 (as amended) expressly prohibits the adoption of FIDIC forms of contract in certain contracts with the Dubai government, other than in exceptional circumstances.

In the authors' experience, where a FIDIC form of contract is used, it is often heavily amended through particular conditions.

3. Do FIDIC produce their forms of contract in the language of your jurisdiction? If not, what language do you use?

Yes, FIDIC produces some of their forms of contract in Arabic such as the 1999 FIDIC Red Book, 1999 FIDIC Silver Book, 1999 Yellow Book and the 2008 Gold Book. However, for projects in the UAE involving one or more international participants, English is the preferred language of the contract.

4. Are any amendments required in order for the FIDIC Conditions of Contract to be operative in your jurisdiction? If yes, what amendments are required?

Where FIDIC form contracts are used for private sector construction projects, UAE law generally recognises the parties' freedom to contract, subject to certain mandatory provisions of the law. Accordingly, where UAE law is chosen as the governing law of a FIDIC contract these mandatory provisions must be considered at the outset and the contract amended if so desired. To take the key examples:

- Liquidated damages: Article 390(2) of the UAE Civil Code permits a court or arbitral tribunal to adjust the amount that parties have specified in their contract in order to reflect the actual loss suffered by the claiming party. This means that although parties are free to agree a liquidated damages clause in their contract, there is a risk the clause will not be strictly enforced.
- Exclusions and limitations of liability for structural failure or defects: under Article 880 of the Civil Code, a Contractor and architect are jointly liable to compensate the Employer for any total or partial collapse of a building or installation and for any defect which threatens the stability

or safety of the building, for a period of ten years from the date of handover (unless the architect was responsible for design only, in which case the architect will only be liable for defects in design). Any agreement to exclude or limit the liability of the Contractor or the architect for structural failures or defects is void. This should be considered by Parties when they are agreeing a Defects Notification Period and the indemnities and limitations on liability.

- Force majeure and exceptional circumstances: Article 287 of the Civil Code permits the allocation of risk for *force majeure* events as the parties. However, Article 249 provides that where exceptional events of a public nature, which could not have been foreseen, occur, as a result of which performance of a contractual obligation becomes onerous, even if not impossible, such as to threaten the party obliged to perform the obligation with grave loss, the court or the tribunal has the power to reduce the onerous obligation to reasonable level if justice so requires. Accordingly, careful consideration must be given to ensure compatibility between this mandatory provision of UAE law and the force majeure provision in the relevant FIDIC form contract.
- Termination: Article 892 of the Civil Code provides that a *Muqawala* contract shall terminate upon the completion of the work agreed, upon termination by consent or by order of the court. Parties can also agree to the contract being treated as automatically terminated without the need for a court order, upon non-performance of obligations under the contract, provided that notice is given and the right to terminate is clearly expressed in the contract. The termination provisions in a FIDIC form contract should be reviewed to ensure they are sufficiently clear to bring about automatic termination without a court order.

5. Are any amendments common in your jurisdiction, albeit not required in order for the FIDIC Conditions of Contract to be operative in your jurisdiction? If yes, what (non-essential) amendments are common in your jurisdiction?

Yes. Sub-Clause 5.1 of the FIDIC Red Book 2017 is consistent with Article 890(2) of the Civil Code in providing that the Contractor remains responsible to the Employer for Works that it subcontracts. However, there is uncertainty as to whether the UAE courts would consider nominated Subcontractors as falling within this provision. To avoid confusion, it should be expressly stated that they do in the Particular Conditions. In addition, some amendments may be made to take into account the practicalities of working in the UAE. For example: (1) it would be helpful to expressly state in the Particular Conditions that all dates and periods of time referred to in the Contract (including all references to day, month, and year) shall be ascertained in accordance with the Gregorian calendar to avoid confusion as to whether the Hijri calendar is applicable; (2) when stating normal working hours for a project in the Particular Conditions, local labour laws should be considered. In Dubai for example, these restrict working hours during the peak heat months of July and August and during the holy month of Ramadan; and (3) all foreign workers are required to hold a valid visa to enter, reside and work in the UAE. It may, therefore, be prudent to include a clear provision identifying who will be responsible for obtaining such visas or permits in the Contract.

6. Does your jurisdiction treat Sub-Clause 2.5 of the 1999 suite of FIDIC contracts as a precondition to Employer claims (save for those expressly mentioned in the Sub-Clause)?

The principle that the contract is the law of the parties is embodied

in the Civil Code such that a court or tribunal applying UAE law should seek to enforce the provisions of the contract in so far as is legally possible. This means that a court or tribunal may consider a party's compliance with notice provisions, but where such provisions are not expressly stated to be a condition precedent to a claim (as is the case in Sub-Clause 2.5), a court or tribunal applying UAE law may be reluctant to conclude as such. In practice, even where the parties have expressly agreed that a notice provision is a condition precedent to recovery or that a failure to notify constitutes waiver or extinguishment of a claim, depending on the circumstances, such a provision will not necessarily operate to preclude recovery as a matter of UAE law.

7. Does your jurisdiction treat Sub-Clause 20.1 of the 1999 suite of FIDIC contracts as a condition precedent to Contractor claims for additional time and/or money (not including Variations)?

Although Sub-Clause 20.1 of the 1999 suite of FIDIC contracts expressly provides that if the Contractor fails to give notice, time shall not be extended, it shall not be entitled to additional payment and the Employer shall be discharged from all liability in connection with the claim, this provision will not necessarily be treated as a condition precedent to the claim with the effect of precluding recovery as a matter of UAE law.

In accordance with Article 473 of the Civil Code, a right under a construction contract will not expire by the passage of time unless there has been a lapse of 15 years without lawful excuse. Under 487(1) of the Civil Code, it is not permissible for parties to agree that a claim may not be brought after a period differing from the period laid down by law. These provisions give scope to a court or tribunal to look to the substantive legal basis for the claim and to rule

that a clause that seeks to extinguish an otherwise valid claim solely due to non-compliance with notice provisions is void.

Beyond the notice provisions in Sub-Clause 20.1, a court or tribunal applying UAE law may take a more stringent approach to non-compliance to the extent it considers an Engineer's determination to be a pre-condition to commencement of arbitration. The UAE courts typically seek to enforce pre-conditions to arbitration where such conditions are clearly defined in terms of what the parties must do and, sometimes, in what timeframes.

8. Does your jurisdiction treat Sub-Clause 20.1 of the 1999 suite of FIDIC contracts as a condition precedent to Contractor claims for additional time and/or money arising from Variations?

There is no definitive answer as a matter of UAE law to whether the regime in Sub-Clause 20.1 applies to claims for additional time and/or money arising from Variations. One view is that it does not apply to claims for money for work done as part of a Variation but does apply to claims for additional time and/or cost arising in consequence of a Variation.

Irrespective of the ambit of Sub-Clause 20.1, as discussed in question 6, it will not necessarily be treated as a condition precedent to the claim with the effect of precluding recovery as a matter of UAE law.

9. Are dispute boards used as an interim dispute resolution mechanism in your jurisdiction? If yes, how are dispute board decisions enforced in your jurisdiction?

Dispute adjudication boards (DABs) are not a recognised form of dispute resolution in the UAE. Therefore, even if a Party obtained a DAB decision that was final and binding under the terms of the FIDIC contract, it would still need to go through an arbitration process to have the DAB decision converted into an arbitral award that could

then be recognised and enforced in the UAE. However, the Dubai Court of Cassation in Case No 795/2018 upheld the agreement to refer a dispute to a DAB as a condition precedent to arbitration.

10. Is arbitration used as the final stage for dispute resolution for construction projects in your jurisdiction? If yes, what types of arbitration (ICC, LCIA, AAA, UNCITRAL, bespoke, etc) are used for construction projects? And what seats?

Yes. Institutional arbitration is the most commonly used method for settling construction industry disputes in the UAE. The most commonly used arbitration institutions and seats are: the Dubai International Arbitration Centre (DIAC) with a Dubai seat; the DIFC-LCIA Arbitration Centre with a DIFC seat; the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC) with an Abu Dhabi seat; and the International Chamber of Commerce (ICC) with a Dubai, Abu Dhabi, Abu Dhabi Global Market (ADGM) or London seat. For projects with foreign parties, international organisations such as the ICC may be preferred.

11. Are there any notable local court decisions interpreting FIDIC contracts? If so, please provide a short summary.

Since parties to FIDIC form contracts typically agree to arbitrate their disputes, the decisions of the UAE courts arising from FIDIC form contracts largely concern issues around the admissibility of claims and the validity of the arbitration agreements in the context of applications to annul arbitral awards. Some examples are as follows.

In Case No 32/2019, the Dubai Court of Cassation handed down a decision on 5 February 2020 confirming the strict application of the condition precedent in Clause 67 of a 1987 FIDIC form contract. The tribunal in this case had taken

jurisdiction over a DIAC arbitration and the respondent had referred the matter to the Dubai Court of Cassation under the supervisory power in Article 19(2) of the Federal UAE Arbitration Law 2018. The court found that the claimant had prematurely commenced arbitration because it had not referred the dispute to the Engineer for a decision under Clause 67 in a timely manner. It therefore annulled the tribunal's decision on jurisdiction.

A similar outcome occurred in Case No 757 of 2016 at the Dubai Court of First Instance. Here, the claimant had commenced arbitration before the DIAC, which had appointed an arbitrator, and the parties signed Terms of Reference. It appears that the respondent raised an objection to jurisdiction on the basis that the dispute had not been referred to the Engineer as required by the clause. Nonetheless, the tribunal rendered an award requiring the respondent to pay AED 7.3m (about £1.5m). When the claimant sought enforcement of the award before the Dubai Court of First Instance, the respondent counter-filed an annulment application on the basis that the claimant had failed to comply with the precondition in Clause 67. The court found in favour of the respondent, stating that the parties had agreed that disputes could be referred to arbitration if they had been: (1) referred to the Engineer for a decision but had not become final and binding; or (2) referred to the Engineer for a decision and had become final and binding but not complied with by the parties. The court ordered the annulment of the award because the claimant had produced no evidence showing that the dispute was ever referred to the Engineer under Clause 67.

As to the validity of arbitration agreements, the Dubai Court of Cassation in Case No 462 of 2003 held that a dispute resolution clause providing for the settlement

of disputes in accordance with the General Conditions of a FIDIC form contract was sufficient to constitute an agreement to refer the matter to arbitration.

12. Is there anything else specific to your jurisdiction and relevant to the use of FIDIC on projects being constructed in your jurisdiction that you would like to share?

The UAE is a unique jurisdiction in that it consists of 'onshore' UAE laws and courts that follow civil law traditions and two 'offshore' jurisdictions, the DIFC and the ADGM, which each follow common law traditions. The previous responses here focus on onshore UAE only, but it is important to remember that the international nature of many projects in the UAE means that the laws and practices of the DIFC or the ADGM may also be relevant. This may be the case in private-sector construction projects, for example, where the parties have chosen the DIFC or ADGM law as the governing law of the underlying contract or where either of these jurisdictions is chosen as the seat of the arbitration.

Where the parties have chosen onshore UAE law as the governing law of their contract, Article 246 of the Civil Code requires the exercise of good faith in contractual performance. There is no specific definition of what good faith entails – it is a matter of discretion for the court or tribunal based on the particular circumstances – but some indication can be gleaned from Article 106 of the Civil Code, which considers the exercise of a party's right to be unlawful where: (1) it is intended to infringe the rights of another party; (2) the outcome is contrary to the rules of Sharia law, the law, public order or morals; (3) the desired gain is disproportionate to the harm that will be suffered by the other party; or (4) where it exceeds the bounds of custom or practice. Parties to construction disputes governed by

UAE law often rely on the principle of good faith in both arguments concerning the interpretation and application of contractual provisions and those concerning the parties' respective behaviours on the project. This is important to bear in mind for those project participants with a common law background, where the principle of good faith typically does not assume importance to the same extent.

Note

- 1 The authors would like to thank Alexandra Einfeld and Engie Mohsen for their assistance in the preparation of this article. The views expressed in this article are those of the authors and not of Freshfields Bruckhaus Deringer.

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URUGUAY

Amendments to the construction defects liability scheme

Federico Carbajales, Montevideo

Law 19.726 came into force to amend the ten-year liability scheme for construction defects. It is applicable to all construction deals agreed from January last year and updates the liability scheme for construction agents that existed under the Uruguayan Civil Code and Law 1816 of 1885.

One of the amendments brought in different time limits for guarantees based on the type of defect, changing the blanket ten-year period to terms of ten, five or two years. The window of 20 years to bring an action after the occurrence of a defect was reduced to four years.

The law also reaffirmed the liability of construction agents when properties collapse, because they may only waive liability in the event of a non-attributable external cause.

Key amendment

The most significant amendment is the change to guarantee terms based on the type of defect and its seriousness. Architects, engineers, constructors and/or entrepreneurs will be held liable for:

- defects that, in whole or in part, affect the stability or solidity of the property ('structural collapse') or make the property unsuitable for the agreed use – expressly or impliedly – or otherwise for such use as ordinarily intended

('functional collapse'), should these defects be verified within a ten-year term;

- any other defects, except for those only affecting the work's completion and finishing elements should these defects be verified within a five-year term; and
- defects only affecting the work's completion and finishing elements, should these defects be verified within a two year term.

The ten-year term was preserved for the most serious faults because in these cases the safety is at stake. The other defects with shorter terms are minor and the limit of two or five years was deemed to be reasonable for these faults to be verified.

Does the law allow any agreement with different terms?

In the case of defects under point (1), the answer is no. This provision is public policy and, therefore, the parties may not deviate at all from this law by means of any private agreement.

Doubt arises in the case of defects under points (2) and (3) since the relevant governing paragraph in the law fails to make any reference to public policy and therefore leaves a margin for interpretation.

Liability and waivers

The law reaffirms the objective nature of liability for all defects, and professionals may only waive liability in the event that there is a non-attributable external cause, such as force majeure, an act or omission of a third party or an act or omission of the principal. Conducting due diligence is therefore not enough to waive liability.

Moreover, in the case of defects under (1), architects, engineers, constructors and/or entrepreneurs will be held liable in the event of structural collapse or functional collapse even if the materials were supplied by the principal.

The term for claiming

The law reduces the term within which an action after the occurrence of a defect must be brought from 20 years to four years for all cases, including structural collapse and functional collapse.

Other amendments

The law includes some other important amendments, namely:

- it differentiates between constructors and entrepreneurs, which opens the discussion to the possibility of including real estate developers in the list of liable parties;
- it includes within the causes of defects those caused by inappropriate work management or calculation errors;
- it expressly sets out that terms within which defects may occur will be counted from the acceptance of the work; and
- it expressly repeals sections 35 and 36 of Law 1816, which expanded the effects of ten-year liability enshrined under the Civil Code for any defects noted in the work.

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ARGENTINA

Renewable Energy Projects

Santiago J Barbaran, Buenos Aires

Argentina faces a difficult situation. Last year a new government took office with two major challenges: to reinvigorate the economy and negotiate the near default of debt.

Some progress has been made. Argentina recently finished negotiations with its private creditors, having secured an agreement with both international and local creditors. The government agrees with the concept of debt sustainability and this is critical to finding a solution to the solvency issue. Next year it will negotiate with the International Monetary Fund to reschedule its debts.

However, the country has been in almost six months of quarantine because of the coronavirus pandemic. The Economic Commission for Latin America and the Caribbean has estimated that the economy will shrink by about 10.5 per cent this year,¹ double the figure for 2018/19 when it shrunk by about five per cent.²

The history of the country shows that every crisis generates more poverty and that economic growth is essential not only to comply with creditors but also to create a path to the future.

