

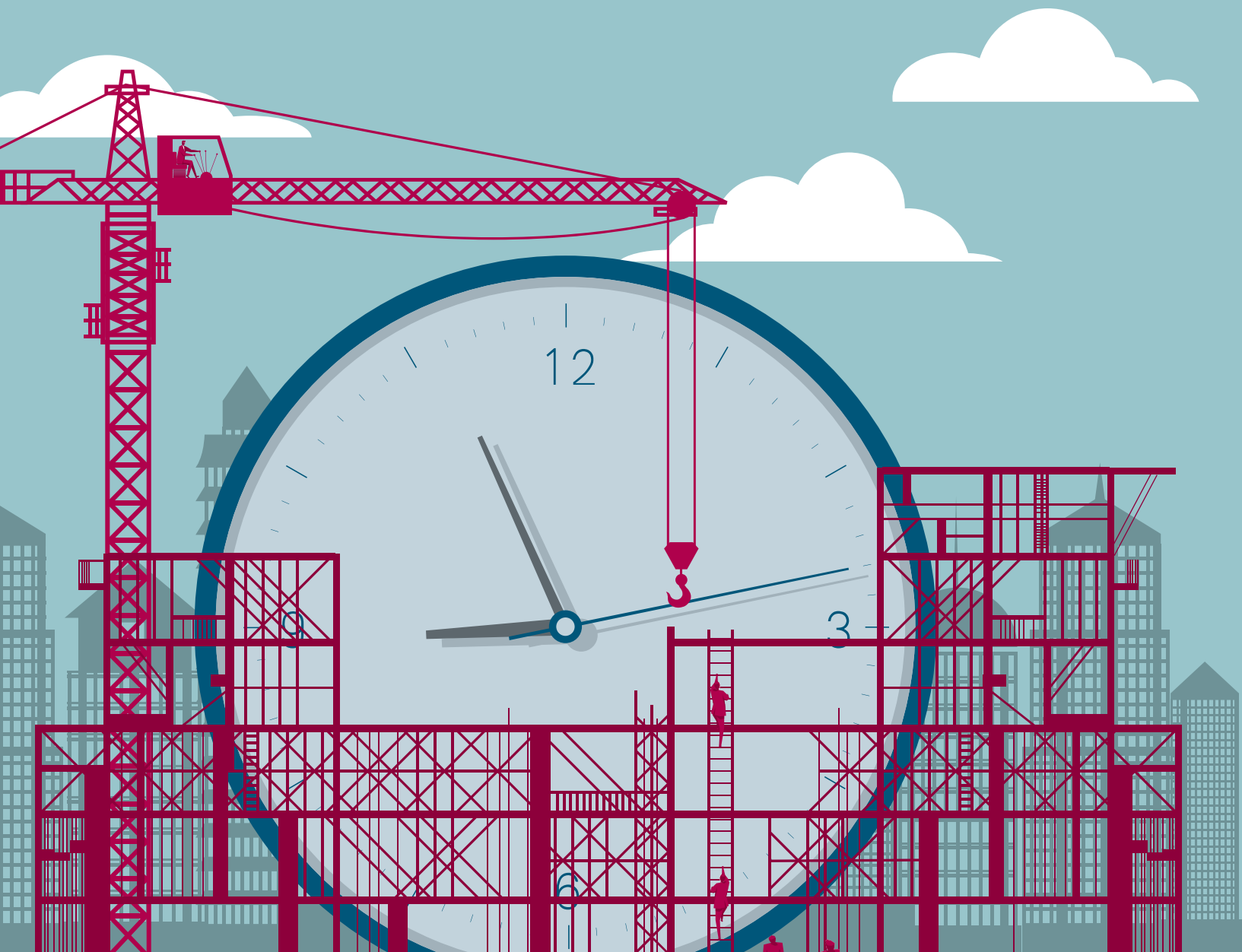
# CONSTRUCTION LAW INTERNATIONAL

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

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the global voice of  
the legal profession

**Delay analysis lore**

**Dispute resolution  
boards**

**Indemnity  
provisions**

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION



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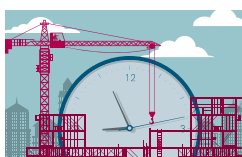
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A Committee publication from the IBA Energy, Environment, Natural Resources and Infrastructure Law Section [tinyurl.com/IBA-SEERIL](https://tinyurl.com/IBA-SEERIL)

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# FROM THE EDITORS

Dear readers,

Firstly, I want to thank Virginie Colaiuta for her leadership of the editorial team during the past two years. We have had diverse contributions largely due to Virginie's hard work. We are, however, fortunate that Virginie's expertise will stay with Construction Law International (CLInt) as she transitions to Chair of the Editorial Board.

In that regard, we extend our gratitude to Roger ter Haar QC for his experienced oversight of the Editorial Board for the past years, always ensuring the ship steered in the right direction.

We also welcome our new editors to CLInt:

- Ana Carolina Horta Barretto, *Veirano Advogados, Sao Paulo*;
- Jinlin Nan, *Zhong Lun, Shanghai*;
- Sung Hyun Hwang, *GS Engineering & Construction Corporation, Seoul*;
- Nnenna Eze, *FHN 26 Limited and First Hydrocarbon Nigeria Company Limited Nigeria*; and
- Sharon Vuillet, *Systra Korea, Seoul*.

In this first edition of CLInt for 2020, we are pleased to continue our 'FIDIC around the world' series with insights from Poland and China. Further on FIDIC, Gordon Jaynes addresses a series of question that highlight the pitfalls of a party having to provide security in respect of a Dispute Avoidance Board decision.

We have a number of feature articles ranging from considerations of dispute boards in Austria by Thomas Frad, to rethinking the resolution of construction disputes by John Hinchey.

From Australia Matthew Muir and James Arklay consider a Supreme Court case which gives cautionary guidance on delay analysis lore. Roberta Downey discusses winning delay claims, based on the paper presented at the ICP Working Weekend in Athens in 2019, and Alexandre Arlota and Marc-Henrik Werner consider delays in construction projects in Brazil.

In Asia, Sung Hyun Hwang discusses preventative legal measures under Korean Law against unjust bond calls. We have two book reviews in this edition: Bill Barton has reviewed Richard Davis' *Construction Insolvency: Security, Risk and Renewal in Construction Contracts*, and Thayananthan Baskaran has reviewed Eckart J Brodermann's book *UNIDROIT Principles of International Commercial Contracts, An Article-by-Article Commentary*.

This issue of CLInt certainly provides diverse perspectives on international construction issues. 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](mailto:CLInt.submissions@int-bar.org).

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# FROM THE CO-CHAIRS

Dear International Construction Projects Committee members,

1 January 2020 marked not only the end of a decade and the beginning of a new year; it also marked the official end of our two-year term and change in leadership of the International Construction Projects Committee (ICP) (though unofficially this is traditionally done during the IBA Annual Conference every second year). As in the past, the Vice-Chairs have assumed the roles so your new Co-Chairs are Ricardo E Barreiro-Deymonnaz of Buenos Aires and Shona Frame of Glasgow. Many of you already know them from their long history of activity in the ICP; others may have met them at past IBA Annual Conferences, ICP Working Weekends, and other IBA conferences and events. If not, we urge you to attend our conferences and events to meet them personally and share your thoughts, ideas and vision for the ICP so you can contribute and help to make the ICP more valuable to all members.

It has been our pleasure to have worked closely with Ricardo and Shona over the past few months to ensure a smooth and seamless leadership transition. There can be no doubt that the ICP is in very good hands. We'd also like to acknowledge and thank not only Ricardo and Shona, but all the other officers of the ICP for their considerable time, assistance and support over the past two years in making all our programmes and events so successful, especially at two Annual Conferences, the Biennial Conference on Construction Projects from Conception to Completion in Berlin in October last year, the Biennial Conference of the Section on Energy, Environment, Natural Resources and Infrastructure Law (SEERIL) in Lisbon in April 2018, and our Working Weekends in Amsterdam in 2018 and in Athens last year. And, of course, none of this would have been possible without the active support and help of so many of our ICP members.

Other than conferences, what has been accomplished? Well, over the past two years our subcommittees have been active in identifying and pursuing initiatives that we trust will prove to be of benefit to all ICP members. The Project Establishment Subcommittee has been compiling and expanding materials presented at the 2019 Working Weekend in Athens on the use of new technologies in construction, procurement and supply-chain management, which should be available in the near future. The Project Execution Subcommittee has been working on *The Anti-corruption Ready Reckoner* and an accompanying compendium that address anti-corruption issues specific to the construction industry and should be published within the next year. The Alternative Dispute Resolution (ADR) Subcommittee has published a *Country Guide to ADR* (for procurement and construction disputes), which includes 19 countries and is in the process of being expanded to include more countries (it can be obtained by searching for the title on the IBA website). Anyone interested in volunteering to assist in those endeavours, or who has ideas for other initiatives that will prove useful to all ICP members, is encouraged to let the officers of those subcommittees know (their contact information is available on the ICP pages of the IBA website).

Speaking of new technologies and methods in construction, during our ICP Working Weekend in Athens we were privileged to have Professor Theodosios Tassios as a keynote speaker to demonstrate convincingly that some of our 'new' ideas prove the old adage that 'everything old is new again'. His entertaining and interesting presentation included an account of contracting practices used by the ancient Greeks in the construction of the Parthenon, including not only the use of funded design competitions and separate, funded contractor proposals, but also the use of forms of contract we see today, including lump sum contracts, unit price contracts, and liquidated damages for delay and non-performance. Hopefully, we'll soon see a new book published by Professor Tassios that will reveal other old methods long forgotten that may become 'new' today.

Work has been progressing well at organising the next ICP Working Weekend from 15–17 May this year in Vevey, Switzerland. The main purpose of the Working Weekend, organised exclusively by the ICP and not through the IBA, is to hold a meeting of ICP officers to discuss and plan ICP business. Attendance has traditionally been limited to about 50 attendees, with priority given to existing and past officers of the ICP and the balance allocated to reflect differing legal regimes and regional, ethnic and gender diversity, giving preference where possible to those who first expressed their interest to attend immediately after the ICP business session at the end of the IBA Annual Conference each year. Several spots are always reserved for new members to welcome them to ICP. Unfortunately, by the time this issue of CLInt is published the invitation list will have been closed so anyone interested in attending in 2021 should make sure that they attend the IBA Annual Conference this year in Miami so they know when and where the 2021 Working Weekend will be held and can be among the first to email their interest to receive an invitation.

In the meantime, the ICP is working with the other committees of the Section on Energy, Environment, Natural Resources and Infrastructure Law (SEERIL) on the next Biennial Conference of the SEERIL, which is scheduled for 15–18 April in Marrakesh, Morocco. The programme theme is 'Development in an era of decarbonisation: legal challenges for industrialised and developing economies'. Please refer to the IBA website as more details of the programme become finalised.

It has come to our attention that some ICP members were not aware of calls for expressions of interest or notices of upcoming conferences until it was too late for them to participate. In the past we were able to issue such requests and notices proactively through ICP-Net, which automatically sent out notices to everyone who signed up for ICP-Net. Unfortunately, this feature is no longer available and the onus has shifted to ICP members to be proactive and to access ICP-Net themselves through the IBA website using the following link: [www.ibanet.org/LPD/SEERIL/Intl\\_Construction\\_Projects/ICP\\_terms\\_of\\_use.aspx](http://www.ibanet.org/LPD/SEERIL/Intl_Construction_Projects/ICP_terms_of_use.aspx). Until a new system is developed by the IBA to allow postings and threads to automatically be pushed out to all members, everyone is strongly encouraged to periodically log on to the IBA website (at least once a week) to ensure they are aware of all notices from the ICP of upcoming events and requests for expressions of interest. At the same time, it is hoped they will take the opportunity to take part in discussions on ICP-Net, whether to post questions, answers or otherwise contribute to discussions on ICP-Net.

In closing this, our last column, we'd like to thank all writers, editors and readers of CLInt over the past two years for continuing to make it one of the most successful newsletters of the IBA. To show your support of these efforts, please circulate your copies, and articles from CLInt, as widely as possible within your firm and other organisations to which you belong. Hopefully, the value they see in the articles will encourage them to submit their own articles as well as to become members of the ICP and the IBA.

Thank you for the honour of having been given the opportunity to serve you over the past two years.

Helmut Johannsen and Jaime Gray  
ICP Co-Chairs 2018–2019

# IBA App – additional functionality now added

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The IBA App has been updated to become even more user friendly, providing you with the latest legal news, updates and content while on the move.

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## POLAND

### FIDIC around the world: Poland

Dr Joanna Rupa

*Friedrich Graf von Westphalen & Partner,  
Cologne*

In this questionnaire, references to FIDIC clauses are references to clauses in the 1999 Red Book.

#### 1. What is your jurisdiction?

Poland.

#### 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 forms of contract are frequently used in Poland, primarily for domestic projects for construction of buildings and large infrastructure projects (construction of roads and motorways), but also for civil engineering works in the private sector.

The most commonly used FIDIC forms of contract are Conditions of Contract for Construction (1999 Red Book), but also Conditions of Contract for Plant and Design-Build (Yellow Book) and Conditions of Contract for Design, Build and Operate Projects (Gold Book). The Short Form of Contract (Green Book) is also used often for projects carried out in Poland.

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

The FIDIC forms are available and commonly used in Polish, even for

the projects with a foreign element. The translations of the Red Book, Yellow Book, Golden Book and Green Book was prepared under the patronage of the Polish Association of Consulting Engineers and Experts (Stowarzyszenie Inżynierów Doradców i Rzeczoznawców).

#### 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?

Generally, parties are permitted to arrange a contractual relationship at their sole discretion under Polish law as long as the content or purpose of the contract is not contrary to the nature of the relationship, the law or the principles of community life (Article 353 (1) of the Polish Civil Code). FIDIC conditions might form the basis of a contractual relationship; however, some of the FIDIC terms contradict mandatory provisions of Polish law.

For example, according to the Civil Code, the regular term for asserting a claim associated with business operations is three years and changing the limitation periods in a contractual way is not allowed (Article 119). In this regard, Sub-Clause 20.1 of the FIDIC forms of contract, as far as it excludes the Contractor's right to claim an extension of time or additional payment after the expiry of 28 days, might be invalid under some circumstances (see the response to question 7).

Some clauses, such as Sub-Clause 8.7, require interpretation adjustments to existing national legal instruments, rather than amendments.

Furthermore, considering the fact that FIDIC terms of contract are commonly used for public procurement projects, the provisions of the Polish Procurement Act need also to be taken into account. According to its Article 144, changes to the contractual provisions modifying the offer are not permitted. This would lead to the loss of the importance of Clause 13, regulating the variation procedures.

In line with Article 144 of the Polish Procurement Act, an example is that changes to the works that require the contracting of additional services are conceptually a distinct matter from an amendment to the contract due to a variation. These examples are not exhaustive.

#### 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?

Due to the common use of the FIDIC Conditions of Contract for contracts awarded under the public procurement procedure, a number of FIDIC Sub-Clauses are amended. The majority of these amendments consider the reduction of a Contractor's rights and an increase of its obligations, as well as changes in the provisions, to reflect local regulatory requirements.

#### 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)?

There is case law (eg, Case No XXV C 1328/15 dated 14 July 2016 and Case No XXV C 1328/15 dated 28 September 2016 in the Warsaw District Court) with respect to the interpretation of Sub-Clause 2.5 under Polish law, which concentrates on the conditions of a valid deduction from the contract price. In general, Polish law permits the parties to arrange a contractual relationship at their sole discretion (see the response to question 4). This also applies for regulating the conditions of asserting and deducting claims in the contract deviating from the legal regulations. The Polish jurisdiction treats the 'notification' stated in the Sub-Clause 2.5 as a condition that needs to be complied with to assert the claims or make a deduction to the contract price.

There are no court decisions or (published) arbitration awards dealing with Sub-Clause 2.5 as a precondition to Employer's claims. It is worth mentioning, that this Sub-Clause is often modified in contracts awarded under the public procurement procedure.

**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 are two opposing views in Polish law regarding the nature, validity and consequences of Sub-Clause 20.1 of the FIDIC Conditions of Contract. Under one view, Sub-Clause 20.1 is invalid. The Civil Code prohibits the change of limitation periods in contracts (Article 119). In a judgment dated 11 June 2012 (Case No XXV C 647/11) the Warsaw District Court defined the notification period provided by Sub-Clause 20.1 as a limitation period and determined that a sanction for failure to comply with the notification period would have the same results as a sanction for taking action after the limitation periods. As a consequence, Sub-Clause 20.1 is a violation of the mandatory law. According to the opposing view, Sub-Clause 20.1 is not a modification of the limitation period but only a contractual agreed term under which claims are made, which is permitted under Polish law. The Supreme Court declared this in its judgment dated 23 March 2017 (Case No V CSK 449/16). At the same time, the Supreme Court ruled that the validity of such contractual provisions needs to be proved having regard to the particular circumstances of the case against the general rules of the law, especially Articles 353 (1) and 56 of the Polish Civil Code. In that particular case, Sub-Clause 20.1 was declared as invalid.

**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 answer 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?**

There is a practice of using dispute boards under FIDIC contracts performed in Poland, but it is not widespread.