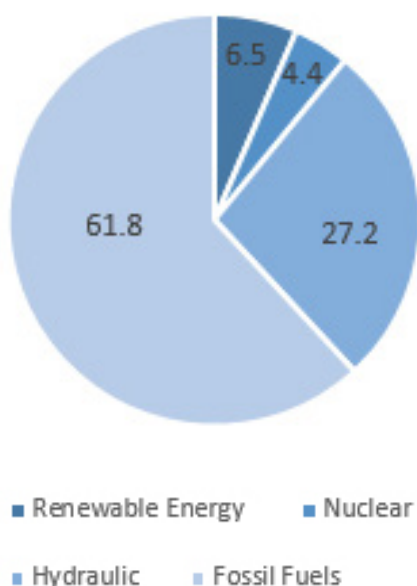
Energy matrix 2015-2019

Law 26,190 of 2006 declared that the generation of electric energy from renewable energy sources

was a matter of national interest. Article 2 stated that within ten years renewable energy sources should account for 8 per cent of all electricity consumed nationally. After that target was missed, the law was modified by Law 27,191 of 2015, which extended the deadline to 31 December 2017.

Various governments have sought to increase the use of electricity generated from renewable sources. There is a valid argument for this aim: the Argentine energy matrix is highly dependent on fossil fuels. The following chart shows the energy matrix last year:

Energy Matrix 2019



Wholesale Electricity Market Clearing Company (CAMMESA) Report 2019³

The matrix in 2017 was as follows: nuclear one per cent; hydraulic 32 per cent; renewable energy five per cent; and fossil fuels 62 per cent. Argentina started this year covering eight per cent of the electricity demand with renewable energy.⁴

The government implemented the RenovAR programme to increase the percentage of renewable energy in the matrix. At present wind power provides 2,197 megawatts, solar 459MW, bioenergy 171MW and hydraulic 496 MW.⁵

Covid-19 regulations

In March this year, Decree 260/2020 declared Covid-19 a pandemic situation in accordance with the World Health Organization. This situation had showed no sign of abating by October.

Consequently, Decree 297/2020 stated that people had to be isolated and were not allowed to circulate. Some activities were declared essential and could continue. These activities were mainly related to food production, public work and public administration.

In April, Administrative Decision 468/2020 stated that people involved in private energy works could also circulate, therefore allowing renewable projects to continue. The government showed support for this public policy.

However, the response was far from simple as there were countless situations that could not be solved because of the pandemic, such as machinery importation, provincial regulations and workers being infected with Covid-19. Thus, numerous projects were developed slower than expected.

The RenovAR programme stipulated different dates and conditions for the awardees of the projects. If the awardees did not achieve the stages of financial closure, construction start date, equipment arrival date and commercial habilitation date, they would be fined.

As a consequence of the pandemic, the government decided to extend the deadline to sign the contracts and, consequently, the commercial habilitation date (Resolution 227/2020 of the Secretary of Energy) until 30 November this year. This is very significant as companies have lost time because of the quarantine situation and the government has showed support by extending the dates.

Law 27,191 stated that by 2025 renewable energy sources must contribute 20 per cent of national electricity consumption, implying a present shortfall of 12 per cent.

At present Argentina also faces restrictions on high energy transport. In accordance with market sources, for the next and fourth round of the RenovAR programme, it was suggested that the bidders should include in their offers a proposal to extend transmission lines, previously defined by the state. With the change of government this project was suspended.

Argentina has succeeded in generating eight per cent of its energy from renewable sources. Now it faces the significant challenge of attaining 20 per cent. The main obstacle to achieving this proportion is reaching a political consensus to underpin this public policy, in the general context of economic difficulties.

Conclusion

At different times, Argentina has shown resilience to recover from major crises, in 1989 and 2001. This year, the pandemic has caused the country's debt to increase significantly so the solution is more complex.

The public policy of diversifying the energy matrix to include renewable sources has taken almost 20 years. A process has been initiated that, hopefully, will prove beneficial to Argentina generally. The debate is not only about growth but sustainable growth.

Notes

- 1 Economic Commission for Latin America and the Caribbean www.cepal.org/es/publicaciones/45782-enfrentar-efectos-cada-vez-mayores-covid-19-reactivacion-igualdad-nuevas accessed 13 September 2020.
- 2 National Institute of Statistics and Census www.indec.gob.ar accessed 13 September 2020.
- 3 CAMMESA <https://portalweb.cammesa.com/Pages/PgInformeAnual.aspx>, accessed 13 September 2020.
- 4 *Ibid.*
- 5 <https://despachorenovables.cammesa.com/renovables> accessed 13 September 2020.

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AUSTRALIA

Comprehensive reform package to target defective building work

Andrew Chew, Sydney

Christine Covington, Sydney

Louise Camenzuli, Sydney

The parliament of New South Wales recently passed two pieces of legislation to address issues that have arisen over a long period of time about deficiencies in the quality of building and construction work across the state. The introduction of the Design and Building Practitioners Act 2020 (the 'DBP Act') and the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (the 'RAB Act') follows the Shergold-Weir report into the building and construction industry in 2018¹ and the appointment of the first NSW Building Commissioner in August last year.

The DBP Act introduces a number of additional requirements on building practitioners, including that building practitioners:

- owe a statutory 'duty of care' to landowners and subsequent land owners;
- are properly qualified and recognised by professional bodies, adequately insured and registered with the NSW government; and
- issue compliance declarations that confirm their work complies with the Building Code of Australia (BCA).

These changes are designed to prevent defective building work by

ensuring building practitioners have increased duties to landowners, provide the certifications required to allow principal certifiers to issue occupation certificates and have the necessary insurance to cover their liability if they breached their duties.

The RAB Act is designed to increase the governance framework to minimise defective residential apartments and inadequate certification process in residential apartments by:

- giving the Secretary of the Department of Customer Services the power (which will be delegated to the building commissioner) to issue stop work orders and building work rectification orders, and prohibit the issuing of occupation certificates; and
- increasing the regulatory and enforcement powers of government to investigate and prosecute building practitioners who have engaged in defective work.

Design and Building Practitioners Act

The DBP Act was introduced as a Bill to the NSW parliament late last year and, after more than 70 amendments by the government, opposition and crossbench, passed by parliament on 11 June this year. Amendments included the mandatory registration of engineers.

Duty of care

The most significant change made by the DBP Act is the imposition of a statutory duty of care on any person who carries out construction work.

Construction work is defined to include: (1) building work; (2) the preparation of regulated designs and other designs for building work; (3) the manufacture or supply of a building product used for building work; and (4) supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any of this work.

Practitioners involved in building design, building work, the manufacturing or supply of products used for building work and supervisory roles will be required to exercise reasonable care to avoid economic loss that would be caused by defects relating to, or arising from, construction work.

If a practitioner breaches this duty of care, a property owner will be entitled to damages (regardless of whether there is a contractual arrangement to carry out that construction work).

Application

The duty of care cannot be delegated or contracted out, and it does not limit damages or other compensation that may be available where a breach of another duty occurs.

The duty of care will apply retrospectively to existing buildings and contracts, if the economic loss has become apparent within the past ten years or after the DBP Act commenced. The duty of care also extends to subsequent owners.

Regulatory framework

The framework means that a principal certifier can only issue an occupation certificate after it has determined and obtained all compliance declarations for the building work. The compliance declarations can be only issued by registered practitioners at various levels of the building cycle.

Registration of practitioners

The DBP Act requires the registration and regulation of design and principal design practitioners, building practitioners, professional engineers and specialist practitioners.

The DBP Act broadly defines building practitioners to include anyone who is engaged, under a contract or other arrangement,

to do building work or, if more than one person is doing the building work, the principal contractor for that work.

The broad nature of this definition means the vast majority of people engaged in building work will be required to register. Under the registration regime, building practitioners will be required to register with the Department of Customer Service and must be 'adequately insured' before undertaking building work.

Compliance declarations

The DBP Act introduces the following concepts to implement the registration and compliance framework:

- 'building elements' – which includes fire safety systems, waterproofing, load-bearing components, parts of a building enclosure and any other mechanical, plumbing or electrical services for a building to achieve compliance with the Building Code of Australia (BCA);
- 'building work' – defined broadly, it includes the construction, alteration, repair or renovation of a building or part of a building of a class or type prescribed by the regulations; and
- 'regulated designs' – which includes designs prepared for a building element for building work.

These new concepts facilitate a number of additional regulatory requirements, including requirements that:

- design and building practitioners must make 'compliance declarations' to the Department that building work or building elements that they have undertaken comply with the DBP Act and other required standards (including the BCA);
- any variations by a building practitioner from a regulated design for building elements or building works must be documented and new compliance declarations are sought from designers for the varied design; and

- when an application for an occupation certificate is made, notice must be given to registered building practitioners who have completed the work of the intention to apply for an occupation certificate.

Enhanced enforcement

In addition to the duty of care owed by the practitioners, the DBP Act also provides for enforcement through:

- disciplinary action against practitioners and companies involved in misconduct, including the imposition of fines between AU\$550 and AU\$330,000, and imprisonment terms of up to two years for making a false compliance declaration or improper influence in relation to the issue of a compliance declaration;
- issuing of stop work orders, either unconditionally or subject to conditions; and
- executive liability for contraventions of the DBP Act, if they knowingly authorised or permitted the contravention.

The DBP Act also makes numerous references to a regulatory scheme that is yet to come into effect. The proposed regulations are anticipated to further detail:

- the insurance requirements;
- minimum qualification and continuing professional development requirements for practitioners;
- particulars required in regulated designs and compliance declarations and the form and manner in which these documents may be recorded and provided to the Department;
- additional offences as necessary to support the operation of the DBP Act; and
- the record keeping requirements for the Department and the Secretary in respect of documents collected under the Act.

Residential Apartment Buildings Act

The Act is designed to:

- ensure developers are prevented from carrying out building work that may result in serious defects or cause significant harm or loss to the public or present or future occupiers of the building; and
- require developers to notify the Secretary of the Department of Customer Service six to 12 months before applying for an occupation certificate, to enable the government to undertake quality assurance checks.

To achieve these objectives, the RAB Act enables the Secretary to:

- issue a stop work order if building work is being carried out, or is likely to be carried out, in a manner that could result in a significant harm or loss to the public or present or future occupiers of the building;
- issue prohibition orders stopping the issuing of an occupation certificate where notification requirements have not been met, there is a serious defect or payment of a full strata bond has not been made;
- issue a building work rectification order to require developers to repair defective building works; or
- prohibit the issuing of an occupation certificate in relation to building works in certain circumstances, including where a 'serious defect' exists.

Under the RAB Act, a new defect category of 'serious defect' has been established, which includes:

- non-compliant building elements that are attributable to a failure to comply with the BCA, relevant Australian standard or approved plans;
- a defective building element or building product that is attributable to defective design, defective or faulty workmanship or defective materials and is likely to cause an inability to inhabit or use the building, the destruction of the building or any part of it, or a threat of collapse of the building or any part of it;

- the use of a building product that is prohibited under the Building Products (Safety) Act 2017; and
- any other defects prescribed as a serious defect under the regulations.

Application

The RAB Act applies to 'developers', which is broadly defined by the Act to include:

- a person who contracted or arranged for, or facilitated or otherwise caused, the residential apartment building work to be carried out;
- if the residential building work is the construction of a building or part of a building, the owner of the land on which the work is carried out;
- the principal contractor for the work under the Environmental Planning and Assessment Act 1979 (NSW) (EPA Act); or
- in relation to work for a strata scheme, the developer of the strata scheme under the Strata Schemes Management Act 2015.

The RAB Act came into force on 1 September this year and applies to:

- 'Class 2 buildings' within the meaning of the BCA, which is limited to residential, multi-residential and mixed-use buildings;² and
- all buildings either under construction or completed within the previous ten years, ensuring protections to owners of existing defective buildings.

Appeals

Developers can appeal stop work orders to the Land and Environment Court. However, this appeal must be lodged within 30 days of the notice of the order being given and, unless otherwise determined by the Court, will not operate to stay the stop work order.

Increased regulatory and enforcement powers

To ensure the integrity of the residential apartment building industry, the RAB Act grants the government a number of additional regulatory and enforcement powers including:

- requiring developers notify the Secretary of the Department at least six months, but not more than 12 months, before an application for an occupation certificate is intended to be made in relation to building works;
- allowing authorised officers to undertake inspections of notified building work;
- establishing penalties for the contravention of the requirements of the RAB Act, which range from infringements of \$550 to \$330,000;
- providing for the recovery of costs associated with compliance by a developer where there is more than one developer for the building work; and
- executive liability for contraventions of the RAB Act if they knowingly authorised or permitted the contravention.

It is intended that the Secretary's powers under the RAB Act will be delegated to the Building Commissioner.

Implications

Overall, it is hoped that both the DBP and RAB Acts will have the desired effect of reinstating investor and community confidence in the construction industry, particularly Class 2 building work, without excessive time delays and cost as a consequence.

Developers and builders in NSW will need to have regard to these regulatory and governance requirements in projects going forward. There will be challenges for the design and building practitioners in particular, including ensuring they are adequately insured in a challenging professional indemnity insurance market.

Where developers have previously enjoyed a level of flexibility in relation to materials used or final

designs, the new legislation will mean more rigour in the certification process and this will need to be factored into the whole planning and delivery project timeframe.

For existing and new projects, additional modifications to development consents may be required. Developers should consider the extent to which they are giving themselves sufficient flexibility where needed in documentation that will form part of consents and which will not fundamentally affect the design outcome.

It is difficult, at this stage, to foresee all of the potential implications of the RAB Act, but it does appear that there is a risk to developers of time and cost delays if vexatious claims are made regarding defective building works. Because of this, contingencies should be factored into development program timeframes, particularly for contentious projects.

Notes

- 1 Peter Shergold and Bronwyn Weir, Building Confidence (February 2018) www.industry.gov.au/sites/default/files/July%202018/document/pdf/building_ministers_forum_expert_assessment_-_building_confidence.pdf accessed 22 September 2020.
- 2 Exclusions for smaller class two projects that are low risk are expected to be included in the supporting regulations.

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ITALY

Simplifying Italian public tenders: will it work this time?

Alessandro Paccione, Giada Russo, Marco Giustiniani and Giovanni Gigliotti, Rome

On 16 July this year, the Italian government enacted the so-called Simplifications Decree (Decree No 76/2020).

As the name reveals, the Decree is an attempt to simplify the legal system and, in particular, its administrative procedures and bureaucratic structures. Also, in light of the coronavirus pandemic and its impact on the economy, the government boosted its strategy of facilitating economic recovery through a massive simplification of administrative procedures and offices. More specifically, the Decree aims to provide citizens who are entitled to receive benefits from a public administration (eg, public contracts or building permits) with a faster and more efficient way to obtain them.

The scope of the Decree is wide, ranging from building to environmental law, including the green economy and, importantly for the public economy, public tenders.

Regulation on public tenders

Legislative Decree No 50/2016 (the 'Public Contracts Code') provides for the regulation of public tenders in Italy.

The Public Contracts Code executes and implements the

European directives on public tenders by boosting public investments and providing a legal framework for the process to increase competition in the market.

Due to the high value of the investments and interests involved, public tenders require a balance between fast processes for awarding contracts that also respects the fundamental principles of legality and competition in the free market.

The economic crisis has required the government to tilt the scales towards the speed with which contracts are awarded in order to relaunch the national economy. In this context, the most impactful changes brought by the Simplifications Decree are empowering the contracting authorities to:

- directly award public contracts up to the value of €150,000;
- avoid prior publication of any call for tenders and use negotiated procedures for contracts with a value of €150,000 to €5m (in case of works) or €200,000 (in case of services and supplies, both the 'EU thresholds'); and
- partially derogate some of the provisions within the Public Contracts Code in the case of 'anti-crisis' contracts.

These powers will cease on 31 July next year.