In light of Polish case law, if parties agreed on the application of the Sub-Clause 20.2, enforcing the decision of dispute boards is a necessary precondition to initiating arbitration (Case No II CSK 327/14 dated 6 February 2015 r and Case No IV CSK 443/14 dated 19 March 2015 r in the Supreme Court). Dispute board decisions might be enforced in a similar way to decisions made by an arbitration tribunal according to the Civil Procedure Code (Article 1212) once certified by the court.

**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 generally used in Poland to resolve disputes arising under FIDIC contracts. However, institutional arbitration seems to be increasingly popular, compared to ad hoc arbitration. The most common institutions that parties choose include the arbitration tribunal of the Polish Chamber of Commerce (Sąd Arbitrażowy przy Krajowej Izbie Gospodarczej), the arbitration tribunal of the Association of Consulting Engineers and Experts (Sąd Arbitrażowy przy Stowarzyszenie Inżynierów Doradców i Rzeczoznawców) and the arbitration tribunal of the Polish Confederation

of Private Employers Lewiatan (Sąd Arbitrażowy przy Polskiej Konfederacji Pracodawców Prywatnych Lewiatan). The international arbitration institutions, such as International Chamber of Commerce or the London Court of International Arbitration, are chosen by the parties in some cross-border projects.

Notwithstanding this, in some FIDIC contracts, the parties exclude both dispute boards and arbitration in favour of national courts.

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

There are not many court decisions that interpret FIDIC terms. The most important ones are referred to in the answers to question 6, 7 and 9. However, it is worthwhile to refer to the judgment of the Supreme Court dated 13 September 2017 (Case No IV CSK 578/16), which confirms that the FIDIC terms are general contract terms and shall apply as agreed between the parties insofar as they are not in conflict with the law. Another significant judgment of the Supreme Court, dated 29 April 2016 (Case No I CSK 306/15), confirms that the general rules of interpretation (Article 65 of the Civil Code) also apply to the interpretation of FIDIC terms.

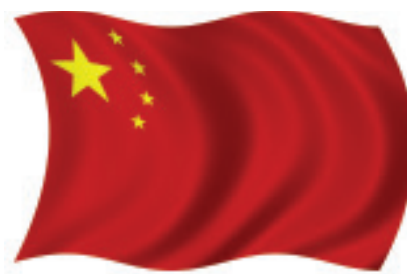
**12. Is there anything else specific to your jurisdiction and relevant to the use of FIDIC on projects being constructed in your jurisdiction that you would like to share?**

Due to the fact that the FIDIC Conditions of Contract are often applicable to contracts awarded under the public procurement procedure, two things are specific when using FIDIC terms in Poland. First, the FIDIC terms are usually changed in favour of the government Employer. Second, the Public Procurement Act provides special procedures from the National Board of Appeal regarding disputes arising during public procurement. Particularly, FIDIC conditions or



modified FIDIC conditions often have been issued in proceedings from the National Board of Appeal. Decisions of the National Board of Appeal are generally not binding, but they affect the practical use of the FIDIC Conditions of Contract.

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## CHINA

### FIDIC around the world: China

Jinlin Nan  
*Zhonglun Law Firm, Shanghai*

In this questionnaire, references to FIDIC clauses are references to clauses in the 1999 Red Book.

**1. What is your jurisdiction?**  
China.

**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?**

Normally, for foreign-investment projects in China, the FIDIC forms are frequently preferred by the Employer, especially when the funds are from multilateral development banks, such as the World Bank. However, the standard template issued by the Ministry of Housing and Urban-Rural Development, which includes

versions for construction, design and engineering, procurement and construction (EPC), are more widely used when both the Employer and Contractor are domestic companies. The Ministry drafted the template contract in reference to the FIDIC version, particularly the structural form and clauses.

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

The FIDIC 1999 forms were translated into Chinese by the China National Association of Engineering Consultants, as authorised by FIDIC. The 2017 forms have not been translated into Chinese yet. Chinese-language FIDIC contracts are recognised by authorities in most places.

**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?**

Yes, there are amendments required for the FIDIC Conditions to be operative. The usual way is that parties write the contract on the FIDIC general conditions and do not draft a new particular condition. Occasionally when we are involved in the drafting work, we recommend that the parties keep the general conditions as they are and draft a particular condition and putting the revised term in it.

Regarding the frequently revised clauses, there are some clauses under the general conditions that are in conflict with mandatory regulations in China, such as that a foreign arbitration tribunal (such as the International Chamber of Commerce) shall not be selected when the contractual relationship lacks foreign elements and that the completion and acceptance standards must meet the requirement of regulations issued by the government besides the requirements of Employers. The nominated subcontract in the FIDIC Conditions of Contract is also not allowed in China.

**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?**

No, there are not common amendments in China except the mandatory clauses stated in the answer to question 4.

**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)?**

There is no mandatory requirement to treat Sub-Clause 2.5 as a precondition to Employer claims. Chinese laws recognise freedom of contract and it very much depends on the contract terms agreed. Normally, the Employer claim occurs at the time of the final account and occasionally the court would prefer to select a third party to do the evaluation of the claimed work if there is no precondition clause to restrict such claim in the contract.

**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 mandatory restriction on treating Sub-Clause 20.1 as a precondition to Contractor claims. Under Chinese law, the issues related to Contractor claims for extension of time and money, whether such claims arise from Variations or not, shall comply with the contract signed by the parties and be in line with the true and common intention of the parties.

For some cases the court recognises the precondition to a Contractor's claim, such as duly giving notice of claim, based on freedom of contract. But it very much depends on how the Employer's lawyer presents the claim in court.

**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 answer 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?**

No, in the construction sector in China an interim dispute resolution such as a decision of a dispute adjudication board (DAB) or dispute avoidance adjudication board (DAAB) is unusual. Most contracts would stipulate that both parties shall actively communicate and negotiate when a dispute arises. If the dispute cannot be settled through top-level negotiation by the parties, a court or arbitration procedure shall be triggered.

**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?**

Both arbitration and court are common for dispute resolution in the construction field in China, depending on the parties' preferences. For arbitration, the China International Economic and Trade Arbitration Commission is frequently chosen as the arbitration commission for purely domestic construction projects.

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

In an interesting case in 2013, the Intermediate Court of Chongqing considered the role of the Engineer under the contract (as in FIDIC Red Book 1999) regarding the variation orders. Although the case was amicably settled in the court, the judge recognised the FIDIC contract terms and interpretation of the independent Engineer role in accordance with FIDIC.

**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?**

In China, apart from the conditions stipulated in Sub-Clause 10.2, a project shall be taken over after a joint check by the Employer, Contractor, Engineer, Designer and Supervisor (called the five-party check and acceptance) and passing a fire protection test by the fire department of the public security office. This process is a mandatory condition for the Taking-Over Certificate.

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## FIDIC COMMENTARIES

### A FIDIC pitfall perpetuated

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FIDIC's concept of requiring the Party receiving a dispute board award of money to provide to the paying Party security for the payment pending the award becoming final appeared in 2007. The evolution of the provision into its appearance in FIDIC's Gold Book (2008) is mentioned in passing in 31 Const L J 7 (2015) at p 415, where it was noted as a brief insertion in the FIDIC Guidance Memorandum of 1 April 2011. Despite its brevity, the insertion stood out because it had no relevance to the rest of the Memorandum, which recommended amendments to Clause 20 intended to enable a failure to comply with a binding-but-not-final dispute board decision to be referred to arbitration without having first to obtain a further dispute board decision and undertake amicable settlement efforts. Those amendments were FIDIC's response to the *Persero* court decisions in Singapore in 2010 and 2011.

The concept of providing security was to be inserted as a new penultimate paragraph for Sub-Clause 20.4 of the 1999 First Edition of the Red, Yellow and Silver Books: 'If the decision of the DAB requires the payment by one Party to the other Party, the DAB may require the payee to provide an appropriate security in respect of such payment'.

Obviously, the concept was problematic.

What are the criteria which the DAB should consider in deciding whether to require the security? Should it be for every payment irrespective of the nature of the payment? For example, should it apply to a decision that the Contractor should pay the Employer delay damages? Should the security be for every payment irrespective of amount? If the payment is an amount to be paid over time, should the security be reduced as payments are made, and if so, how and by whom – the dispute board? The payer? The payee?

What constitutes 'appropriate' security? A surety? A bank guarantee? A pledge of non-monetary property? Does the Party providing the security have choice of the form of security or is the form to be determined by the dispute board? Should the security be irrevocable? Unconditional? Payable in full at first demand? Must the security be issued in the country of the project or can it be issued in a foreign country? Is the judgment of the dispute board on what is 'appropriate' binding unless and until modified in arbitration or litigation? What if the Party to whom the payment is to be made is unable, for reasons not its fault, to obtain an appropriate security – does that extinguish the right to the receipt of the payment?