Public contracts up to €150,000

The contracting authorities may award any contract, the value of which is not higher than €150,000, without any competitive process or any prior consultation of private companies operating in the market. In essence the contracting authorities are entitled to choose private contractors at their discretion.¹

The lack of competitiveness is intended to increase the speed with which the executor of a public contract is selected, even if simplifying the procedural steps to award a contract may result in works or services of a lower quality.

The power to use negotiated procedures

For contracts over €150,000 but lower than the EU thresholds, the contracting authorities may consult a number of operators (depending on the subject and the value of the contract) and then use the negotiated procedures without a prior call for tenders.

The negotiated procedures are extremely fast, allowing the contracting authorities to obtain works, services and supplies on conditions set out after negotiations conclude with a small number of selected private companies. Again, it is worth highlighting that the Simplification Decree permits contracting authorities to extend the range of procurements in which they may directly invite private operators to submit offers, without the filter of a call for tenders and with minimal competition, with a view to more efficient public procurements.

Anti-crisis contracts

The provision of the Decree that allows the contracting authorities to partially derogate the Public Contracts Code for anti-crisis contracts is potentially very invasive.

The speed at which anti-crisis contracts are awarded must be increased to face the consequences of the pandemic. These contracts are, for example, contracts for building (or restructuring) schools, universities, hospitals and public safety infrastructures in order to make them compliant with the Covid-19 safety measures. For these contracts, the public authorities may: (1) use negotiated procedures without prior call for tenders (even if the amount is higher than the EU thresholds); and (2) more generally, derogate from any binding provision, except for criminal provisions and the general principles set out in the EU directives for public tenders.

Conclusion

According to its stated aim of boosting the economy, the Simplification Decree makes it easier for a company in Italy to be awarded a public contract through faster and more efficient procedures. Only its application will reveal if it has the desired economic effect without compromising the quality-price ratio in public works, services and supplies.

Notes

- 1 This power was previously limited to contracts with a value of up to €40,000.

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Investor-state disputes arising from the pandemic

Balancing public health and corporate wealth

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In response to the Covid-19 pandemic, governments globally are engaging in a difficult balancing act of protecting public health, mitigating economic damage and avoiding interference of private rights. Even in a pandemic, however, states are likely to be challenged for implementing measures that interfere with an investor's private rights. Yet do investors have legitimate claims? How would a state defend such claims?

As governments navigate their way out of the shutdowns necessitated by the coronavirus pandemic, foreign investment in construction and infrastructure projects will play a crucial role in the global financial

recovery. For foreign investors and high-value contracts there are certain risks for which recourse to investor-state arbitration is the forum in which those injured foreign investors may recover losses. This article considers

whether investors have a legitimate basis to claim an indemnity under an international investment agreement for their loss arising from government-mandated Covid-19 measures. It also discusses the potential defences under international investment agreements and customary international law available to a state that is implementing measures to prevent the spread of the virus.

Covid-19 measures

Governments globally have taken different approaches to prevent the spread of the virus. At the most extreme, governments in countries such as Italy and India have suspended manufacturing, construction and mining. The Spanish and Irish governments nationalised private hospitals and healthcare. A number of countries, including China and Australia, have imposed internal travel restrictions or closed borders to limit the movement of people between regions within those countries. At the other end of the scale, the Swedish Government has taken a recommendations-over-restrictions approach. Bars, restaurants and businesses all remain open, with the government putting the onus on the elderly to remain inside.

A tribunal may consider whether a state's Covid-19 measures restricting an investor's private rights are proportionate to the anticipated benefit of preventing the spread of the virus.

Potential claims by investors

Government-mandated restrictions may be challenged by investors if the measures breach the protections owed by the state to the investor under an international investment agreement. An international investment agreement is an agreement between two or more states that contains rights and protections to promote private investment between the states. The most common types of international investment agreements are bilateral investment treaties (BITs), multilateral treaties or free trade agreements (FTAs) (with investor protections). Although every international investment agreement is different there are a number of investor protections that are common across the agreements. It is possible that an investor could make a claim under an international investment agreement arising from the government measures on the following bases:

- a breach of an investor's right to fair and equitable treatment (FET);
- a breach of investor's right to full protection and security (FPS);
- a breach of the national treatment standard; or
- indirect expropriation by the state.

Australia, for example, is a party to 15 different bilateral investment treaties and 12 free trade agreements.¹ To make a claim under an international investment agreement an investor relies on the investor-state dispute settlement provisions in the agreement.

Fair and equitable treatment

Generally, international investment agreements require the state to ensure an investor receives fair and equitable treatment. For example, Chapter 8, Article 6(1) of the Singapore-Australia FTA (SAFTA) states: 'Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security'.² The United States-Australia FTA contains the same protections at Article 11.5(1).

The requirement for a state to afford an investor fair and equitable treatment has both procedural and substantive elements. From a procedural perspective, the FET protection requires the state afford the investor procedural fairness and due process in the exercise of its powers. One of the key drivers of this protection is transparency. For example, a state that made public statements guaranteeing certain businesses would not be shut down during Covid-19 and subsequently mandated that those businesses be shut down may be in breach of its requirement to afford investors FET. Substantively, a tribunal may consider whether a state's Covid-19 measures restricting an investor's private rights are proportionate to the anticipated benefit of preventing the spread of the virus.

Full protection and security

In international investment agreements the FET protection is generally accompanied by a State's obligation to provide full protection and security to an investor and its investments. A critical question is whether the FPS protection applies only to physical security or extends to legal and commercial protection.

This question has divided international tribunals and remains unsettled. On the one hand, physical protection extends to the state being obliged to defend the investment from physical violence or force. If a tribunal interprets the FPS protection narrowly in this way it is unlikely that government mandated Covid-19 measures would result in physical violence or force. On the other hand, if a tribunal was to interpret the FPS protection more broadly, a state's failure to implement appropriate and timely Covid-19 prevention measures may give rise to a claim that the state breached its obligation to provide full commercial protection and security to the investor and its investment.

National treatment standard

The national treatment standard exists to ensure that foreign investors and their investments will be treated no less favourably than domestic investors and their investments. For example, Article 3(c) of the BIT between Australia and China states: 'A Contracting Party shall at all times [...] treat investments and activities associated with investments in its own territory [...] on a basis no less favourable than that accorded to investments and activities associated with investments of nationals of any third country.'³

A tribunal may find that a state has breached the national treatment standard if the government implements measures that discriminate against foreign investors. Government mandated Covid-19 protection measures have the potential, at least arguably so, to discriminate against foreign investors. For example, a number of governments globally have implemented Covid-19 measures that mandate the closure of airports and prohibit flights in or out of the country. These measures adversely affect both domestically owned and internationally owned airlines. If, however, a state government subsequently implemented bailout measures that only applied to domestically owned airlines, the state may face a claim that it has breached the national treatment standard.

Indirect expropriation

Indirect expropriation by a state occurs when a state implements measures that have the effect of controlling or interfering with the use, value or benefit of an investment. For example, in the

Indonesia-Australia Comprehensive Economic Partnership Agreement (IA-CEPA), Article 14.11 states that:

'A Party shall not expropriate or nationalise a covered investment either directly or through measures equivalent to expropriation or nationalisation (expropriation), except:

1. for a public purpose;
2. in a non-discriminatory manner;
3. on payment of prompt, adequate and effective compensation; and
4. in accordance with due process of law.'

An International Centre for Settlement of Investment Disputes (ICSID) tribunal held that a series of state measures over a period of time that has the same effect may also constitute indirect expropriation.⁴ In Spain the government has issued a royal decree that has the effect of allowing the government to assume control of private hospitals and clinics in an attempt to 'nationalise' the Spanish health system and its response to Covid-19.⁵ Such government measures may provide a basis for an investor to allege indirect expropriation by the government.

A tribunal may find that a state has breached the national treatment standard if the government implements measures that discriminate against foreign investors.

Defences under international investment agreements

If it can be established that government-mandated Covid-19 measures are incompatible with a state's obligation under a relevant international investment agreement, the question will then turn to whether the state has a valid defence to a claim. A state may have a defence under the relevant international investment agreement or at customary international law.

Where an exception exists under an international investment agreement and the exception applies, the international investment agreement obligations will not apply to the Covid-19 measure. The General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS) include general exceptions that the agreements will not prevent a party from adopting or enforcing measures to protect human life or health, provided that the measures are not arbitrary or discriminatory.⁶

Only few bilateral investment treaties include general exceptions of a similar nature. For example, some BITs include exceptions for non-discriminatory measures ‘necessary for the maintenance of public order’⁷ or permit actions taken in ‘circumstances of extreme emergency’⁸ or ‘for the protection of its own essential security interests’.⁹ Exceptions are increasingly present in more modern international investment agreements, for example:

- the SAFTA that entered into force on 28 July 2003 provides that non-discriminatory measures are permitted where ‘necessary to protect public morals or to maintain public order’, ‘necessary to protect human [...] life or health’ or ‘necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter including those relating to [...] safety’;¹⁰
- the China-Australia FTA that entered into force in December 2015 provides that non-discriminatory measures for ‘legitimate public welfare objectives of public health, safety, the environment, public morals or public order shall not be the subject of a claim’ by an investor;¹¹
- the IA-CEPA provides that non-discriminatory measures are permitted where ‘necessary to protect public morals or to maintain public order’ and to ‘protect human [...] health’;¹²
- the Australia-Hong Kong FTA that entered into force on 18 January 2020 incorporates the general exceptions found in the GATT and GATS.¹³

While there is a strong argument that Covid-19 measures would be classified as a measure to protect ‘public health’ and ‘safety’, it must be remembered that for the exceptions to apply, the measures taken must be ‘non-discriminatory’ in nature. States may also seek to rely on the doctrine of the state’s police power which provides that state regulations within the bounds of accepted police power or regulatory power of states are not compensable expropriations where such measures are for the bona fide purpose of protecting public welfare. The same caveat applies, however, to the power being exercised in a non-discriminatory and proportionate manner.¹⁴

Defences under customary international law

States may also defend against treaty claims on the basis of customary international

law defences.¹⁵ The three defences relevant to defending Covid-19 measures include force majeure, distress and necessity. The plea of necessity featured heavily in the investment treaty-based cases arising from the Argentine financial crisis, whereas force majeure and distress have not featured prominently in investment treaty cases.

The defence of necessity requires a state to fulfil four requirements: a grave and imminent peril; that threatens an essential interest; the state’s act must not seriously impair another essential interest; and the state’s act was the ‘only way’ to safeguard the interest from that peril. The plea of necessity will be excluded if the obligation in question excludes reliance on necessity and the state contributed to the situation of necessity.¹⁶ The issue of contribution was live in the claims arising from the Argentine financial crisis. For example, one tribunal dismissed Argentina’s attempt to rely on necessity, finding it contributed to the situation of necessity with ‘well-intended but ill-conceived policies’.¹⁷ Another tribunal found the plea of necessity required some degree of fault and accepted Argentina’s reliance on the plea.¹⁸ Satisfying the requirements of necessity is a high bar and the level of contribution by the government to the Covid-19 pandemic will become a critical factor.

The defence of force majeure is strict. It requires the fulfilment of five conditions: unforeseen event or an irresistible force; the event or force must be beyond the state’s control; the event must make it ‘materially’ impossible to perform an obligation; and the state must not have assumed the risk of the situation occurring.¹⁹

The defence of distress requires the state to show: threat to life; a special relationship between the author of the act and the persons in question; that there was no other reasonable way to deal with the threat; that it did not contribute to the situation; and that the measures were proportionate.²⁰

As aforementioned, the defences of force majeure and distress have not received much attention in investment treaty cases and it remains to be seen whether this will change in any claims arising from the Covid-19 pandemic.

Notes

- 1 Australia is party to bilateral investment treaties with Argentina, China, Czech Republic, Egypt, Hungary, Laos, Lithuania, Pakistan, Papua New Guinea, the Philippines, Poland, Romania, Sri Lanka, Turkey and Uruguay. Australia has entered into free

- trade agreements with Chile, China, Hong Kong, Indonesia, Japan, Korea, Malaysia, Peru, New Zealand, Singapore, Thailand and the United States. See Department of Foreign Affairs and Trade, 'Australia's bilateral investment treaties' www.dfat.gov.au/trade/investment/Pages/australias-bilateral-investment-treaties accessed 22 September 2020.
- 2 See Department of Foreign Affairs and Trade, 'Official documents' www.dfat.gov.au/trade/agreements/in-force/safta/official-documents/Pages/default accessed 22 September 2020.
 - 3 Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments www.austlii.edu.au/au/other/dfat/treaties/1988/14.html accessed 22 September 2020.
 - 4 *Generation Ukraine Inc v Ukraine* (2003) ICSID Case No ARB/00/9 [20.22] www.italaw.com/sites/default/files/case-documents/ita0358.pdf accessed 22 September 2020.
 - 5 Royal Decree 463/2020 (14 March 2020) www.redaccionmedica.com/contenido/images/BOE-A-2020-3692.pdf accessed 22 September 2020.
 - 6 Article XX of the General Agreement on Tariffs and Trade and Article XIV of the General Agreement on Trade in Service.
 - 7 This wording does not appear in BITs entered into by Australia (see n 2 above). See, eg, Japan-China BIT (Beijing, 27 August 1988) and Latvia-United States BIT (Washington, 13 January 1995) and summary table www.oecd.org/daf/inv/investment-policy/40243411.pdf accessed 22 September 2020.
 - 8 Appears in BITs entered into by India, see eg Hungary-India BIT (New Delhi, 3 November 2003); United Kingdom-India BIT (London, 14 March 1994) and summary table www.oecd.org/daf/inv/investment-policy/40243411.pdf accessed 22 September 2020.
 - 9 Australia-India BIT (New Delhi, 26 February 1999, entry into force 4 May 2000, terminated 23 March 2017) and summary table www.oecd.org/daf/inv/investment-policy/40243411.pdf accessed 22 September 2020.
 - 10 Ch 8, Art 19, see www.dfat.gov.au/trade/agreements/in-force/safta/official-documents/Pages/default accessed 22 September 2020.
 - 11 See Art 9.11(4) and 9.8 www.dfat.gov.au/trade/agreements/in-force/chafta/Pages/australia-china-fta accessed 22 September 2020.
 - 12 See ch 17, Art 17.2(3) and 17.2(4) www.dfat.gov.au/trade/agreements/not-yet-in-force/iacepa/iacepa-text/Pages/default accessed 22 September 2020.
 - 13 See ch 19 www.dfat.gov.au/trade/agreements/in-force/a-hkfta/a-hkfta-text/Pages/default accessed 22 September 2020.
 - 14 *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7
 - 15 See the International Law Commission's Articles on State Responsibility (2001) ch V.
 - 16 *Ibid*, Art 25.
 - 17 *Impregilo v Argentina* (ICSID Case No ARB/07/17), at 356 and 359.
 - 18 *Urbaser v Argentina* (CISID Case No ARB/07/26) at 711.
 - 19 *Ibid*, Art 23.
 - 20 *Ibid*, Art 24.

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Differing site conditions: contrasting the English and US legal systems

Introduction

Traditionally, a contractor took responsibility for any additional cost and time when that contractor encountered actual site conditions that were more adverse than expected during the tender stage. An experienced contractor would be expected to calculate and include allowances within a bidding price. The fundamental drawback of this approach is that, during the tender stage, a cost estimator cannot accurately estimate a true unknown, which may lead to enormous amounts of contingencies and to a costly project.

This is a critical issue in major projects, such as large-scale civil and plant projects. Therefore, some standard forms of contract have a differing site condition clause¹ to minimise contingency costs in pursuit of financial effectiveness. In the United States, the use of contractual provisions allocating the site-related risks is very common, even

required under the law in some public works contracts, contrary to the United Kingdom default position where the risk of adverse site conditions still rests largely with the contractor.