When is the security required to be furnished? Before the paying Party makes payment? If so, what happens if security is provided but the Party that was to make the payment fails to do so? Should there be the equivalent of a

'closing' at which the payment and the provision of security are exchanged? If so, should the dispute board be the entity conducting the exchange? If another entity is used to effect the exchange, such as an escrow agent, how is such entity selected and what security of such agent's good performance is to be obtained?

What is to be the duration of the security? If we assume what is likely, that is, that the amount of money is significant, there is a significant risk that the dispute to which the payment relates may not be resolved finally until the dispute is the subject of a final award in arbitration or the final decision of a court, which may take some years and involve extensions or renewals of the security. Even when the final award or decision is obtained, such award or decision may have to be enforced, which may involve additional duration for the security.

Who bears the cost of the security? Presumably the Party that the dispute board ordered to pay was (in the view of the board) wrongfully failing to pay: if so, should payment of the cost of the security be a condition precedent to the entitlement to receive the security? With the possible exception of a nation state, a person furnishing security normally suffers a corresponding restriction upon borrowing or bonding capacity for other purposes, thus, for example, prejudicing a Contractor's ability to supply performance guarantees in order to secure other work. Should this be taken into account? If so, how?

Why restrict the requirement of 'suitable security' to dispute board decisions requiring 'payment'? Might it not be just as appropriate for obligations to do work? If near to the time for Completion, a variation is instructed and performance will entitle the Contractor to additional time, should the Employer be required to provide 'suitable security' to the Contractor for the Employer's obligation to adjust the date(s) for Completion?

These questions and problems were raised during FIDIC's 'friendly review' process prior to the publication of the 2017 second editions of the Red, Yellow and Silver Books. Whether as a consequence or for other reasons, what FIDIC published was a provision that introduces even more problems:

'If the decision of the DAAB requires a payment of an amount by one Party to the other Party:

(i) subject to sub-paragraph (ii) below, this amount shall be immediately due and payable without any certification or Notice; and

(ii) the DAAB may (as part of the decision), at the request of a Party but only if there are reasonable grounds for the DAAB to believe that the payee will be unable to repay such amount in the event that the decision is reversed under Sub-Clause 21.6 [Arbitration], require the payee to provide an appropriate security (at the DAAB's sole discretion) in respect of such amount.' [Sub-Clause 21.4.3]

It will be noted that the 2017 provision has what seems to be a new requirement, which is that the DAAB is to act 'at the request of a Party' and seemingly not on its own initiative. There is no indication of the time at which the request is to be made to the DAAB. Should the ability to pay be allowed to be raised at the time of the Engineer's endeavours to 'agree' the resolution of the claim? If it is allowed, can it be raised again if no agreement is reached and the Engineer has begun the 'determining'? If it is not raised earlier, can it be raised after the Engineer's determination? If yes, must it be raised at the same time as the notice of dissatisfaction with the Engineer's determination, or can it be raised later? If the latter, what is the effect on the time limit for the DAAB decision?

What if the DAAB decision on an amount to be paid is not 'reversed' but simply modified, perhaps to a lesser or greater amount, does that

affect entitlement to make use of the security, and if yes, how?

Suppose that no request is made by a Party but a DAAB member becomes aware after referral to the DAAB that the Party seeking a payment is in financial difficulty and may be unable to repay later if the right to payment is not upheld in arbitration – can such DAAB member raise the matter? If yes, should the member do so?

Does the request affect the time limit for the DAAB's decision? Can either Party ask for a hearing by the DAAB on the issue of ability to repay? Can either Party make written submissions to the DAAB on ability to repay? Can the Parties introduce independent expert evidence on the issue? Would such evidence be within the intent of DAAB Procedural Rule 5.1(d), and if yes, can the party who may have to repay have the power to block the use of such expert evidence?

If 'suitable security' has been provided in response to the DAAB requirement, can the providing Party 'redeem' the security and settle the amount finally determined to be due by means other than use of the security?

Aside from these procedural questions, what are 'reasonable grounds' for belief of future inability to repay if obliged to do so? How can a DAAB member – or anyone – make such a judgment when the obligation to repay may not arise until some years after the obligation to pay was established? The risk of such an eventuality seems unavoidable in a system providing timely decisions which are binding but not final because they may be subject to later revision. If so, there seems to be solid reasons to leave that risk where it fell at the time of the binding (but perhaps not final) decision.

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## Dispute resolution boards under Austrian law

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In Austria, disputes arising out of construction agreements are most commonly dealt with by ordinary courts. If both parties agree to an arbitration or mediation agreement, their dispute can be solved by an arbitral tribunal or through mediation. However, if one party does not agree with the outcome, this party can still challenge it before a court. Recently, the question of if and how dispute adjudication boards (DABs) might be used in Austria arose. As in most civil law jurisdictions, the implication of mechanisms, developed under common law, can be quite challenging.

As mentioned, there are existing alternative dispute resolution methods in Austria, such as arbitration, mediation and expert determination (*Schiedsgutachten*). Although parties commonly use standardised contracts, such as the ÖNORM B 2110, those do not provide a means of alternative dispute resolution. Should the parties desire alternative means of dispute resolution, they might use FIDIC contracts as standardised contracts.

Dispute adjudication is a means of dispute resolution, which has no legal background in Austria. In contrast to Germany's *Streitschlichtungsordnung Bauwesen* ('SL Bau'), there are no similar proceedings in place.

The purpose of the DAB is to settle disputes through a ruling,

which is, at least preliminarily, binding but not enforceable. The parties are free to decide whether this procedure is obligatory or not. The DAB is no arbitral tribunal, at least according to FIDIC Contracts. Furthermore, it cannot be classified as mediation since it can render a decision. The DAB's task is to ascertain disputed facts, to subsume them under the applicable law and to reach a decision.

Contrary to the prevalent view in Germany, in Austria it cannot be qualified as an expert's determination as well. An expert might determine facts, supplement, amend or replace the will of the parties or clarify the contents of the contract. According to Götz-Sebastian Hök, the German assumption of the DAB's nature can only be explained through the reasoning that it is, in fact, no arbitration. In the absence of alternatives, there is no other reasonable way than to qualify it as an expert determination.

From an Austrian perspective, the DAB is a contractual instrument to resolve disputes, which is, in accordance with the principle of private autonomy, admissible. Similar to the Engineer's Determination under FIDIC contracts, the DAB acts as a third party, which is entitled to determine the contractual rights of the parties. Following the prevailing view, these rights are qualified as '*Bestimmung vertraglicher Leistungen durch einen Dritten*' ('Determination of contractual rights through a third party') pursuant to section 1056 of the Austrian Civil Code. Under Austrian law, the DAB's decision is

therefore binding but non-enforceable without a further decision of a court or an arbitral tribunal, depending on the contract. This result is in line with the FIDIC rules or other contractual rules for dispute adjudication.

At present there are no ambitions to implement further alternative dispute resolutions methods in Austria. Due to the complexity of bigger construction projects and the duration and costs of court proceedings, alternative forms of dispute resolution are desperately demanded.

The development and implementation of alternative dispute resolutions – as in Germany through the SL Bau – should therefore be discussed in Austria as well. In contrast to the traditional means of dispute resolution, such as mediation and arbitration, the means of the FIDIC terms or the SL Bau provide different ways to resolve disputes.

It remains questionable if dispute adjudication can be implemented as a special procedural model and if disputes in construction cases may be legally shifted to DABs. Dispute adjudication, however, provides means that are not achievable through state courts and, to some extent, arbitration.

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# Rethinking resolution of construction disputes

Over the past three decades, construction industry leaders and organisations have been increasingly concerned with how best to avoid disputes, but if not avoided, how to resolve those disputes in the most cost-efficient and timely manner.

**I**t is an unremarkable fact that disputes among contracting parties are common in the construction industry, often leading to arbitration and litigation. However, the same industry has a rich tradition of creating and experimenting with alternatives to litigation. Some have characterised this innovative process as analogous to a ‘laboratory’, noting that: ‘The construction industry represents not only the cutting edge of experience with dispute resolution processes, but also the spearhead of experimentation with

mechanisms aimed at avoiding disputes by attacking the roots of controversy’.<sup>1</sup>

And yet, this continual searching for the most effective, the most cost efficient or even the ‘best’ process tends to mask what may be the most important value of alternative dispute resolution. This article briefly surveys the spectrum of techniques and processes to avoid and resolve disputes and concludes that the goal should not be to discover some ideal or optimum process, but rather to determine which technique or process best suits the values and objectives of the affected parties.