In general, most differing site condition clauses, which allocate the site-related risks, differentiate between two main types of differing site conditions: Type 1, concerned with the material difference between the information in the contract documents, or the employer furnished information during the tender stage, and the actual site condition; and Type 2, concerned with the unusual or unknown physical conditions different from those reasonably anticipated for a similar project. Risk allocation on Type 1 and 2 varies in the standard forms of contract most often used in building and construction, such as the contracts under the Joint Contracts

Tribunal (JCT);² FIDIC;³ New Engineering Contract (NEC);⁴ and standard forms⁵ in the US such as the Federal Acquisition Regulations (FAR), ConsensusDOCS, the American Institute of Architects (AIA) and the Engineers Joint Contract Documents Committee (EJCDC).

Although many contracts provide a differing site condition clause, not all construction contracts provide one, and the risks as to site conditions are mostly allocated to the contractor. In this instance, the law may provide grounds for the contractor to claim for the additional cost and time caused by differing site conditions if the contractor suffered from serious financial loss as a result of the employer's misrepresentation, a breach of an implied term or a breach of the duty to disclose. The application of these legal principles to differing site conditions are not the same in the UK and US.

This article will explore the various approaches related to differing site conditions under the standard forms of contract and the legal positions as to differing site conditions in the UK and US.

Definitions

A 'differing site condition' (which can also be referred to as a changed condition, an adverse physical condition, an unforeseeable physical condition, a concealed condition or a latent physical condition) is a physical condition encountered during the performance of a contract of work that was not visible and not known to exist at the time of bidding, and that materially differs from the condition envisaged at the time of pricing the contract.⁶ This could include: soil with inadequate bearing capacity; unsuitable filling materials; unanticipated groundwater conditions (static or permeable); quicksand; muck; rock formations (that are either excessive or insufficient); and artificial (manmade) subsurface obstructions.⁷ A 'differing site condition clause' is the parties' agreement of who should bear the risk arising from a differing site condition.

The necessity of differing site condition clauses

Under a traditional contract risk-allocation mechanism, it is expected that

an experienced contractor will include contingencies in its bid price to protect themselves against unforeseen conditions.⁸ The basic drawback to this approach is that a contractor cannot accurately estimate an unknown.⁹ Major construction projects usually involve such massive earthworks (excavation and backfilling), foundation works, tunnelling works, boring works, dewatering works and the like that the contingencies related to site conditions are the critical factor in determining the project costs.

Experience shows that up-to-date quantitative risk analysis techniques, such as the Monte Carlo simulation, frequently fail to provide the appropriate contingency costs in major projects.¹⁰ Although contingency costs are included, the contingency may end up being underestimated or grossly overestimated. In instances where overestimation is an issue, bid prices end up becoming too high, and thus the employer bears the costs of unnecessary financial expenses if adverse conditions are not encountered. This places a redundant financial burden upon employers.

Even with contingencies, the estimate for the differing site conditions may prove wholly inadequate to cover the contractor's actual costs.

A differing site condition clause may be beneficial for the employer as it allows contractors to lower contingencies and the project to be delivered at lower cost to employer. From the contractor's perspective, the contractor can better mitigate the unknown risks with the knowledge that costs for unforeseen risks can be recovered. Even with contingencies, the estimate for the differing site conditions may prove wholly inadequate to cover the contractor's actual costs. Even if the contractor can rely on common law and statute to recover increased costs under certain circumstances, the costs related to dispute and recovery can be high. (These legal remedies will be discussed later.) In light of this, many standard or bespoke contracts provide the differing site condition clause to resolve the fundamental drawback for estimating site-related contingencies.

The default position for differing site conditions in the UK and US

Hess and Bailey¹¹ contrasted the position as to site conditions in the US and English law and concluded that the English and American legal systems have taken very different paths concerning the allocation of risk for differing site conditions.

The UK

Hudson¹² summarises the English position in relation to the adverse site conditions:

‘A great weight of authority exists showing that an Employer, in the absence of an actionable misrepresentation or deliverable concealment, or of some express warranty, owes no implied duty to a Contractor, whether of disclosure or otherwise, in either contract or tort in regard to the pre-existing state of the site.’

In the UK, as a basic principle, it is clear that the risk of adverse site conditions rests with the contractor.¹³ When parties have reached no express agreement on the risk of adverse site conditions being encountered, the English law is clear that, for a fixed-price contract, it is the contractor who bears the risk of being delayed, disrupted or incurring additional costs because works are more difficult or expensive to perform than anticipated.¹⁴ As a matter of practice in the UK, it is observed that the JCT suites (the most frequently used standard forms of the construction contracts in the UK) do not entitle the contractor to time or monetary relief if adverse conditions are encountered.¹⁵

The US

The American position is different to that of the UK. The US seems to adopt a risk retention strategy from the perspective of the employer.¹⁶ This strategy accepts the gain and pain from a risk when an incident occurs and sets up a budget to prepare for the risk. Differing site condition clauses have become a common feature in virtually all construction contracts in the US.¹⁷ The rationale for the use of the differing site condition clause was elucidated by the US Court of Appeal in *Foster Construction v United States*:¹⁸

‘The purpose of the changed conditions clause is thus to *take at least some of the gamble on subsurface conditions out of bidding*

[...] Bidders need not weigh the cost and ease of making their own borings against the risk of encountering an adverse subsurface condition, and they need not consider how large a contingency should be added to the bid to cover the risk. *There will be no windfall and disaster.* The Government benefits from more accurate bidding, without inflation for risks which may not eventuate [emphasis added].’

It is clear that the US and English approach to a differing site condition is not the same. Table 1 shows the contradictory approaches in two jurisdictions.

Table 1: Default risk allocation for differing site conditions in the UK and US

	UK	US
Allocation of risk	The Contractor takes responsibility arising from adverse site conditions with some exceptions.	The standard forms of contract in the US make contractual provisions regarding adverse site conditions.
Risk allocation to	Contractor	Usually Employer; or Employer and Contractor
Necessity for Contingencies	Must be necessary	Unnecessary or minimal

Type 1 and Type 2

In the US, the FAR, ConsensusDOCS, AIA and EJCDC contract provisions identify two distinct types of unanticipated conditions that may be compensable.¹⁹ These are usually designated as Type 1 and Type 2 changed conditions. Type 1 refers to the changed conditions that ‘differ materially from those indicated in the contract’²⁰ or ‘differ materially from that shown or indicated in the Contract Documents’.²¹ Type 2 refers to unusual or unknown physical conditions at the site that differ materially from those ordinarily encountered and recognised as inherent in work of the character provided for in the contract.²² The approach in the US to the Type 1 and Type 2 distinction can also be found in the international standard forms such as the 1999 version of the FIDIC contract.²³

Risk allocation in the standard form of contract

Each standard form of contract has a characteristic contractual risk-allocation mechanism regarding differing site conditions.

In the US, most of the standard forms of contracts contain differing site conditions, the effect of which is to put the risk of unexpected or unforeseen site conditions on the shoulders of the employer by allowing the contractor a contractual entitlement to extension of time or price increase. I explain later the contractual risk-allocation mechanism for some standard forms of contract and analyse the deciding factor for allocation. As discussed previously, most US contracts provide a differing conditions clause and the effect of that is to pre-allocate the risk between employer and contractor, but mostly on the employer.

JCT SBC/Q 2016²⁴

The major standard form in the UK, the JCT form of contract, does not entitle the contractor to time or monetary recovery if adverse conditions are encountered,²⁵ which is in accordance with the English common law position where, in the absence of express contract provisions, the risks for physical conditions principally lie with the contractor.²⁶

JCT MP 2016

The JCT Major Project Construction Contract (MP) is the only JCT contract that includes an express clause dealing with ground conditions.²⁷ This form is designed for large-scale construction projects where major works are involved. It seems the employer adopts the risk retention strategy. The employer takes responsibility for: ‘... a change to the extent that the ground conditions or man-made obstructions in the ground could not reasonably have been foreseen by an experienced and competent contractor on the Base Date, having regard to any information concerning the Site that the Contractor had or ought reasonably to have obtained’.²⁸

FIDIC Red/Yellow 1999

Clause 4.10 and 4.11 of FIDIC Red/Yellow 1999 are concerned with Type 1 provisions and do not provide a contractual entitlement to Type 1 conditions. Clause 4.12 makes provision for Type 2 and provides the contractual grounds for the contractor’s entitlement for additional time and money for Type 2.

FIDIC Silver 1999

The FIDIC Silver Book 1999 maintains that a contractor takes responsibility and risk in situations where the contractor is required to obtain or verify site information for themselves and not to rely on information furnished by the Employer.²⁹ Thus, there is no warranty regarding the accuracy or completeness of any such provided information. The contractor is further considered to be responsible for taking into consideration unforeseen conditions, which is the equivalent of Type 2, that may pose a risk to a project, which is contrary to the position in the Red and Yellow.³⁰ The contractual mechanism in the Silver Book seems to have a connection with the frequent usage the form. The Silver Book is frequently used with project financing, which requires the certainty of the project costs from inception and hedging the financial uncertainty.³¹

NEC4

Clauses 60.1(12), 60.2 and 60.3 cater for provisions as they pertain to adverse site conditions. Unlike other standard forms (such as FIDIC, and the standard contracts in the US), NEC4 does not make Type 1 and 2 distinctions. It provides the contractual grounds for compensation for time and money for both conditions. NEC4 seems to adopt a risk retention approach as seen in the standard forms in the US, by which a contractor is not obliged to include potentially significant contingencies within its tender, and the employer pays for the costs based on the difference between the actual conditions and the envisaged conditions by an experienced contractor.³²

Comparison

Table 2 provides a summary of the distinctive risk allocations in standards forms of contract. On analysis, the decisive factors with regard to allocation seem to be connected with:

- the scale of the project and whether it is small-scale works or large-scale infrastructure projects;³³
- private contract or public works contract;³⁴
- financial purpose for seeking either certainty or efficiency;³⁵ and
- the common law position in the legal jurisdiction.³⁶

Roadblocks to recovery

Despite the existence of the differing site condition clause, it is not always a guarantee

	JCT SBC/Q 2016	JCT MP 2016	FIDIC Red/Yellow 1999	FIDIC Silver 1999	NEC4 ECC	EJCDC C-700 (2007 ed)
Major use of the forms	The UK building works	The UK large-scale construction projects	International civil works, electrical and mechanical plant	International process plant procured by project financing	Public sector contracts in the UK	Public works in the US
Responsibility on	Contractor	Contractor and Employer	Shared	Contractor	Contractor and Employer	Contractor and Employer
Type 1	Silent	Compensable	Practically non-Compensable	Practically non-Compensable	Compensable	Compensable ³⁷
Type 2	Silent	Compensable	Compensable	Non-Compensable	Compensable	Compensable ³⁸

Table 2: Various site related risk allocations in the standard forms of contract

that the contractor will get a price adjustment or time extension.

Standard of 'experienced contractor'

Even with a differing site condition clause, the contractor should be aware that the court's approach to interpretation of differing site condition clause is affected by the standard of the experienced contractor. In the case of *Obrascon v Gibraltar*,³⁹ the English court in examining the FIDIC Yellow Book clause 4.12 regarding Type 2 held that the experienced contractor should have considered the worst-case scenario when he evaluated the ground condition. The judge in the case ruled that 'the [experienced] contractor needed to make provision for a possible worst case scenario. The contractor should have made allowance for a proper investigation and removal of all contaminated material.'⁴⁰

The question is on what a reasonable bidder at that time of preparing its bid would have expected to encounter.

In the UK, the standard for what an experienced contractor should have known was held to be very high, as was shown in the decision in *Van Oord v Allseas*,⁴¹ which is consistent with the decision in *Obrascon*. These cases in the UK illustrate that it is not easy to succeed with an 'unforeseen physical conditions' claim and with the condition of experienced contractor clause.

The US position for experienced contractor appear to be somewhat different. The objective standard applies to a Type 2 differing site conditions – the question is on what a reasonable bidder at that time of preparing its bid would have expected to encounter.⁴²

The contractor should also recognise the associated obligations in relation to the differing site conditions. The primary contractor's obligations may be a site investigation obligation and verification obligation of the information provided by the employer. Exculpatory or disclaimer clauses may make the provision that contractors agree and acknowledge that it has not relied upon any information furnished by the employer, nor does it make a claim on the ground of the inadequacy and inaccuracy of any information provided by the employer. Furthermore, it is clearly understood that the employer does not make any promise or representation as to the accuracy of that information.⁴³

Inspection or site investigation obligations

In the US, the term 'site investigation' is generally interpreted to mean, essentially, 'sight investigation' and does not extend to the making of independent subsurface investigations.⁴⁴ However, the contractor is deemed to have a reasonably sound knowledge of the site as well as access to all information that could be gained by a 'reasonable' site inspection under the circumstances.⁴⁵ To determine whether the contractor conducted

a reasonable site investigation, what a reasonable and experienced contractor would have discovered in light of the time and access allowed for a site investigation should be considered.⁴⁶ This standard of an experienced contractor does not expect that the contractor should discover what a trained engineer or geologist would discover in the performance of a site investigation, only what a reasonable contractor would discover in the US.⁴⁷

These limitations of the contractor's responsibility are also found in NEC4 clause 60.2 as follows:

'In judging the physical conditions for the purpose of assessing a compensation event, the contractor is assumed to have taken into account: The Site Information; Publicly available information referred to in the Site Information; Information obtainable from a visual inspection of the Site; and Other information which an experienced contractor could reasonably be expected to have or to obtain.'

The standard for an experienced contractor for measuring the additional compensation is also found in clause 14.1 of JCT MP 2016.⁴⁸ The standard is what 'an experienced contractor could reasonably be expected to obtain or have been foreseen', but as discussed, the standard for what an experienced contractor should have known is very high in the UK.

Disclaimer clauses

Exculpatory clauses⁴⁹ offering the proviso that a contractor agrees that it has not relied upon any employer furnished information may also be a hindrance to recovering costs from differing site conditions. For example, clause 4.10 of FIDIC states:

'The Employer shall have made available to the Contractor for his information, prior to the Base Date, all relevant data in the Employer's possession on subsurface and hydrological conditions at the Site, including environmental aspects. The Employer shall similarly make available to the Contractor all such data which come into the Employer's possession after the Base Date. *The Contractor shall be responsible for verifying and interpreting all such data. The Employer shall have no responsibility for the accuracy, sufficiency or completeness of such data, except as stated in Sub-Clause 5.1 [General Design Responsibilities] [emphasis added].*'

In the UK, provisions of this nature, which are often referred to as 'non-reliance' clauses or disclaimers, will generally be given contractual effect so as to preclude a contractor from claiming based on any pre-contractual misrepresentation by the employer or its agent.⁵⁰ However, this is subject to: (1) the Misrepresentation Act 1967; (2) the Unfair Contract Terms Act 1977; and (3) the contractor's ability to investigate a site or check the accuracy of information pertaining to that site.⁵¹ It is worth noting that exclusion clauses will not relieve the employer from the results of their negligence unless liability for negligence is expressly excluded.⁵² In the US, many decisions by the courts have held that these clauses do not have sweeping effects.⁵³ The courts, in general, will not allow such clauses to override the relief provided to the contractor by the differing site conditions clause.⁵⁴

	Standard of 'experienced contractor'	Inspection/cite investigation obligations by the contractor	Disclaimer Clause
Issue facing the contractor	The standard for experienced contractor is high, and the contractor may need to make provision for a possible worst-case scenario in the UK.	The contractor has limited time and access for site investigations during the tender process.	The employer provides incorrect information but does not want to take responsibility for the information.
Potential arguments by the contractor	The objective standard test applies to the Type 2 differing site conditions in the US.	A site investigation obligation may be limited to a 'sight' investigation, or investigation works carried out by an experienced contractor (not a geological specialist) considering the time and access allowed for a site investigation in the US.	A disclaimer clause may not be valid under certain circumstances if deceit, fraud, or negligence is committed by an employer. In the US, a disclaimer clause may be interpreted narrowly.

Table 3: Limitation to recovery

Legal grounds in the absence of a contract provision

In the event that a differing site conditions clause is absent in a contract, the contractor may rely on legal principles to recover time and money under certain situations or circumstances. Those are where there is an occurrence of the employer's: (1) misrepresentation; (2) a breach of duty as it pertains to disclosure of available information; or (3) a breach of warranty.

Misrepresentation

PRE-CONTRACTUAL REPRESENTATIONS IN GENERAL

It is inevitable that, before entering into a construction contract, the parties to a contract will make representations of fact and/or law, which will influence the other party's behaviour.⁵⁵ If a pre-contractual representation turns out to be incorrect, the question is whether the representee has a remedy against the representor for loss or damages suffered as a consequence of *reliance* on the misrepresentation.⁵⁶

MISREPRESENTATION IN THE UK

An employer may be liable for fraudulent misrepresentation pursuant to *Pearson and Son v Dublin Corporation*.⁵⁷ Under the law of obligation, employers were not liable for negligent misrepresentation until the landmark case of *Hedley Byrne v Heller*.⁵⁸ The present position is that negligent misrepresentation may give rise to claim for liability either under the *Hedley Byrne* rule or the Misrepresentation Act 1967. However, in general and in most construction and engineering contracts, where an employer provides inaccurate or partial information to a contractor carelessly before a contract is entered into, a duty of care will not usually be imposed by law.⁵⁹

Negligent misrepresentation may give rise to claim for liability

Exceptions to this do exist. In *Howard Marine and Dredging v Ogden*,⁶⁰ where Howard (the employers of a barge) provided an inaccurate capacity of the barge to Ogden (the contractor) who had hired the barge for construction works, Howard was held liable for negligent misrepresentation under section 2(1) of the Misrepresentation Act 1967.⁶¹ In *Turriff v Welsh National Water Authority*,⁶² the employer carelessly and erroneously represented to the contractor that a particular specification was 'buildable', and the contractor was not expected to check whether it was in fact 'buildable', therefore, the employer was held to owe a duty of care to the contractor, whose duty it had breached.⁶³

MISREPRESENTATION IN THE US

The position in the US differs from that of the UK.⁶⁴ Three Supreme Court cases have established the principle of misrepresentation in relation to site information furnished by the government.⁶⁵

First, in *Hollerbach v US*,⁶⁶ Hollerbach was contracted to rebuild a dam on the Green River in Kentucky. As Hollerbach conducted the work, it encountered an old dam that had used timber and stone as (unsuitable) backfill materials. However, the contract documents indicated the old dam had used broken stone, sediment and sawdust as backfill. The Court noted that the contract obliged the contractor to investigate the site and 'to make [its] own estimates of the facilities and difficulties attending the execution of the proposed contract'. However, these broad requirements did not override the employer's specific representation regarding the material used as backfill for the old dam. The Supreme Court said that:

'We think this positive statement of the specifications must be taken as true and binding upon the government, and that, upon it, rather than upon the claimants, must fall the loss resulting from such mistaken representations. We think it would be going quite too far to interpret the general language of the other paragraphs as requiring independent investigation of facts which the specifications furnished by the government as a basis of the contract left in no doubt. If the government wished to leave the matter open to the independent investigation of the claimants, it might easily have omitted the specification as to the character of the filling back of the dam. In its positive assertion of the nature of this much of the work, it made a representation upon which the claimants had a right to rely without an investigation to prove its falsity.'

Second, in *Christie v US*,⁶⁷ there was a misleading representation in the specifications as to the material to be excavated, which actually misled the bidder who obtained the contract, and the government admitted that the contractor did not have time to make borings to verify the representations. The Supreme Court held that the contractor was entitled to an allowance for the actual amount expended over what would have been the cost if the boring sheets had been accurate, notwithstanding there was no fraudulent purpose.

Last, in *Atlantic Dredging v US*,⁶⁸ where the government declined to guarantee the accuracy of the information but expressed its belief that the government furnished information was trustworthy, the Court elucidated the implied warranty for the accuracy of representation by the government and held that the contractor was to be relieved if he was misled by erroneous statements.⁶⁹

The employer's tactical method to secure financial certainty by allocating site-related risk to the contractor and reducing the time allowed for tendering by providing various site information, usually a lengthy and costly period, thus inducing the contractor to use the employer furnished information, is not unusual.⁷⁰ In these circumstances, the US courts seem to take into account various factors, such as the time and access allowed for a site investigation, the employer's conduct, the knowledge of the employer and contractor, and the employer's objective intention for providing the site information, instead of omitting the specifications and information.

Duty to disclose

POSITION IN THE US

The second ground of recovery from the contractor, which is closely related to misrepresentation or good faith, is the failure of the employer to disclose all available information.⁷¹ In a number of cases, it has been held that the employer may have a duty to disclose vital information in their possession where the contractor is unlikely to obtain it.⁷² In *Morrison-Knudsen v State of Alaska*,⁷³ the Supreme Court of Alaska said that:

'It is well settled in this court that where the Government possesses special knowledge, not shared by the contractor, which is vital to the performance of the contract, the Government has an affirmative duty to disclose such knowledge. It cannot remain silent with impunity.'

In a subsequent case, *D Federico v Bedford Redevelopment Authority*,⁷⁴ it was stated that when the government agency was in possession of information that may be relevant to the work to be undertaken by the contractor, there was a duty to disclose the information to the contractor fully. Interestingly, in *Pinkerton & Laws Co v Roadway Express*,⁷⁵ the courts recognised the duty of disclosure by a private employer, which is unlike most cases where a

public employer or government authority has been held liable under a duty of disclosure. It is worth noting that clause 4.10 of FIDIC provides for an employer's duty to disclose.⁷⁶

UK AND COMMONWEALTH POSITION

The doctrine of the duty to disclose in the US would not seem to accord with ordinary contractual principles in England or the Commonwealth.⁷⁷ In general, the employer or the project owner does not have a duty, implied or otherwise, to disclose any pre-existing site condition. However, there have been exceptional authorities that support the duty to disclose. In the Australian case of *Dillingham Construction v Downs*,⁷⁸ it was recognised that the employer could owe the contractor a duty of care and this would include disclosure of relevant information, though the decision went against the contractor due to there being no reliance on the information provided by the employer.⁷⁹

In the Canadian case of *Opron Construction v Alberta*,⁸⁰ the court took into account lack of time, the opportunities available for the tenderer to acquire the information, whether the information was indispensable and the degree of technicality of the data. There has been no legal authority in the UK on this matter.⁸¹

Implied warranty by law

THE UK

The employer gives no implied warranty of the nature or suitability of the site or subsoil, or as to the practicality of the design in general in the UK.⁸² In *Thorn v London Corporation*,⁸³ where the contractor agreed to build a new bridge over the Thames using caissons according to the engineer's design, it was held that there should be no implied warranty for information provided by the employer or engineer and thus the engineer and employer could not be sued when the work proved much more expensive than the contractor anticipated. Lord Chancellor and Lord Cairns observed the mere fact that because an employer provided tendering information, it did not mean that its accuracy

It may exceptionally be possible for a warranty of accuracy to be implied.

was guaranteed; it may exceptionally be possible for a warranty of accuracy to be implied.⁸⁴ In *Bacal Construction v Northampton Development Corporation*,⁸⁵ where the contractor was directed to design foundations on the basis of ground information supplied by the employer, it was held there was an implied warranty that the ground would accord with the information provided.⁸⁶

THE US

There generally is an implied warranty by law for employer's plans and specifications including site information in the US. The position is articulated by Brandeis J in the landmark case by the Supreme Court of *United States v Spearin*⁸⁷ as follows:

'... if the contractor is bound to build according to plans and specifications prepared by the employer, the contractor will not be responsible for the consequences of defects in the plans and specification. This responsibility of the employer is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work.'

Table 4 makes a summary of the contradictory approach as to a differing site condition in the US and UK. It is worth noting that the leading cases regarding the employer's furnished information, duty to disclose are developed by the public works contracts whereas the English law has been developed under private contracts. Also, the implications of a good faith obligation during the tender stage,⁸⁸ which is closely related to the duty to disclose, may be a decisive factor in determining the employer's liability.

	UK	US
Misrepresentation	Unlikely with some exceptions	Likely
Duty to disclose	No case law	Likely
Implied Warranty	Unlikely with some exceptions	Likely
Good faith	Not implied	Implied

Table 4: Basis for a claim in the absence of an adverse site condition clause

Conclusion

In the absence of a differing site condition clause, contractors must incorporate contingency costs into their bids, which is an extremely difficult undertaking. It may result in huge amounts of contingency costs in large-scale projects, particularly where the site conditions are a critical factor in determining the project costs. This may place an unnecessary financial burden upon the employer. Without a differing site condition clause, the contractor bears the burden of underestimating the effects of differing site conditions and may have to go through the complex process of making claims on the basis of legal principles such as misrepresentation, breach of duty to disclose and implied warranty. Therefore, a differing site condition clause is beneficial for both contractors and employers to minimise bid contingency costs, disputes and accompanying legal costs.

The English and American legal systems have taken very different paths concerning the allocation of risk for differing site conditions. The English position is that the risk of adverse site conditions rests with the contractor. The US law has encouraged the use of a differing site condition clause to allocate the site-related risks.

Several standard forms of contract provide different mechanisms to deal with differing site conditions. The differences in the proposed mechanisms depend on factors such as:

- the scale of the project;
- whether the contract is private contract or public works contract;
- financial purpose for seeking either certainty or efficiency; and
- the common law position in the legal jurisdiction.

Despite the existence of a differing site condition clause, the contractor may have obligations to investigate the site conditions or verify the site information furnished by the employer. The employer may provide a disclaimer provision that contractors cannot rely on the employer furnished information. In the UK, the standard for what an experienced contractor should have known by their own investigation without relying on the employer-furnished information appears to be very high.

In the absence of a differing site condition clause, the law may prohibit an employer's attempt to transfer all the site condition-associated risks to a contractor, depending on the circumstances. These may include when:

- the employer fraudulently or negligently makes representations about the site information;
- the employer breaches the duty to disclose; and
- the employer provides an implied warranty and breaches it.

The positions in the US and UK are dissimilar with regard to these legal grounds. The US courts seem to consider various factors such as the time and access allowed for a site investigation, and the employer's conduct, their knowledge and purpose of providing the site information instead of omitting the information. With some exceptions, English law does not provide remedies when the contractor's cause of action relies on the employer's negligent misrepresentation, breach of duty to disclose and implied warranty.

Notes

- 1 A 'differing site condition clause' is the party's agreement on who should bear the risk arising from a differing site condition. A 'differing site condition' (which can also be referred to as a changed condition, an adverse physical condition, an unforeseeable physical condition, a concealed condition, and a latent physical condition) is a physical condition encountered during performing a contract work that was not visible and not known to exist at the time of bidding, and that materially differs from the condition to be envisaged at the time of pricing the contract.
- 2 The author will explore the conditions in the Joint Contracts Tribunal (JCT) Standard Building Contract with Quantities (SBC/Q) 2016, and the JCT Major Project Construction Contract (MP) 2016.
- 3 The author will explore FIDIC 1999.
- 4 The author will explore the New Engineering contract (NEC) 4 Engineering and Construction Contract (ECC).
- 5 The Federal Acquisition Regulations (FAR), ConsensusDOCS, the American Institute of Architects (AIA) and the Engineers Joint Contract Documents Committee (EJCDC) will be examined by the author.
- 6 Thomas J Kelleher and G Scott Walters, (4th ed) *Common Sense Construction Law* (New Jersey: John Wiley & Sons, 2009) p 249.
- 7 *Ibid*, p 250.
- 8 *Ibid*, p 249–250.
- 9 *Ibid*.
- 10 See Association for the Advancement of Cost Engineering International (AACEI), Recommended Practice 57R-09, Integrated Cost and Risk Analysis using Monte Carlo Simulation of a CPM model, AACEI, Morgantown, WV, (latest revision).
- 11 S Hess and J Bailey, *Delay Damages and Site Conditions: Contrasts in US and English Law* (Society of Construction Law paper 181, 2015).
- 12 Nicholas Dennys, Robert Clay, Alfred A Hudson and Atkin Chambers (13th ed) *Hudson's Building and Engineering Contracts* (London: Sweet & Maxwell, 2015) p 480.
- 13 W Hughes, R Champion and J Murdoch (5th ed) *Construction Contracts: Law and Management* (London: Routledge, 2015) p 194.
- 14 Hess.
- 15 *Ibid*; JCT 2016 are silent on a differing site condition except JCT Major Project Construction Contract 2016.
- 16 Risk management techniques fall into one or more of these four main categories: (1) avoidance; (2) reduction; (3) sharing; and (4) retention.
- 17 See Federal Acquisition Regulations (FAR), ConsensusDOCS, the American Institute of Architects (AIA) and the Engineers Joint Contract Documents Committee (EJCDC); see also Kelleher, p 250.
- 18 435 F.2d 873, 887 (Ct.Cl.1970).
- 19 Kelleher, pp 249–250; FAR, ConsensusDOCS, AIA and EJCDC.
- 20 FAR (1984 ed) cl 52.236-2.
- 21 EJCDC (2007 ed) C-700.
- 22 Kelleher, p 257.
- 23 See FIDIC Red/Yellow 1999 cl 4.10 and 4.12.
- 24 Joint Contracts Tribunal Standard Building Contract with Quantities 2016
- 25 JCT 2016 are silent on a differing site condition except JCT Major Project Construction Contract 2016
- 26 See chapter 4.1.
- 27 See JCT Major Project Construction Contract 2016 cl 14.1:
'If the Contractor encounters ground conditions or man-made obstructions in the ground that necessitate an amendment to the Requirements and/or Proposals he shall notify the Employer of the amendments he proposes [...] shall be treated as giving rise to a Change to the extent that the ground conditions or man-made obstructions in the ground could not reasonably have been foreseen by an experienced and competent contractor on the Base Date, having regard to any information concerning the Site that the Contractor had or ought reasonably to have obtained.'
- 28 *Ibid*.
- 29 See FIDIC Red, Yellow, Silver 1999, cl 4.10 and 4.11.
- 30 Dennys, p 469.
- 31 S H Kim, *International Construction Contracts: Law and Practice* (Seoul: Park Young-sa, 2015) chs 4.2 and 4.3.
- 32 See NEC4 Engineering and Construction Contract cl 63.1.
- 33 See JTC SBC/Q 2016 and JTC Major Project Construction Contract 2016 in Table 2.
- 34 *Ibid*.
- 35 See JTC Major Project Construction Contract 2016 and FIDIC Silver 1999 in Table 2.
- 36 See JTC SBC/Q 2106 and EJCDC C-700 (2007 ed) in Table 2.
- 37 See GC-4.03 (Differing Subsurface or Physical Conditions) sub-cl A(2) and (3).
- 38 *Ibid*, sub-cl A (4).
- 39 [2015] EWCA Civ 712.
- 40 *Obrascon v Gibraltar* [2015] EWCA Civ 712, para 94.
- 41 [2015] EWHC 3074 (TCC).
- 42 M Beutler and E Gentilcore (2nd ed) *Model Jury Instructions: Construction Litigation* (Chicago: ABA, 2015) p 122.
- 43 See FIDIC 1998 Silver cl 4.10.
- 44 Kelleher, p 267.
- 45 *Ibid*.
- 46 *Christie v US* 237 US 234 (1915); *Opron Construction v Alberta* (1994) 151 AR 241 (QB).