## The spectrum of dispute avoidance

The primary theme of dispute avoidance efforts has been that parties to construction contracts should structure their relationships and take appropriate action to prevent disputes from arising on the job. The spectrum of dispute avoidance techniques has included enlightened risk allocation in contracting, efforts to improve quality and efficiency of work performed, and the use of incentives for exceptional performance. In the 1980s, for example, the emphasis was on improvement of quality of work. The term used was 'quality assurance' (QA), and then in the late 1980s, it became 'total quality management' (TQM).<sup>2</sup> The emphasis then shifted in the 1990s to project delivery strategies to encourage and motivate the parties to work in a non-adversarial manner. Different approaches evolved in the United Kingdom and United States to achieve these project delivery objectives – in the US the 'partnering' or 'project neutral' model was in fashion.<sup>3</sup> In the UK and Australia, it was the 'project alliancing' model that led the way,<sup>4</sup> followed by the US version of alliancing, better known as 'integrated project delivery'.<sup>5</sup>

However, these dispute avoidance techniques should not be confused with procedures to resolve disputes once they arise. Even so, one hears industry representatives opining, for example, that they prefer negotiation or mediation over arbitration, which is little more than recognising an obvious preference to avoid or settle disputes rather than going to trial or arbitration.<sup>6</sup> Without question, in any regime of relational contracts, construction contracts being prime examples, the parties should begin with a view to avoiding or preventing disputes from arising.

## The spectrum of construction dispute resolution

If a construction dispute cannot be avoided, the industry believes that it should be resolved by the most effective and cost-efficient means possible.<sup>7</sup> As with dispute avoidance, the construction community has been particularly proactive and creative in developing new techniques, processes, rules and various protocols, guidelines and practice pointers, all with a view to reducing the scope, time and cost of resolving construction disputes.<sup>8</sup>

As a first step, it is difficult to argue against the proposition that parties should attempt to meet and negotiate solutions to their disputes, as they normally do. During the 1990s, especially on the North American scene, construction contracts began to mandate exchanges of relevant documents and information, followed by required negotiation, the assumption being that a prime cause of construction disputes is insufficient knowledge by either or both parties to the dispute, that is, the more facts that can be placed on the table, the more discernible the solution to the problem.<sup>9</sup>

Because sooner is better when it comes to resolving construction disputes, several approaches have been taken to resolve construction disputes on the job, some in 'real time' while the work is being performed. Generally, these arbitration-alternative procedures are non-binding in the sense that the parties are not bound to resolve or accept a decision or recommendation for resolving their dispute, even though the parties may be contractually or legally obligated to go forward with the process, that is, the process is a mandatory requirement.<sup>10</sup>

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*In any regime of relational contracts, construction contracts being prime examples, the parties should begin with a view to avoiding or preventing disputes from arising.*

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One of the earliest examples of on-the-job dispute resolution was the engineer's historical role as the professional peacekeeper between the employer and contractor. However, the fact that the designer or engineer was traditionally hired by the employer led to concerns about the engineer's independence and neutrality in decision-making. As a result, most construction standard form contracts have now relieved the engineer or design professional of the traditional obligation to perform an adjudicative role on disputes between the employer and contractor. Instead, the traditional decision-making role of the architect and engineer is migrating to presumably independent third parties, such as 'independent decision-makers' and dispute adjudication boards.<sup>11</sup> As an example, the latest FIDIC form contracts have effectively removed the engineer from a disputes decision-making role, replacing it with a



required submission to a dispute avoidance/adjudication board (DAAB), followed by arbitration or litigation.<sup>12</sup> In fact, many construction contracts and dispute resolution provisions now require a succession of mandatory negotiation, which, if unsuccessful, then leads to required mediation or conciliation, which are conditions to proceeding with arbitration or litigation.<sup>13</sup>

Even though mediation, conciliation and dispute review boards have proven demonstrably effective in resolving construction disputes, they should not be viewed as ‘either-or’ alternatives to arbitration. Instead, these structured negotiation procedures with the assistance of third parties should be viewed as a prelude or as filters to arbitration or litigation. That is to say that the probable and desirable consequence of this filtered or tiered approach to dispute resolution is that only the most intractable and difficult disputes will go to the more elaborate, costly, time-consuming, trial-like arbitration procedures as a last resort.

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*Structured negotiation procedures with the assistance of third parties should be viewed as a prelude or as filters to arbitration or litigation.*

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#### **Efforts to reduce time and cost of arbitration**

That the arbitral process takes too long or costs too much is a top concern about commercial arbitration generally, and particularly so in the construction and technology sectors of the business community.<sup>14</sup> A sobering example in the US occurred in 2007 when the American Institute of Architects dropped arbitration as the default process for ultimately resolving construction disputes in their suite of contract forms.<sup>15</sup> Now, the parties must affirmatively elect to arbitrate.

Over the past 20 years or so, growing concern about the increasing time and cost of arbitration has prompted arbitral institutions, industry and bar organisations, and even legislatures, to develop faster, more efficient and generally cheaper adjudication processes for deciding construction disputes. In the UK, for example, the procedure that the industry thought might have success in reducing the time and cost of construction dispute resolution was statutory adjudication.<sup>16</sup> Enacted in the mid-1990s, it was said that the underlying purpose of

statutory adjudication was to provide a ‘pay now, litigate later’ solution on the assumption that anything that goes awry can be cured in subsequent litigation or arbitration.<sup>17</sup>

Under the English version of statutory adjudication, a party to a ‘construction contract’, as defined, has the right to refer a dispute arising under the contract for statutory adjudication under specified procedures providing for:

- a written notice of adjudication, briefly stating a description of the dispute, names of parties, details of where and when the dispute has arisen, and the nature of redress sought;
- after appointment of the adjudicator, the referring party must, within seven days, produce and serve on the opposing party pertinent information from the construction contract, including ‘such other documents as the Referring Party intends to rely upon’;
- the adjudicator is then required to ‘act impartially in carrying out his duties... in accordance with any relevant terms of the contract... [and] shall [decide] in accordance with the applicable law in relation to the contract’ and ‘shall avoid incurring unnecessary expense’;
- the adjudicator may act inquisitorially and ‘take the initiative in ascertaining the facts and the law necessary to determine the dispute’, including requesting documents or written statements, deciding the language(s) to be used and whether there shall be a hearing or meetings of the parties, making site visits, conducting tests and inspections, appointing experts, assessors or legal advisers, establishing a timetable and deadlines for responses, and generally establishing the procedure to be followed by the parties in the adjudication;
- the adjudicator’s decision is required to be made within 28 days after the date of referral (or 42 days thereafter if the referring party consents), and if requested by one of the parties, the adjudicator shall provide reasons for the decision; and
- in the absence of directions by the adjudicator relating to the time for performance of the decision, the parties are required to comply with the decision, immediately upon receipt.<sup>18</sup>

However, after approximately five years of experience with statutory adjudication, the Society of Construction Arbitrators assessed the advantages and disadvantages of statutory adjudication relative to full-scale arbitration.<sup>19</sup>

The conclusion drawn was that the perceived 'wrongs' of arbitration had been overstated and there was much to be seen as 'right' with arbitral processes. For example, there was a closer balance that could be struck as between the 28-plus day statutory adjudication process and full-scale arbitration, which often takes one to two years or more to complete. The result of this balancing analysis was the promulgation in 2004 of a set of rules to be known as the 100-Day Arbitration Procedure.<sup>20</sup>

Essentially, the 100-Day rules expanded the 28-day time period to 100 days, but beginning upon the filing of the statement of defence or counterclaim. Thereupon, a procedural conference is quickly arranged among the arbitrator and the party representatives to obtain their views on future procedures. The arbitrator is expressly granted authority to: (1) order any submission or other material to be delivered in writing or electronically; (2) take the initiative in ascertaining the facts and the law; (3) direct the manner in which the time of the hearing is to be used; (4) limit or specify the number of witnesses and/or experts to be heard orally; (5) order questions to witnesses or experts to be put and answered in writing; (6) conduct the questioning of witnesses or experts; and (7) require two or more witnesses and/or experts to give their evidence together. Finally, the arbitrator is to make an award within 30 days of the oral hearing.<sup>21</sup>

After the introduction of the 100-Day Arbitration Procedure, almost every major arbitral institution promulgated similar accelerated procedures, all in an effort to reduce the time and cost of construction arbitrations. Some examples:

In 2005, the CPR International Institute for Conflict Prevention and Resolution (the 'CPR Institute'), taking the English Statutory Adjudication and 100-Day Arbitration Procedures as guides, formed an advisory and drafting committee to develop accelerated construction arbitration procedures for use both in the US and globally. The result of this committee's work was the promulgation, effective June 2006, of the CPR Rules for Expedited Arbitration of Construction Disputes (the 'CPR Expedited Construction Rules').<sup>22</sup>

On 1 June 2007, the Institute of Arbitrators and Mediators Australia (IAMA) (now the Resolution Institute) published a new set of rules with the goal of reducing the costs associated with arbitrations and to provide

the parties with quick determinations. The stated objective of the IAMA Fast Track Rules is to enable an arbitrator to produce an award, excepting only costs, within 150 days after appointment. In general, the IAMA Fast Track Rules follow the same patterns as the English 100-Day Arbitration Procedure and the CPR Expedited Arbitration Rules.<sup>23</sup>

On 20 August 2009, the CPR Institute promulgated their Global Rules for Accelerated Commercial Arbitration (the 'CPR Global Accelerated Rules'). The CPR Global Accelerated Rules provide for a schedule 'that will result in issuance of the Award in as short a period as feasible under the circumstances, consistent with the reasonable needs of the parties, the subject matter of the arbitration and such other factors as the Arbitral Tribunal determines to be appropriate, but not later than six (6) months from the Selection of the Arbitral Tribunal'.<sup>24</sup>

Effective from 1 August 2016, the Singapore International Arbitration Centre (SIAC) issued the sixth edition of its arbitration rules, which included several new provisions for expedited arbitration. The expedited procedure significantly shortens the timeframe of arbitration with the potential to reduce costs. For example, the tribunal now has the discretion to decide whether an expedited procedure case is to be decided on the basis of documentary evidence only, and makes it clear that if there is any conflict between the terms of the arbitration agreement and the expedited procedure, the provisions in the latter will apply.<sup>25</sup>

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## *A closer balance could be struck between the 28-plus day statutory adjudication process and full-scale arbitration.*

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The Construction Industry Development Council (CIDC) of India, in cooperation with the SIAC, has established an arbitration centre in India known as the Construction Industry Arbitration Association (CIAA). The CIAA Arbitration Rules provide for tight timeframes for the appointment of arbitrators and for rendering the award. Under the CIAA Rules, the arbitrator is required to make a reasoned award within 45 days from the close of the hearing.<sup>26</sup>

Effective from 1 January 2017, the Stockholm Chamber of Commerce (SCC) adopted new Rules for Expedited Arbitrations (the 'Expedited Rules').<sup>27</sup> The Expedited

Rules mirror, to a great extent the regular Arbitration Rules, but there are distinguishing features. For example, under the Expedited Rules a sole arbitrator decides the dispute; the award is to be made within three months from the referral of the case; the number of submissions and deadlines to exchange them are limited; an award does not have to be reasoned; and a different (lower) table of costs applies.<sup>28</sup>

Effective from 1 March 2017, the International Chamber of Commerce (ICC) introduced an expedited procedure providing for a streamlined arbitration with a reduced scale of fees.<sup>29</sup> This procedure is automatically applicable in cases where the amount in dispute does not exceed US\$2m, unless the parties decide to opt out. One of the important features of the ICC Expedited Procedure Rules is that the ICC Court of Arbitration may appoint a sole arbitrator, even if the arbitration agreement provides otherwise. Other features of the ICC expedited procedure are that the case management conference convened pursuant to Article 24 of the Rules shall take place no later than 15 days after the date on which the file was transmitted to the arbitral tribunal, subject to extension by the tribunal; the tribunal has great discretion to adopt such procedures as it considers appropriate; the case may be decided solely on the basis of the documentary evidence; hearings may take place by video conference, telephone or similar means of communication; and the tribunal is required to render its award within six months from the case management conference.<sup>30</sup>

### **Situational tensions with efforts to reduce time and cost**

Although well intended, the efforts to accelerate and to reduce the time and cost of construction arbitration are in tension with certain basic interests of the parties and counsel. Ask almost any commercial person who is not then engaged in a serious dispute and you are likely to hear strong complaints about delays and costs associated with arbitration. Yet, when that same commercial person's substantial assets are at risk or if the company's very existence is on the line, concerns about getting it done quickly and cheaply often give way to greater concerns about getting it right. Another situational status that often leads

to tension in construction arbitrations is 'who wants the money?' and 'who will have to pay?' A party that is seeking to recover substantial sums is likely to press for speed and efficiency of process, whereas, the party that will ultimately write the cheque may want more time for case preparation and careful deliberation.

Typically, also, the initiating or complaining party seeking recovery will be better, if not fully, prepared to present their case and will, most likely, resist efforts to engage in prolonged document disclosure and extended written submission dates. Conversely, the responding party is often heard to claim 'surprise' or 'ambush', with pleas for more time for full disclosure of the claimant's evidence. Thus, claimants will almost always insist on speedy resolution, whereas respondents will not.

There is also the well-known fact, quite understandably, that lawyers want to be thoroughly prepared so as to lessen the risk of losing their client's case or being professionally embarrassed. Lawyers do not like ugly surprises, and neither do their clients. Further, to the point, and especially so with construction disputes, it is generally the case that the truth of the matter is likely to be found in the contemporaneous written records that were generated as the job progressed, rather than in the witness statements prepared for the arbitration. After the dispute is in full flower, truth tends to be filtered through the competing interests of the opposing parties. Construction disputes counsel know these dynamics well. Thus, they will almost always urge full production and exchange of project documentation, perhaps even the taking of depositions, to test the memories and biases of witnesses. Yet, quite obviously, because contemporaneous records usually take time to acquire and analyse, the tedious effort to 'get it right' becomes the enemy of speed and efficiency for 'getting it done'.

Other tensions can be found in the nature of the dispute. If the issue has to do with quality of workmanship or conformance to specification, the case may require less time because technical experts can usually observe and test the physical condition at issue and reach resolution relatively quickly. On the other hand, if the issue is legal or contractual in nature, such as with issues concerning wrongful termination or claims for delay, more complex questions can arise, thus requiring procedural time and energy.



And, finally, it should not be forgotten that very large, complex and high-value disputes, which formerly were resolved in the courts with much expenditure of time and expense, are now being arbitrated. Thus, there is little reason to expect that less time or less expense will be incurred when the same type of disputes are in arbitration.

## Is there an ideal process?

Especially over the past ten years or so, we have seen that various international organisations have made concerted efforts to identify and remedy the causes of cost and delay in commercial and construction arbitration.<sup>31</sup> One such conference took place in the US in 2010, sponsored by the College of Commercial Arbitrators with various other arbitral institutions, including the Chartered Institute of Arbitrators.<sup>32</sup> This conference was called as a three-day summit gathering of representatives of all segments of the business and arbitration communities, including corporate counsel, outside counsel, and the most experienced international and domestic arbitrators in the country. The purpose of the summit was threefold: (1) to identify, as precisely as possible, the causes of delay and high cost associated with arbitration proceedings; (2) to determine who or what groups were most responsible for delay and cost; and (3) to develop responsive remedial measures to lessen the time and cost of arbitration. The summit resulted in a 90-page set of findings and ‘Protocols for Expeditious, Cost-effective Commercial Arbitration’ (the ‘Protocols’). Essentially, the Protocols broke down the universe of arbitration participants into four groups: the commercial business users and their corporate in-house counsel; the arbitral institutions; outside counsel; and, of course, the arbitrators. The Protocols recognised that each of the four groups had particular opportunities and responsibilities to manage the time and cost of arbitration, and undertook to identify the precise measures that each of the four groups could take to manage and reduce time and cost.<sup>33</sup>

With similar objectives in mind, the ICC first published guidelines for efficiently and fairly arbitrating international construction disputes in 2001 (*Final Report on Construction Industry Arbitrations*).<sup>34</sup> This so-called *Final Report* provided useful guidance on a range of best practices for managing ICC and ad hoc construction arbitrations all over the

world. Following issuance of the *Final Report*, in spring 2019 the ICC issued an updated set of tools, techniques and guidelines in *ICC Commission Report: Construction Industry Arbitrations: Recommended Tools and Techniques for Effective Management*.<sup>35</sup>

This updated 2019 report, like the 2001 report, recognised that construction arbitrations are in many respects no different from other commercial arbitrations, but noted that construction cases typically raise more complex factual, technical and legal issues – such as multiple parties that may require joinder of additional parties or the consolidation of separate arbitrations, not to mention the typically huge quantities of documentary evidence. The 2019 report’s 27 pages of recommended practices read like a practice guidebook and focus on the full spectrum of processes in typical ICC construction arbitration cases – from start to finish. Its recommended tools and techniques were suggested by experienced construction arbitrators and scholars from a variety of countries, all in an effort to accommodate and harmonise the approaches of different national jurisdictions, and with the goal of reducing time and cost in construction arbitrations.<sup>36</sup>

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*Conflict can often be avoided by taking preventative measures at the inception of contracting, but not always, and at what cost?*

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## Conclusions

So, after decades of searching unceasingly for ideal techniques and processes to reduce time and cost in arbitration, what have we learned? Perhaps, to paraphrase TS Eliot, at the end of all our exploring will be to arrive where we started and know the place for the first time.<sup>37</sup> We know that conflict can often be avoided by taking preventative measures at the inception of contracting, but not always, and at what cost? We know that some disputes can be resolved while on the job, but not every dispute and not on every job. We know that time can be saved by implementing a variety of procedural techniques, including an accelerated timetable for the arbitration. However, cutting time may result in an injustice to one or both parties.