- 47 Beutler, p 124.
- 48 See n 27 above.
- 49 They are sometimes referred to as information-only clauses; disclaimer clauses; no reliance clauses; exculpatory clauses; exemption clauses; or limitation clauses
- 50 J Bailey (2nd ed) *Construction law* (London: Informa Law, 2016) pp 329–330.
- 51 Bailey, pp 329–330.
- 52 R Knowles, *200 Contractual problems and their solutions* (London: Wiley-Blackwell, 2012) p 37.
- 53 Kelleher, p 268.
- 54 *Ibid.*
- 55 Bailey, pp 319–320.
- 56 *Ibid.*
- 57 [1907] AC 351.
- 58 [1964] AC 465.
- 59 Bailey, p 321.
- 60 [1978] QB 574.
- 61 Knowles, pp 35, 45.
- 62 [1979 EWHC].
- 63 Bailey, p 321.
- 64 *Ibid.*, p 331.
- 65 Kim, p 175.
- 66 233 US 165 (1914).
- 67 237 US 234 (1915).
- 68 253 US 1 (1920).
- 69 Robert F Cushman, John D Carter, Paul J Gorman and Douglas F Coppi (3rd ed) *Proving and Pricing Construction Claims* (New York: Aspens Publishers, 2000).
- 70 Kim, pp 176–179.
- 71 Kelleher, p 272.
- 72 J Uff (12th ed) *Construction Law: Law and Practice Relating to the Construction Industry* (London: Sweet & Maxwell, 2017) p 292.
- 73 519 P 2d 834 (1974).
- 74 (1983) 9 Mass App Ct 141.
- 75 650 F Supp 1138 (ND Ga 1986).
- 76 ‘The Employer shall have made available to the Contractor for his information, prior to the Base Date, all relevant data in the Employer’s possession on sub-surface and hydrological conditions at the Site, including environmental aspects. The Employer shall similarly make available to the Contractor all such data which come into the Employer’s possession after the Base Date.’
- 77 Dennys, p 480.
- 78 [1972] 2 NSW49.
- 79 Knowles, p 45.
- 80 (1994) 151 AR 241 (QB).
- 81 Knowles, p 46.
- 82 Hess.
- 83 (1876) 1 App Cas 120.
- 84 Uff, p 191; R Wilmot-Smith (3rd ed) *Wilmot-Smith on Construction Contracts* (London: OUP, 2014) p 194.
- 85 (1975) 8 BLR 88.
- 86 Uff, p 292.
- 87 248 US 132 at 136 (1918).
- 88 See *Yam Seng v ITC* [2013] EWHC 111(QB) paras 123–130; Leggatt J compares and contrasts the good faith obligations in the UK and other jurisdictions, para 123–130.

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Concurrent delay: unliquidated damages by employer and disruption claim by contractor

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Introduction

Concurrent delay, a controversial issue among construction lawyers and practitioners, centres around: (1) a contractor's entitlement for an extension of time (EOT); (2) an employer's right to impose liquidated damages; (3) a contractor's entitlement for losses and expenses associated with an EOT (referred to as a prolongation claim); and (4) general principles as to 'causation in fact'.¹

The English position with regards to EOTs in concurrency cases is well illustrated in the Society of Construction Law Delay and Disruption Protocol (the 'SCL Protocol') in core principle 10² (referred to as a full EOT).

However, a full EOT has been criticised on numerous grounds. One criticism is that employers lose the right to impose liquidated damages but are still expected to compensate for a contractor's prolongation claim if a full EOT is granted (the 'obverse problem')³. To overcome such disadvantages, employers may claim unliquidated damages when contractors breach contracts. Also, a separate entitlement or causation in the form of a 'but-for test' can be applied when assessing prolongation claims.⁴ Therefore, the English position as to losses and expenses in concurrency cases means contractors are required to satisfy a but-for test or burden of proof test,⁵ a position that SCL Protocol core principle 14 fully supports.⁶

This essay will explore why the English position is the right approach for recouping time and money in cases involving concurrency; it will then explore how contractors can make disruption claims to obtain monetary compensation, tackling causal requirements in the form of a but-for test.

Consideration of but-for test in relation to EOT

To establish 'causation in fact', it is a requirement in contract law that a but-for test be satisfied. It usually operates on an all-or-nothing basis and is measured using civil law standards examining a balance of probabilities (ie, those in excess of 50 per cent⁷). The but-for test encounters well-known difficulties when issues of concurrency arise.⁸ Moran QC examined causation as a general principle in tort law and contract law paying specific attention to construction contracts.⁹ He was especially concerned with concurrency and applications of causation and keen to determine whether 'dominant cause tests' and 'approximately equal causative potency tests' were a valid means of measuring these situations. He determined they were not. Consequently, he suggested the 'effective cause test', recently approved during *Walter Lilly v Mackay*.¹⁰ This test defines an effective cause as being one that causes critical delay to a project's completion. An effective concurrent cause can be established by a 'reverse but-for test', and 'is (in fact) routinely applied by courts in different areas of the law and would not be beyond contract administrators'.¹¹

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Development of English law position on EOT entitlement

Extension of time clause and meaning of concurrency

Henry Boot v Malmaison,¹² a leading case in England and Wales, saw a situation where no work was possible on a specific site for a week because of exceptionally 'inclement weather' (a relevant event under JCT).¹³ However, another issue had been manpower shortage (not a relevant event). Both issues

were likely to delay project completion by one week. It was held that if there were two concurrent causes of delay, one of which was a relevant event and the other not, then the contractor would be entitled to an EOT for the period of delay caused by the relevant event notwithstanding the concurrent effect of the other event. The decision was based on strict application and construction of a contract provision that contract administrators shall make 'fair and reasonable' assessment of 'relevant events' in the contract, a decision consistent with one made in *Balfour Beatty v Chestermount*.¹⁴ In *Balfour Beatty* it was held that an EOT should be assessed on a 'net' rather than 'gross' basis; therefore, no EOT should be refused on the grounds that a delay would have occurred by reason of labour shortage.¹⁵ Keating comments that the rationale for such an approach is that where the parties have expressly provided in their contract for an EOT caused by certain events, the parties must have contemplated that there could be concurrent delay but nevertheless by their express words the contractor is entitled to an EOT for an effective cause of delay.¹⁶

*The Royal Brompton Hospital NHS Trust v Hammond (No 7)*¹⁷ discussed the meaning of concurrent delay and made a distinction between true concurrency and sequential delays.¹⁸ True concurrency (the narrow approach) requires both the timing of events and their delaying effect to coincide. Therefore, true concurrency was separated from sequential delays that could have the same effect on completion, and it was held that sequential delays cannot be defined as concurrent delay.¹⁹ However, Keating and the SCL Protocol²⁰ state that true concurrency rarely occurs, and probably only qualifies as such if each event is critical to completion of a project.²¹ The current consensus regarding 'concurrent delay' is that it represents a period of project overrun caused by two or more effective causes of delay of approximately equal causative potency.²² It is worth noting that the first edition of the SCL Protocol²³ also distinguished true concurrency from sequential delay, but in all cases, 'the contractor's concurrent delay should not reduce any EOT due'.²⁴

*De Beers UK v Atos Origin IT Services UK*²⁵ followed the decision made in the *Malmaison* case, holding that the contractor 'is entitled to have the time within which to complete which the contract allows or which the employer's conduct has made reasonably

necessary' irrespective of the contractor's risk events. The decision is consistent with the principle that 'float is owned by the project' as it relates to time.²⁶

In contrast, in Scotland, *City Inn v Shepherd Construction*²⁷ adopted apportionment where there was delay caused by two concurrent causes, one of which was a relevant event under JCT.²⁸ Hamblen J, in *Adyard Abu Dhabi v SD Marine Services*,²⁹ reviewed the decision of *City Inn* but did not follow the decision based on the dissenting judgment of Lord Carloway in *City Inn*, which supported 'fair and reasonable' assessment of 'relevant events' in the contract. In a more recent case, *Walter Lilly v Mackay*,³⁰ Akenhead J held that a contractor was entitled to a full EOT in respect of the delay, where a period of delay has two effective causes.

Keating concludes the current position of English law, stating:

'It is now generally accepted that under the Standard Form of Building Contract and similar contracts a contractor is entitled to an extension of time where delay is caused by matters falling within the clause notwithstanding the matter relied upon by the contractor is not the dominant cause of delay, provided only that it is an effective cause of delay.'³¹

Prevention principle

Several commentators have suggested that the right approach to concurrent delay needs to refer to the prevention principle.³² It has long been accepted that the prevention principle applies to every contract.³³ The prevention principle in construction contracts was summarised by Lord Denning MR in *Trollope & Colls v North West Metropolitan Regional Hospital Board*,³⁴ holding that the employer cannot impose liquidated damages or any penalties when the contractor has prevented the performance of other contracting parties. The prevention principle applies to concurrent delay as Salmon LJ in *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd*³⁵ has observed:

'If the failure to complete on time is due to the fault of both the employer and the contractor, in my view the clause (giving the employer liquidated damages) does not bite. I cannot see how, in the ordinary course, the employer can insist on compliance with a condition if it is partly his own fault that he cannot be fulfilled.'

The recent practice in construction contract conditions seeks to bar entitlement to an EOT for any period of contractor-responsible delay occurring during a period of delay for which the employer would otherwise be responsible.³⁶ The question for the court was whether such a clause offends the prevention principle. The English Court of Appeal in *North Midland Building Ltd v Cyden Homes*³⁷ decided that barring an extension of time in concurrent cases does not offend against the prevention principle. Coulson LJ viewed the prevention principle as implied terms rather than an overriding rule of public or legal policy; thus, the express terms (the parties' agreement) can override the implied terms.

Approaches in other jurisdictions: apportionment and its rationale

Cocklin,³⁸ analysing approaches in other common law jurisdictions, has suggested that other jurisdictions such as Australia,³⁹ Canada, Hong Kong, Scotland and the US implement apportionment or critical path method (CPM) techniques in cases of

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concurrent delay. In a Hong Kong case, *Wing Construction Co Ltd v Boost Investment Ltd*,⁴⁰ the apportionment for an EOT was allowed, and the apportionment has now been regarded as a general principle in Hong Kong. Furthermore, Canadian courts do not recognise an all-or-nothing approach since it is regarded as leading to disproportionate results.⁴¹ The justification of apportionment in Canada has two bases: (1) the courts must 'do the best they can'; and (2) stretching contributory negligence legislation, which entitles the court to apportion liability between a claimant and defendant in tort case. These approaches have given the Canadian courts the ability to allocate responsibility to cases of concurrent delay based on 'guesswork'. Cocklin states that it may lead to an equitable solution in a complex concurrent delay case,

but it lacks certainty of outcome. The US had adopted similar approaches to the UK but shifted to apportionment or CPM techniques due to development of delay analysis methodologies with the view that CPM could accurately segregate the impact of concurrent delays.

Mastrandrea has also suggested apportionment based on the view that 'due weight to the degree of culpability and the significance of the delaying factors of each of the relevant causes' will provide a more satisfactory outcome than an all-or-nothing approach.⁴²

Flaws of apportionment

The prevention principle and arguable penalty regime

Apportionment in the *City Inn* case and other similar cases appears to be contrary to the well-established prevention principle.⁴³ Apportionment may lead to an irrational result where an employer's delay may be used as a basis for liquidated damages. Having said that, Hudson asserts that the imposition of liquidated damages due to failure to grant an EOT due to a concurrency situation would constitute a penalty.⁴⁴ Liquidated damages shall be imposed only for delays to completion of a project caused by a contractor. However, in situations of true concurrency, it is argued a contractor cannot be held liable for delays to completion of a contract, which is why imposing liquidated damages in such contexts is considered a penalty. Blackburn J in *Roberts v Bury Commissioners*⁴⁵ said: '... no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself.'⁴⁶

Uncertainty and non-reliance of delay analysis

Justice Ramsey argued that the adoption of a general apportionment approach based upon the respective culpability and/or causative potency of the concurrent causes would introduce a new element of uncertainty and could prove unworkable in practice.⁴⁷ It may lead to an unnecessary dispute about the delay analysis methodologies as seen in the *Walter Lilly*⁴⁸ case.

Apportionment heavily relies on expert reports and delay analyses, but the danger of usage of delay analyses to apportion delays has been met with considerable concern by a

number of commentators. Wilmot-Smith refers to a series of case law to warn against overemphasis of delay analyses that rely on computer programme to identify critical paths and eventually analyse concurrent delay.⁴⁹ Marshall analysed different delay analysis methodologies and concluded that even in a simple project, results of prospective and retrospective delay analyses are unlikely to produce the same results.⁵⁰ Farrow was more critical about use of delay analysis to make a determination of concurrent delays.⁵¹ 'It is not difficult to manipulate a methodology to arrive at the *required* answer. There are many related issues that influence the analysis [...] Hence, an analyst's view of a given set of facts will result in a different conclusion from another analyst. The methodologies do not tell you what the results mean in terms of contractual liability [...] delay analysis [...] is not as precise a science as some suggest [emphasis added].'

Although Mastrandrea has supported apportionment, he has also acknowledged the limitations of critical path analysis and has pointed out that 'segregation of delays (has) not always (been) possible.'⁵² Even in the US, if the effects of concurrent delay cannot be accurately segregated, the court will be likely to revert to a non-apportionment type review.⁵³

Contractual status of programmes

Moreover, the use of programmes to apportion delays has been questioned due to its contractual status.⁵⁴ Unless the programme is incorporated into contract documents, there is no implied obligation to perform a set of activities in any particular sequence.⁵⁵ In *GLC v Cleveland Bridge*,⁵⁶ it was held that the contractor could carry out the work at any pace, whether or not it complies with the contractor's programme. Burr criticised apportionment based on programmes averring that the most standard contracts may effectively give the contractor the right to incur its own delay during the construction period until the completion date unless the programme is incorporated into the contract or the contractor does not breach its duty to proceed 'regularly and diligently' with the works, or the contractor suspended works.⁵⁷

The obverse problem and maxim 'the loss lies where it falls'

One of the criticisms of a full EOT, which is used to support the case for apportionment,

is that unless losses are to be apportioned, out of the two associated claims (ie, the employer's liquidated damages claim and the contractor's prolongation claim) one must succeed and the other must fail. This situation is referred to as the obverse problem.⁵⁸

Furthermore, in situations of true concurrency, contractual responsibility for a delay to completion can be considered logically indeterminate because neither delay was actually necessary to cause completion delay. It can, therefore, be argued that, in such a scenario, the employer will not be able to determine its entitlement to liquidated damages. Similarly, the contractor will be unable to prove its corresponding entitlement to a prolongation claim. As Hudson⁵⁹ puts it: 'there is a substantial body of opinion which states that, in circumstances where there are concurrent causes of delay, the Contractor is entitled to an extension of time but does not receive loss and expense.'

Marrin QC describes this notion as the 'Malmaison approach',⁶⁰ and it is sometimes referred to as 'time but no money'.⁶¹ However, this expression is somewhat misleading. A contractor can get monetary compensation if he satisfies a but-for test.⁶² Willmot-Smith⁶³ supports a but-for test to acquire losses and expenses quoting the maxim 'the loss lies where it falls'. Having said that, Keating states the need for a different test of causation for entitlement to time and any associated losses and expenses.⁶⁴ The current consensus is that an 'effective cause test' is best suited to situations requiring an EOT, and a but-for test or burden of proof approach to cover losses and expenses.⁶⁵

Overcoming but-for test in English law

Unliquidated damages by employer

There is an opportunity for an employer to recover losses, based on the general principle that damages may be awarded for a contractor's breach of contract that is not reliant on liquidated damages, and concurrently these liquidated damages cannot satisfy a but-for test. Salmon LJ in *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd*⁶⁶ observed: '... the employer, in the circumstances postulated, is left to his ordinary remedy'; that is to say, to recover such damages as he can prove flow from the contractor's breach.