In summary, we know the causes of delay and cost, we know the remedies and we know which parties are in the best position to remediate the problems. Taking only one

example, arbitrators must be willing to at least consider making earlier decisions in the form of granting applications to dispose of substantive issues. Yet, at the same time, the tribunal must balance speed against the need for fairness and a reasonable opportunity for each party to prepare. Similarly, counsel must commit to prepare and so move the case forward consistent with an accelerated timetable. However, this time commitment may put larger law firms at an unfair advantage over solo practitioners and smaller firms that must attend to other matters.

Clearly, concerns about excessive time and cost for arbitrations are legitimate, but there is no easy or quick fix. There can be no simplification or streamlining of arbitral procedures without significant trade-offs. What is 'streamlining' and 'efficient' for one party is likely to be viewed by the opposing party as denial of due process or injustice. In the end, it may be said that the intrinsic values of arbitration are not speed or economy or even efficiency. Rather, it is party autonomy that transcends all of these alternative values, worthy though they may be. If the parties so choose, they can have speed and early finality of their dispute. On the other hand, the parties can exercise their autonomy to engage in a protracted and thorough grinding out of the issues. In either event, the choice should not be seen as reflecting the core attributes of arbitration, but rather the core values of the parties making the choice.

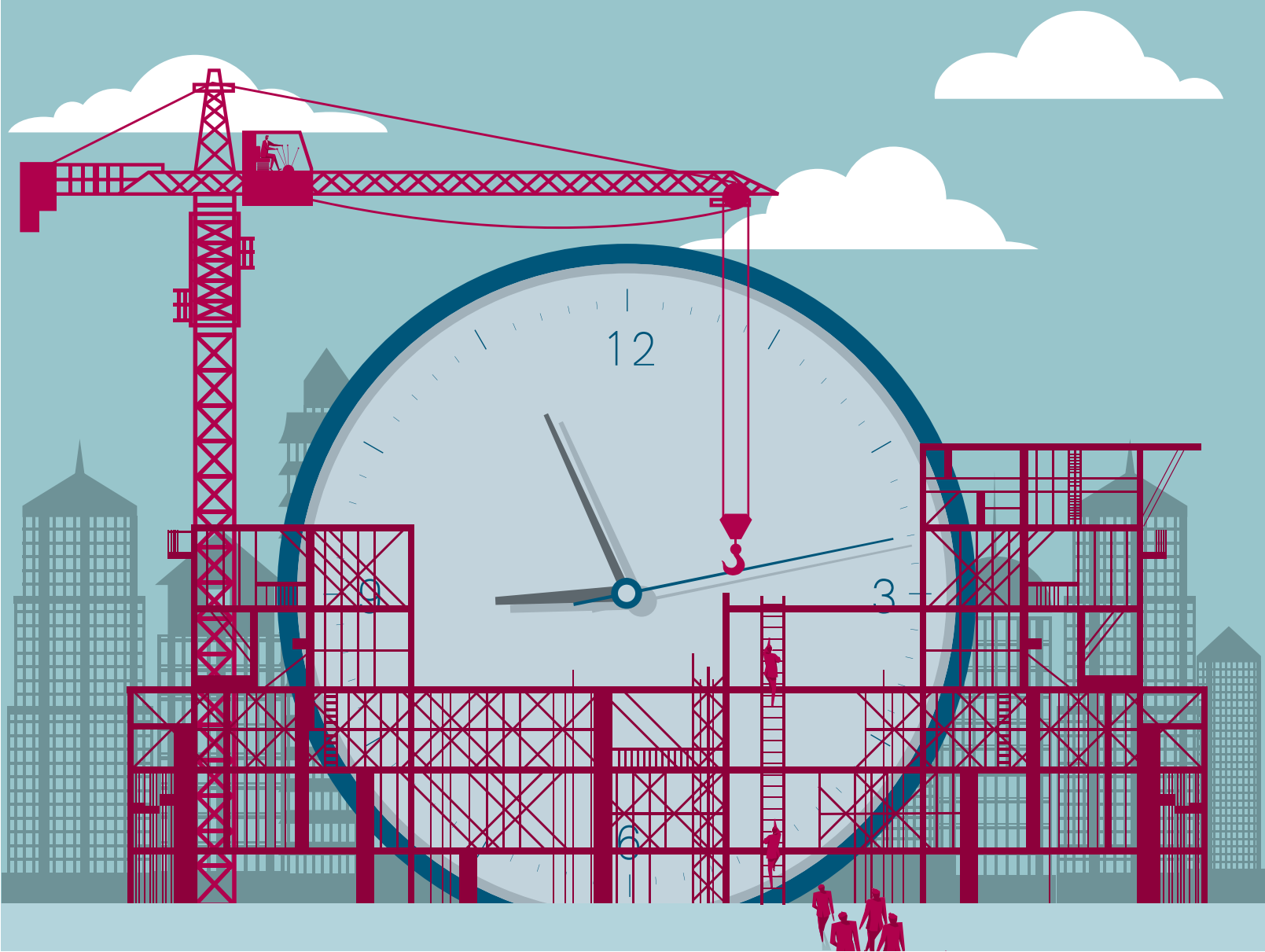
#### Notes

- 1 TJ Stipanowich, 'Beyond Arbitration: Innovation and Evolution in the United States Construction Industry,' 31 Wake Forest L Rev 65, 68 (1996).
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  - 36 ICC 2019 Report, paras 7.1, 8.2, 16.4, 16.7, 17.2 and 18.2.
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# Delay analysis lore falls short at law: cautionary guidance from the NSW Supreme Court

## Introduction

Questions of delay and responsibility for it feature in most construction disputes. Delay cases are complex and expert opinion evidence is often necessary to resolve them.

The United Kingdom Society of Construction Law's Delay and Disruption Protocol (the 'Protocol') is well known to construction industry participants for its explanation of

various methodologies that may be used to analyse delay. The Protocol describes itself as a guidance document only and disavows the notion that it should be treated as a statement of law.

Since its first edition in 2002, the Protocol has been referred to by Australian courts in numerous decisions, albeit in generally neutral terms.<sup>1</sup> In 2012, the South Australian Supreme Court arguably endorsed the

Protocol in *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)*<sup>2</sup> by finding that a delay expert's methodology should be rejected for reasons including that it was not recognised by the Protocol (or other reference texts).<sup>3</sup>

Nevertheless, in *White Constructions Pty Ltd v PBS Holdings Pty Ltd ('White')*,<sup>4</sup> the Supreme Court of New South Wales (Hammerschlag J) recognised that: 'The Protocol methods have apparently been accepted into programming or delay analysis lore'.<sup>5</sup> There is, at times, a perception in the industry that methods of analysis included in the Protocol ought to be preferred over other methodologies.

In *White*, the court rejected the party-appointed experts' evidence despite both experts having used analysis methodologies that are countenanced by the Protocol. Instead, it emphasised the need to select a delay analysis method that has regard to what actually happened on the ground and produces a common-sense analysis of the extent and cause of any actual delay.<sup>6</sup>

## Background

*White* concerned a project involving the design and construction of sewerage infrastructure. The developer sued two of its consultants for loss and damage that it alleged it had suffered due to the delayed development of the sewerage design. A large component of the damages claimed was delay costs that the developer alleged it was liable to pay to its construction contractor under their construct-only contract because of the delayed design.

The developer was therefore required to establish the delays to the project that had resulted from the design, and that such delays had caused it to suffer loss and damage. While the court found that the developer had failed to establish liability, it nevertheless addressed the parties' delay evidence.

## Experts

The parties called delay experts to give evidence. Each expert selected a different delay analysis methodology ('collapsed as-built' in the case of the consultants, and 'as-planned versus as-built windows analysis' in the case of the developer), both of which are included in the Protocol.<sup>7</sup> Each expert disagreed with the methodology that the other had adopted and how the other had applied

that methodology.<sup>8</sup> The experts' conclusions were profoundly different.

The court described the situation as follows:<sup>9</sup> 'Plainly, both experts are adept at their art. But both cannot be right. It is not inevitable that one of them is right... It is not inevitable that one of [their] methods is the appropriate one for use in this case.'