Stephenson LJ in *Rapid Building v Ealing Family Housing*⁶⁷ said that: 'where the claim for liquidated damages has been lost or has gone [...] the defendants are not precluded from pursuing their counterclaim for unliquidated damages'.

Alternative disruption analysis by contractor to satisfy but-for test

In the US, in many cases, contractors submit disruption analysis focusing on increased or additional resources as an alternative to global delay claims.⁶⁸ Nielsen states: 'An emerging analysis and proof technique for delay and disruption dispute impacts is productivity analysis (disruption analysis).'⁶⁹ Resource allocated programmes and cost control systems are known to be able to effectively manage projects, and their importance is recognised in the *Chartered Institute of Building (CIOB) Guide* in the UK.⁷⁰ Global delay claims seem to be regarded as lacking a causal nexus between an employer's delay and associated losses, consequently failing but-for tests. In a recent case, *Costain v Haswell*,⁷¹ the judge rejected a global delay claim since he was

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unable to ascertain losses due to a breach when the contractor submitted a site-wide project delay cost to cover a situation in which only two out of ten buildings were delayed by the architect.⁷²

The claimant could have submitted either a global delay claim or particularised disruption claim to cover losses and expenses based on particular resource increases linking an employer's risk event to losses suffered due to a need for increased or additional resources⁷³. In the UK, a disruption approach was tested in cases involving concurrency in the *Walter Lilly*⁷⁴ case. The court may have adopted a more relaxed approach assessing loss and expense on 'balance of probabilities' if the liability and its link to a disruption⁷⁵ were established and substantial losses (increased

resources) occurred due to the disruption compared to global delay claims. This contrasts with the decision made during the *Costain*⁷⁶ case.⁷⁷ While in *Costain*⁷⁸ the court rejected the preliminary costs as delay damages in the context of a global claim, in the *Walter Lilly*⁷⁹ case, Akenhead J approved the contractor's particularised disruption claim for the delay damages. Keating commented:

'Akenhead J did not consider the [...] preliminary costs to be a global [...] claim if there was evidence to demonstrate that the contractor did apply a greater level of resources than originally planned for, and that the linkage between the relevant event and the need to provide that greater resource is established.'⁸⁰

Conclusion

The rationale behind the UK position in relation to concurrent delays can be: (1) contractual construction of an EOT clause; (2) adherence to the prevention principle; (3) the 'burden of proof on the claimant' consideration; and (4) the penalty regime. Apportionment may be argued to be more equitable than a full EOT. However, apportionment will bring further uncertainty to the construction industry, leading to unnecessary disputes such as delay analysis methodologies. On the other hand, the 'obverse problem' may be overcome by employing different approaches replacing the liquidated damages and global prolongation claims in order to keep up with legal requirements as to causation in fact. The solution may be unliquidated damage claims made by the employer, or particularised disruption claims made by the contractor. Disruption analysis needs to be studied further, not only to ensure equitable compensation but also for better project management.

Notes

- 1 John Marrin QC, 'Concurrent Delay Revisited' (Society of Construction Law paper 179, February 2013).
- 2 Society of Construction Law Delay and Disruption Protocol (2nd ed, 2017).
- 3 See n 1 above.
- 4 Stephen Furst, Vivian Ramsey and Donald Keating (10th ed) *Keating on Construction Contracts* (London: Sweet & Maxwell, 2017) para 8-029; SCL Protocol, core principle 12.
- 5 *Ibid*, Furst, para 9-093.
- 6 See n 2 above.

- 7 Furst, para 9-090.
- 8 Franco Mastrandrea, (2014) 'Concurrent delay in construction – principles and challenges' *The International Construction Law Review*, 31(1), 83–107.
- 9 Vincent Moran QC, 'Causation in Construction Law: The Demise of the "Dominant Cause" Test?' (SCL paper 190, 2014).
- 10 [2012] EWHC 1773 (TCC).
- 11 See n 9 above.
- 12 [1999] Con LR 32.
- 13 JCT Standard Form of Building Contract, 1980 ed (with Quantities).
- 14 (1993) 62 BLR 1.
- 15 Nicholas Denny, Robert Clay, Alfred A Hudson and Atkin Chambers (13th ed) *Hudson's Building and Engineering Contracts* (London: Sweet & Maxwell, 2015) 6-059.
- 16 Furst, para 8-026.
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- 18 K Pickavance (3rd ed) *Delay and Disruption in Construction Contracts* (London LLP, 2005) 620; Denny, para 6-060; Society of Construction Law Delay and Disruption Protocol (1st ed, 2002).
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Concurrent expert evidence in a post-pandemic world

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Introduction

A necessary consequence of the Covid-19 pandemic is the greater use of virtual hearings for international construction arbitrations. Virtual hearings may well continue to feature prominently even in a post-pandemic world. Although there has been a proliferation of protocols on the conduct of virtual hearings,

there has been little to no guidance regarding how expert witness conferencing (or 'hot-tubbing') should take place virtually.

As societies across the world emerge from their respective lockdowns, it is apparent that many individuals have grown accustomed to their new home-working environments. Alongside the normalisation of seeing friends and family, colleagues and clients

through the lens of a laptop or tablet, we have seen an acceleration in the use of virtual technology in international construction arbitrations. Notably, there has been a significant rise in virtual hearings. Although virtual hearings are being used in response to the challenges of convening face-to-face hearings, they will likely become a normal feature of the post-pandemic world.

The authors provide their insights into the increased use of virtual hearings, discuss the challenges that virtual hearings present for hot-tubbing and discuss measures to ensure that expert witness conferencing continues to be a viable option if, or possibly when, virtual hearings become the new normal.

From venue to virtual

The use of virtual technology has long been commonplace in international arbitration. This may partly explain why the leading arbitral institutions did not issue their joint statement on arbitration and Covid-19 until 16 April this year.¹ Although the issuance of a joint statement was relatively slow, arbitral institutions and organisations had been individually publishing guidance statements since as early as March. For example, the Korean Commercial Arbitration Board published the Seoul Protocol on Video Conferencing in International Arbitration on 18 March 2020;² the International Chamber of Commerce published its 'Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic' (the 'ICC Guidance Note') on 9 April 2020;³ and the Africa Arbitration Academy issued its Protocol on Virtual Hearings in Africa in April 2020.⁴

In addition, parties and counsel have prepared their own bespoke protocols, for individual cases, to govern virtual hearings. The protocols, in their various forms, all serve an important and necessary purpose, and cover matters such as:

- the required hardware (screens, cameras, microphones, etc);
- the mechanics of the technology (eg, how to join the virtual hearing and how to contact the virtual hearing organisers);
- how documents are to be managed and shared on screen, and by whom;
- witness examination procedure (eg, how to ensure that no one is in the room with a witness, that clean copies of documents are made available, that there are no external prompts and that any limits to the length of responses are adhered to); and

- practical issues (eg, that participants should be on mute with video off, except the tribunal, leading counsel and the witness, and that only one person should speak at a time, with others to signal an interruption).

The anecdotal evidence suggests that tribunals, counsel and parties have grown accustomed to a socially distanced world. Both domestic and international arbitration hearings, including international construction arbitrations, are increasingly being conducted virtually in lieu of postponement for an unknown length of time.

Virtual hearings – the new normal?

During the pandemic, virtual arbitration hearings using industry-standard web conferencing platforms have largely been successful. However, virtual hearings are not a panacea. While offering a viable medium to proceed with arbitral hearings during the pandemic, numerous practical challenges require consideration in each case. Additional effort should be made to implement safeguards to prevent or minimise the impact of these challenges. The proliferation and use of protocols to guide the virtual hearing process confirms the need for thoughtful planning and organisation.

Although virtual hearings are being used in response to the challenges of convening face-to-face hearings, they will likely become a normal feature of the post-pandemic world.

Nonetheless, there has been demonstrable success in the use of virtual hearings. The chairman of the tribunal in a recent virtual arbitral hearing commented:

'I think it has been remarkable how few hitches there have been. I mean there have been one or two hitches [...] which have been overcome pretty speedily, and I think this is a great tribute to all concerned in organising this virtual hearing and I am sure there are going to be many, many more virtual hearings.'⁵

There is comparable feedback from expert witnesses participating in virtual hearings.

One expert witness commented that their experience of a virtual hearing was 'very stressful during cross examination', akin to being in a physical hearing room.⁶

If the virtual hearing is well organised, it is an effective approach to increasing efficiency and ready access to justice in international

arbitrations. This is relevant not only in a lockdown situation, but also in construction arbitrations concerning international projects where participants often reside in multiple countries.

The increased use of virtual hearings is likely to continue. The use of virtual technology in international arbitration is not novel. Even before the outbreak of Covid-19, it was not uncommon to have a section of the hearing conducted virtually, particularly in emergency arbitrations or where a witness was unable to attend a hearing in person.

There is a long-held perception that it is slower and more costly for parties to obtain an award in international construction arbitration than should rightly be the case. In recent years, there has been a sharpened focus on how international construction arbitrations can be more efficient. Virtual hearings appear to be a further means of driving improvements. For example, virtual hearings eliminate the costs and inconveniences of international travel and accommodation and allow participants greater flexibility for hearing dates.

Do virtual hearings mean pulling the plug on the hot tub?

Although the sharp rise in the use of virtual hearings is a consequence of restrictions on international travel, local lockdowns and social distancing policies, several other innovative procedural approaches applicable to international construction arbitration have been proposed over the past few years, including some involving the provision of expert evidence.

A defining feature of most international construction arbitrations is their factual and technical complexity. Consequently, tribunals rely heavily on expert evidence to understand the technical engineering, programming and economic issues involved. Although the outcome of a case will not be determined solely by expert evidence, it is a vital part of international construction arbitrations.

In traditionally adduced expert evidence, the expert witness of the claimant affirms evidence in chief by reference to served reports. The witness is then cross examined by the opposing counsel, followed by any necessary re-examination. The expert witness of the respondent then follows in a similar fashion. Often, counsel will examine areas

of the expert's evidence to best advance their client's case, without necessarily focusing on the specific issues of disagreement between experts or issues in which the tribunal wishes to explore. The examination of each individual expert can take several hours, or even days. Multiplying this process across all expert evidence explains why a significant amount of time is required for an arbitration hearing.

Hot-tubbing is a departure from the traditional sequential examination of expert evidence. The process of hot-tubbing was originally developed in the Australian Competition Tribunal and has been endorsed by multiple jurisdictions through court rules and practice guidelines. Early provisions for adducing concurrent expert evidence were added to the IBA Rules on the Taking of Evidence in International Commercial Arbitration in 1999,⁷ and it was adopted, as a pilot, in the English Technology and Construction Court guidelines in 2010.⁸

The process of hot-tubbing provides that experts in the same disciplines are affirmed together and often sit in the witness box at the same time. This permits the tribunal to engage with the experts in a question-and-answer format or in a more open discussion. Typically, the process takes place after both experts have been cross-examined and after the significant issues of disagreement have been identified, through factual evidence and the submissions of counsel. The tribunal probes the evidence and allows a simultaneous comparison of the experts' respective evidence.

There are some tangible advantages to hot-tubbing when increasing efficiency in international construction arbitrations is high on the agenda. Professor Doug Jones AO astutely identified that:

'The efficiency derives from the fact that witnesses 'in conference' can effectively confront each other's evidence on the spot. Traditional methods of each side calling their witnesses in a linear fashion can lead to a cognitive disconnect in the arbitrators' and counsel's understanding of the issues. This disconnect is exacerbated in situations where there are large numbers of witnesses and it could be days before the contradictory evidence of an expert witness' counterpart is heard. Further, it is possible that due to the technical nature of the evidence, opposing counsel will not be able to develop fully informed questions

until they have been advised by their own expert. Therefore, allowing experts to analyse and question directly the evidence of other experts ensures greater celerity of the hearing.⁹

However, hot-tubbing of expert witnesses is not used as widely in international construction arbitrations as some might expect. Although 63 per cent of respondents to the Queen Mary 2012 International Arbitration Survey suggested that expert witness conferencing should take place more often,¹⁰ the use of hot-tubbing in construction arbitrations often only comes at the behest of the arbitral tribunal, rather than the parties or their counsel.

This may reflect the perceived disadvantages of hot-tubbing, such as a sense of loss of control, and so increased risk. In many cases, examination of the experts is led by the tribunal, such that ‘barristers, who although given the opportunity to speak, seemed very much to take a back seat’.¹¹ Some practitioners have criticised hot-tubbing for letting ‘very poor experts off the hook from a searching cross-examination’.¹²

In addition, some experts have a more dominant personality than others, which may become problematic if one expert ends up leading the hot tub, such that the other expert fails to be effective in presenting their opinions. There are also concerns that ‘peer pressure’ may lead an expert to make concessions more easily than would otherwise be the case.

Although the use of hot-tubbing would be expected to reduce a hearing’s duration, and therefore its cost, it has been said that both counsel and experts require more preparation time. Nicola Cohen, of the Academy of Experts, noted:

‘... it is unlikely that the preparation time [for counsel] pre-hearing will be reduced. In fact, it may be that counsel will need to do additional preparation, not least of all because, while the experts are in the hot-tub, counsel will not be able to call upon their own expert’s assistance, should the need arise.’¹³

The existence of such barriers to the use of hot-tubbing in international construction arbitration puts into question what impact the move towards virtual hearings will have on its future use. One hypothesis is that an increase in virtual hearings would correlate with a decline in the use of hot-tubbing, with tribunals being reluctant to suggest their use. Although many protocols have now been

devised on the subject of virtual hearings, they are almost all entirely silent on how concurrent expert evidence can, and should, be heard in a virtual hearing, instead assuming a sequential approach to the presenting of expert witness evidence.

Making a splash: can guidelines be adapted in the context of virtual hearings?

The absence of any guidance on hot-tubbing in virtual hearing protocols suggests a reluctance about its use in these circumstances. Indeed, the recently published Chartered Institute of Arbitrators’ Guidelines for Witness Conferencing in International Arbitration (the ‘CI Arb Guidelines’) notes that:

‘There may be circumstances when a witness is unable to attend at the hearing venue for a conference but may be able to give evidence by video. The dynamics and ease of communication of witnesses giving evidence side by side are likely to be adversely altered when they are physically dislocated. A witness conference in such circumstances may be undesirable save where the tribunal considers that time or other constraints or considerations prevail over the limitations of evidence being given by video.’¹⁴

There are several legitimate concerns about obtaining concurrent expert evidence in virtual hearings. After a recent virtual hearing, leading counsel confirmed to the authors that they preferred physically sitting in the same room as the tribunal members because they were able to speak to the members directly, which gave a better sense of their reactions and allowed rapport building. Furthermore, the extent to which an expert witness’s credibility may be impeded by video links is another oft-cited concern due to the reduced ability to assess the disposition of the expert. In addition, the lack of proximity in a virtual hot tub may exacerbate differences of language between participants, leading to a loss of nuance.

Before the CI Arb Guidelines, procedural guidance for parties and representatives on exactly how hot-tubbing should be implemented was limited, an issue long recognised as a lacuna in the arbitration landscape.

The CI Arb Guidelines, published in April last year, are broadly divided into three parts:

- a Checklist, which sets out a non-exhaustive list of matters for the parties and tribunal to

consider when determining whether witness conferencing should be used;

- Standard Directions, which provide a general framework for witness conferencing that can be included in an initial procedural order, providing a set of applicable principles if the tribunal subsequently orders some of the witness evidence to be taken concurrently; and
- Specific Directions, which provide three possible procedural frameworks for witness conferencing depending on whether it is led by the tribunal, the witnesses or counsel for the parties.

While the CI Arb Guidelines appear reluctant to endorse the use of hot-tubbing when hearings take place virtually, it is these same guidelines that may provide a springboard for parties, counsel and tribunals to consider what measures to take to ensure the efficiency and effectiveness of witness conferencing in a virtual hearing.

The authors are aware of virtual arbitral hearings involving expert witness conferences taking place in the wake of the Covid-19 pandemic. In these cases, the tribunal led a question-and-answer session where each expert responded to their specific questions, and with the opportunity to reply to the other expert's views. Counsel were then permitted to raise any further points following the tribunal's joint examination. It would therefore be beneficial for existing virtual hearing protocols to include terms for hot-tubbing.

Although many protocols have now been devised on the subject of virtual hearings, they are almost all entirely silent on how concurrent expert evidence can, and should, be heard in a virtual hearing

However, the CI Arb Guidelines were compiled in a pre-pandemic world. The CI Arb itself has openly acknowledged that there would be circumstances in which the constraints of giving evidence concurrently through virtual means would be outweighed by the benefits of hot-tubbing. Indeed, one consequence of the digitalisation of international construction arbitrations in response to the pandemic might be a faster uptake of the CI Arb Guidelines. Tribunals, parties and counsel will be reliant on having much clearer procedural directions if hot-tubbing is to be used in virtual hearings. The logistics and procedures for hot-tubbing must be more clearly defined:

experts will not, for example, easily be able to intervene with a response to points made by the other expert.

The CI Arb Guidelines provide that where video conferencing is used, the tribunal should issue necessary directions on:

- advance testing of video conferencing facilities;
- the presence of a legal representative of the disputing parties at the venue of the relevant witness;
- the presence of an interpreter, if required; and
- access to all the documents relevant to such a witness's examination.

The guidance is limited and not wholly fit for present purposes (eg, the physical presence of a legal representative may be impossible following social distancing measures, travel restrictions and each firm's guidelines). However, it provides a baseline protocol that participants can develop in the arbitration to suit the needs of a specific virtual hearing. The inherent flexibility to do so is built into the CI Arb Guidelines, which are not intended to be overly prescriptive but instead aim to 'recognise the diversity of approaches that can be adopted without seeking to restrict the ability and imagination of tribunals and parties to shape a conference most suited to any given dispute'.¹⁵

Looking ahead: the future of concurrent evidence

It is timely for virtual hearing protocols to specifically address terms for virtual expert witness conferencing. These protocols may build on the foundation established by the CI Arb Guidelines. As well as agreeing on the usual provisions of a witness conferencing protocol, parties, counsel and the tribunal should include provisions that address the specific challenges of a virtual hot tub, such as:

- agreeing the location from which each expert witness is to give their evidence;
- determining whether the oaths or affirmations given by the expert witnesses need to be expanded, for example, to include the confirmations that:
 - there are no other persons in the room with the expert;
 - the experts are not in communication with anyone outside the virtual hearing; and
 - the experts are only using clean copies of any statements or reports;

- requiring that experts provide their own holy book or scripture, if they wish to give an oath rather than an affirmation;
- designating a neutral individual to run the witness conference, including by:
 - taking an initial ‘roll call’ of the expert witnesses;
 - identifying which expert is being called on to speak next (whether for oaths and affirmations, to give oral presentations or examination by the tribunal or counsel); and
 - managing any interventions from the tribunal;
- specifying the use of an electronic document repository for the participants’ exclusive use during the witness conference;
- specifying the use of separate display screens or windows for viewing documents during the conference;
- setting out an agreed running order for witnesses’ examination by the tribunal or counsel;
- making it clear that the tribunal or counsel may intervene during expert witness presentations, counsel’s examination of the witnesses or witness discussions; and
- setting out how any tribunal or counsel interventions or interruptions should be signalled.

This is not intended to be an exhaustive list. Participants in a virtual hearing featuring witness conferencing are likely to face other issues that can be proactively managed through their virtual hearing protocols.

If, as the authors anticipate, there is a continued uptake in the use of virtual hearings, tribunals, parties, counsel and experts will need to be equipped for the resulting challenges, including those related to expert witness conferencing. A move to virtual hearings cannot signal the end of expert witness conferencing, despite its inherent disadvantages, because hot-tubbing continues to play a significant role in international construction arbitrations and is viewed positively by many experts and tribunals.

Notes

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- 2 Seoul Protocol on Video Conferencing in International Arbitration (18 March 2020) http://www.kcabinternational.or.kr/user/Board/comm_notice_view.do?bbs_no=548&bd_no=169¤t_menu_code=menu0025&top_menu_code=menu0024 accessed 1 September 2020.
- 3 International Chamber of Commerce, ‘ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic’ (9 April 2020) <https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic> accessed 1 September 2020.
- 4 Africa Arbitration Academy, Protocol on Virtual Hearings in Africa (April 2020), www.africaarbitrationacademy.org/wp-content/uploads/2020/04/Africa-Arbitration-Academy-Protocol-on-Virtual-Hearings-in-Africa-2020.pdf accessed 1 September 2020.
- 5 Interview with a senior managing director, Ankura Consulting (London, 30 June 2020).
- 6 *Ibid.*
- 7 *International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration* (adopted by a resolution of the IBA Council June 1999), Article 8(2).
- 8 Technology & Construction Court issued a revised guide on Friday 1 October 2010.
- 9 Doug Jones, ‘Improving Arbitral Procedure: Perspectives from the Coalface’ ch 11 in Bernd Ehle and Domitille Baizeau (eds), *Stories from the Hearing Room: Experience from Arbitral Practice (Essays in Honour of Michael E. Schneider)*, pp 97–98.
- 10 Queen Mary, University of London and White and Case, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, p 28.
- 11 Civil Justice Council, ‘Concurrent Expert Evidence and Hot-Tubbing’, *English Litigation since the Jackson Reforms* (2016) p 19.
- 12 *Ibid.*
- 13 *Ibid.*
- 14 ‘CIArb Guidelines for Witness Conferencing in International Arbitration 2019’, Checklist Item (10).
- 15 *Ibid.*, preamble, para 1.

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Modern buildings near construction site in Santiago de Chile. Credit: kastianz/Shutterstock

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Public works and dispute boards: a pending debate in South America

Introduction

As is well known, dispute boards were created by the construction industry and have been defined by the International Chamber of Commerce (ICC) as ‘a standing body typically set up upon the signature or commencement of performance of a mid- or long-term contract, to help the parties avoid or overcome any disagreements or disputes that arise during the implementation of the contract’.¹ The main purpose of dispute boards is to operate during the execution of construction projects and allow the parties to resolve their differences contemporaneously and in a timely manner. However, it is important to note that in many cases, the use of these bodies

is limited only to dispute resolution, losing their original purpose.

Even though the use of dispute boards is recommended and has important benefits during the execution of a project, South American countries have been reluctant to introduce them into the legal framework, especially in public works contracts. One of several reasons for this is that South American countries have civil law systems, in contrast to the common law system that originated in Anglo-Saxon countries. Under a civil law system, the principle of freedom of contract is limited by the governing law, which relies on public institutions to resolve the conflicts between the parties and to defend the

weakest party. Conversely, under a common law system, in light of the lack of codification and the simplicity of statutory law, the need for legal certainty in contracts has resulted in the creation and development of standard forms, which usually provide for the use of dispute boards, mostly mandatorily.

Some South American countries, however, have been implementing dispute boards for at least two reasons: (1) the progressive introduction of common law features to civil law countries; and (2) the use of FIDIC standard form contracts, which provide for the use of dispute boards, is mandatory in projects financed by the Inter-American Development Bank (IDB).

In this article we will briefly analyse briefly: (1) the legal regulation of dispute boards in public works contracts, including the main causes that have prevented their general application in South American countries; and (2) the advantages and importance of having dispute boards for public works in this region.

The use of dispute boards in public works in South America

Legal regulation of dispute boards in public works contracts

After studying the legal framework of the six South American countries with higher gross domestic product (GDP),² it is possible to conclude that the regulation of dispute boards in public works contracts is minimal if not almost inexistent. Indeed, only Peru has a normative framework on this matter. Some countries have regulations for specific regions only or are working on the incorporation of dispute boards into their legal framework. Yet in most cases there are no legal regulations. The following table describes the regulations in Argentina, Brazil, Chile, Colombia, Ecuador and Peru:

Challenges for the implementation of dispute boards in public works contracts in South America

It is possible to identify at least challenges to the implementation of dispute boards in public works contracts: (1), the necessity of having a legal regulation in South American countries; and (2) the need for substantive change in the professional culture.

In relation to the first, as aforementioned, South American countries follow the civil law system, where the principle of freedom of contract is limited by the governing law, relying on public institutions to resolve the conflicts between the parties. This is especially true for public works contracts, which are ruled by public law regulations that require an express legal provision allowing disputes boards for their use. This brings, as an additional effect, a clear reluctance from the authorities to accept any decision of dispute boards as mandatory, as they are considered to be as an institution with reduced effectiveness.

Even when a legal regulation providing for dispute boards is included in the normative framework, cultural change is also essential, affecting not only the introduction of dispute boards, but also the dissemination of any kind of alternative dispute resolution (ADR). As an expression of this cultural behaviour, it is possible to identify at least the following situations that affect the implementation of dispute boards in South America:

- First, South American countries have a very close relationship with litigation, not other institutions orientated towards conflict avoidance. Almost all countries in the region believe that practically the only way to resolve a conflict that arises during the execution of a contract is through the judicial system, either through the courts or arbitration. Therefore, even when the parties could agree to go before a dispute board during the project execution, this method

	Dispute board in public works contracts	Standing or ad hoc	Number of members	Professional skills	Subject matters
Argentina ³	No	-	-	-	-
Brazil ⁴	Yes	Standing	1–3	Not restricted but preferably one lawyer and two engineers	Patrimonial rights
Colombia ⁵	No	-	-	-	-
Chile ⁶	No	-	-	-	-
Ecuador ⁷	No	-	-	-	-
Peru ⁸	Yes	Standing	1–3	Restricted by profession	Restricted (eg, excludes extra works)

is not widely used or is used only partially, and the parties wait, sometimes as agreed, until the end of the project to resolve their differences judicially (usually through the courts), under the public system.

- Second, in South America, public entities prefer to have full control during the execution of works, rejecting the possible intervention of third parties such as a dispute board. Public entities also face the difficulty of having to explain and justify any public-money expenditure that could involve payment to a dispute board.
- Third, and closely related to the previous point, in most South American countries there is a public controllership, which is usually an obstacle to enforcing dispute board decisions, due to the possibility of administrative sanctions by the public controller.
- Finally, there is a trend in South Africa that non-lawyers are seen as incapable of analysing contractual controversies. Apparently, this arises from confusion between the technical expert used by the judge or arbitrator and the dispute board member. That is not a problem in the common law environment, where the focus when appointing a member of a dispute board is the candidate's skill for the particular case rather than their specific studies, and where the institution of the adjudicators, managed mainly by non-lawyers, has been operating successfully for several years precisely with the objective to avoid submitting disputes to the courts.

Advantages and importance of having dispute boards in public works

In recent decades, the construction sector has become highly complex, requiring more expertise and contractual frameworks that respond to the differences that may arise between the parties during the execution of the project, differences that involve legal and technical issues. Dispute boards were created by the industry to respond to these very challenges, and have been used with proven success in many countries. For that reason, it is difficult to comprehend their lack of use in public construction, at least in conceptual terms.

The public administration is the main party responsible for providing public services to all people in a country. To fulfil this obligation properly, countries need to have an adequate infrastructure that allows

the governments to provide these public services. This infrastructure is developed normally via the execution of public works, which requires efficiency by public entities in the administration of the public budget and timely execution of projects. Dispute boards can help to achieve this objective, because they avoid, in most cases, time-consuming and ineffective litigation, keeping the project under way.

Indeed, dispute boards play an important role in the efficiency of construction because: (1) their existence pushes the parties to resolve any differences in a timely manner while the work continues; and (2) they reduce the probability of incurring court or arbitration costs. These reasons alone should be enough to introduce these bodies into the normative framework of South American countries.

During the pandemic, when it is important that parties can reshape the contractual terms of works in execution, dispute boards can support them to create an environment of mutual reliance, facilitating agreement without stopping projects. It is important to bear in mind that a country's public sector is responsible for taking effective measures to aid economic recovery, and one pillar of any recovery is keeping infrastructure projects in operation.

For the introduction of dispute boards to be effective, it is evident that South American countries need a cultural change, particularly moving from unbalanced contracts and adversarial management to models with more collaboration, focusing on the early avoidance of conflicts instead of resolution through litigation processes, relying on the professional skills of the non-lawyers and using dispute boards to support the parties during the whole project, and not only for dispute resolution.

Finally, given the times in which we are living, when collaboration is the only way to face the global crisis, perhaps the South American public sector will be finally pushed to consider implementing these panels and starting legislative processes to introduce them into their respective legal frameworks.

Notes

- 1 Dispute Board Rules (2015), International Chamber of Commerce, p 2.
- 2 World Bank 'GDP (current US\$) – Latin America & Caribbean' <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=ZJ> accessed

22 September 2020. Note that due to the lack of statistical information in the past five years Venezuela was not included in the analysis.

- 3 Argentina does not have regulations related to dispute boards or alternative dispute resolution (ADR) in public works.
- 4 The only existing legal framework in force is the Law No 16.783 (2018), enacted by the Municipality of São Paulo, which regulates in detail the creation, applicability and procedures of dispute boards, known as committees for the prevention and resolution of disputes (*Comitês de Prevenção e Solução de Disputas*) intended for long-term contracts where the City of São Paulo is a party.
- 5 Colombia does not have any regulations related to dispute boards in public works.
- 6 Since 2018 a committee consisting of the authorities of the Ministry of Public Works and representatives of the Chilean Chamber of Construction and Dispute Resolution Board Foundation, including legal and technical experts, has been working on a pilot plan of six contracts with different types of disputes boards and, in parallel, drafting a regulatory framework. The expectation is that results of the pilot will be gathered this year, and

dispute boards implemented in contracts in specific sectors next year.

- 7 Ecuador does not have a regulation related to dispute boards in public works.
- 8 Peru has a particular regulation for dispute boards (*Junta de Resolución de Disputas* or JRD) in public works. This regulation is contained in three normative frameworks: the Law of Public Procurement No 30.225 (*Ley de Contrataciones del Estado*), enacted in 2015, which was last updated through Supreme Decree No 082-2019; the Regulation of the Law 30.225, contained in Supreme Decree No 350-2015-EF (*Reglamento de la Ley de Contrataciones del Estado*), and the recent Directive of Dispute Boards No 012-2019 (*Directiva No 012-2019-OSCE/CD – Junta de Resolución de Disputas*).

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Construction Law International

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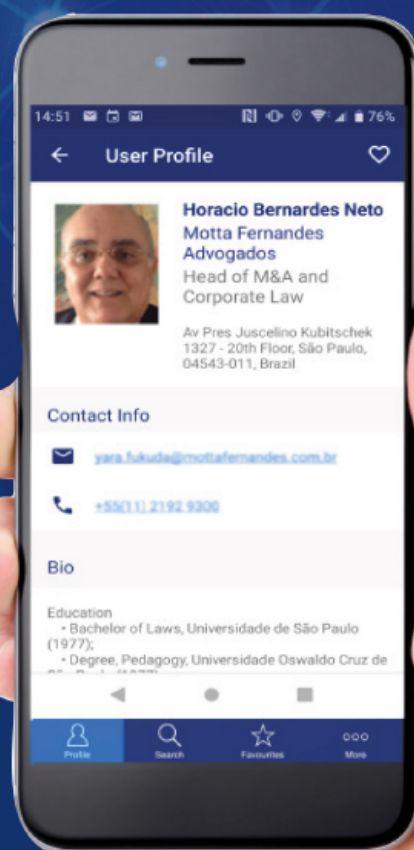
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