Remarking that the reports were complex – to 'the unschooled... impenetrable'<sup>10</sup> – the court used a procedure permitted by its procedural rules (but seldom used) to obtain advice from a third expert to critically evaluate the opinions and conclusions of the parties' experts.<sup>11</sup>

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*'The Protocol methods have apparently been accepted into programming or delay analysis lore'.*

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## Findings

The court considered the third expert's assistance to be invaluable, stating: 'His advice demonstrated that the complexity that has been introduced is a distraction'.<sup>12</sup> The court acted upon the third expert's advice, preferring it to the findings of either of the party-appointed experts.

On the question of the appropriate delay analysis methodology, the court found that:<sup>13</sup> '[F]or the purpose of any particular case, the fact that a method appears in the Protocol does not give it any standing, and the fact that a method, which is otherwise logical or rational... does not appear in the Protocol, does not deny it standing'.

The court found that neither of the methods adopted by the party-appointed experts was appropriate in the case at hand, and that the following instead was required:<sup>14</sup> '[C]lose consideration and examination of the actual evidence of what was happening on the ground [to] reveal if the delay in approving the sewerage design actually played a role in delaying the project and, if so, how and by how much. In effect... a common law, common sense approach to causation.'

## Implications

Delay cases are won or lost on the evidence, and the skill with which the available records of work on site and progress generally are marshalled and analysed. Expert evidence plays a key role, but debates over analysis

methodologies should not cloud or distract from the real issues requiring resolution.

The decision in *White* is an important reminder that complex and often expensive delay analysis will be wasted if fundamental matters, such as the available records and appropriate analysis methodology, are not carefully considered at the outset.

6 *Ibid* [196].

7 *Ibid* [189].

8 *Ibid* [15].

9 *Ibid* [18], [21].

10 *Ibid* [22].

11 Uniform Civil Procedure Rules 2005 (NSW), rule 31.54.

12 See n 4 above [3].

13 *Ibid* [3].

14 *Ibid* [3].

#### Notes

1 See, eg, *SMEC Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* (No 3) [2012] VSC 557; *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd* [2017] QSC 085; *Lucas Earthmovers Pty Limited v AngloGold Ashanti Australia Limited* [2019] FCA 1049.

2 [2012] SASC 49 (Bleby J).

3 *Ibid* [1277], [1282].

4 [2019] NSWSC 1166 (Hammerschlag J).

5 *Ibid* [190].

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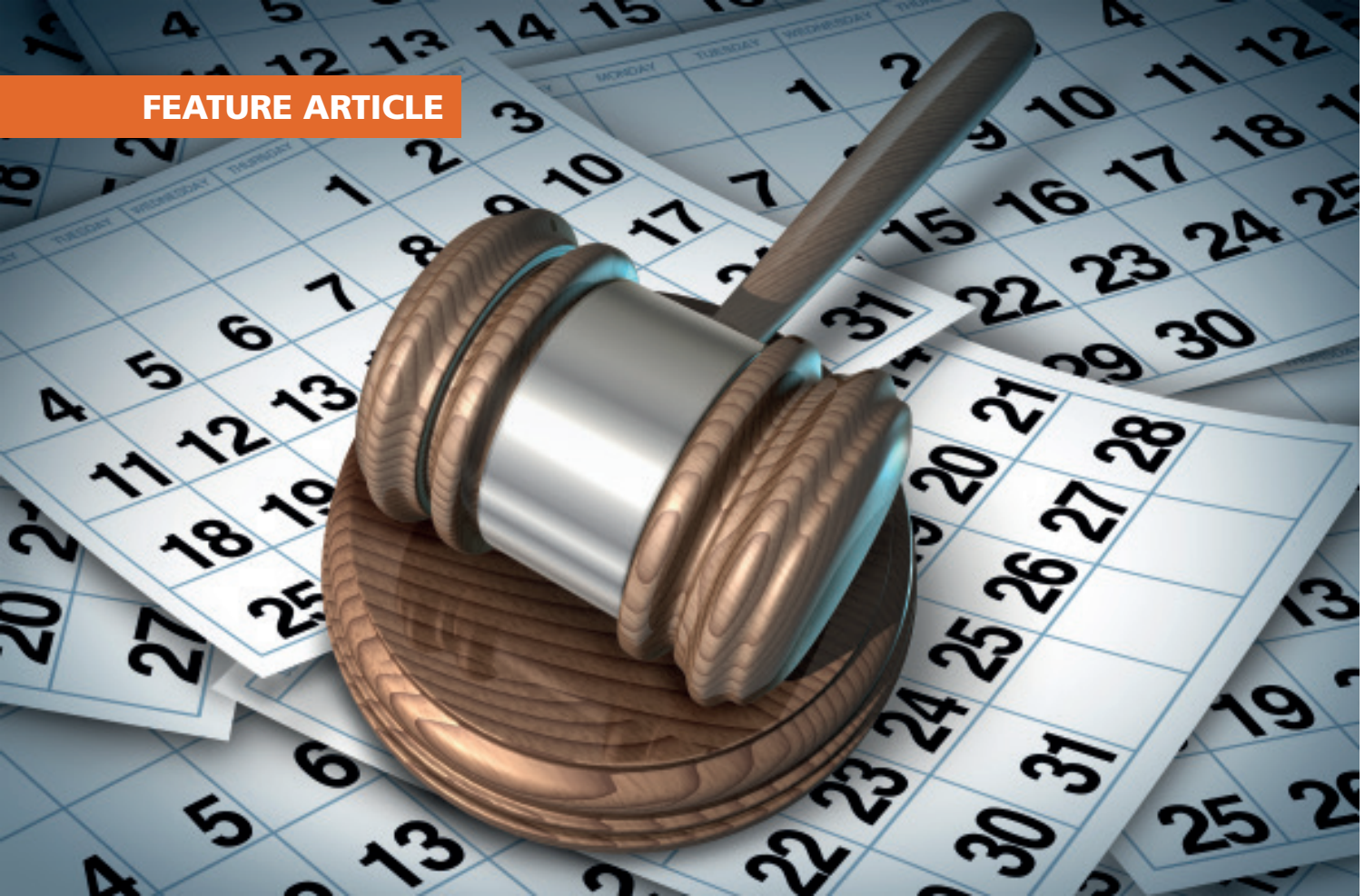


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# Time: winning delay claims

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This paper is based on a presentation at an interactive session during the International Construction Projects Committee (ICP) Working Weekend in Athens in May 2019 during which the participants considered what should happen in different scenarios where a project falls into serious delay and parties disagree about whether or not an extension of time ought to be awarded. The presentation imitated life in that earlier activities (presentations and coffee breaks) had overrun so that, even after an extension of time granted by the ICP chairs and notwithstanding accelerative measures, not all the work was completed within the time available. Accordingly, in places, this paper trespasses beyond the discussion in Athens.

## Why lawyers benefit from delay claims

The financial costs that are associated with delays are often considerable. Whoever ‘funds’ the delays in terms of paying the costs as they are incurred, responsibility will ultimately turn on what the contract says and the extent to which interim milestones or the completion date are extended.

However, deciding where that responsibility lies is far from straightforward. Although

most contracts proactively seek to allocate delay risk, it is difficult (and perhaps dangerous) to devise a regime that prescribes how to go about actually proving and assessing extensions of time but that will also be sufficiently flexible to accommodate what might actually happen at any given time during a major project and come up with a fair outcome in every scenario. Extensions of time provisions have become longer as

draftsmen try to grapple with new scenarios or decisions and remarks from tribunals, but when the parties' dispute lawyers look to the contract for answers to the issues surrounding entitlement in any given case, they still find much has been left ambiguous, unsaid or is unworkable in practice.

When the scope for legal debate over the interpretation of a clause is combined with multiple and competing causes of delay requiring detailed analysis of the facts and expert evidence, the only certainty is that it is going to be expensive to resolve.

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*The commercial reality is that each party gambles.*

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### **Gambling with time**

Rarely will the wheels of justice move as quickly as the project; indeed, a claim that is first presented as forecast delays substantiated by a prospective analysis may not be finally resolved until after the project is completed, by which time the actual delay has crystallised and delays are being assessed by reference to competing retrospective delay analyses. There can be legitimate opposing views in respect of multiple and interrelated causes of delay, so that the task of unravelling what happened in order to assess entitlement becomes complicated and time consuming. Whatever the contract says, in practice: the process of substantiating the impact of events is ongoing; the programmes may not have been updated let alone agreed; the contemporary record is seldom complete, accurate or impartial; and delay analysts have a propensity to argue as to which events were concurrent and sequential, critical and non-critical.

In such circumstances, the commercial reality is that each party gambles. For the contractor's part, the gamble is whether it should proceed on the basis that its entitlement to an extension of time will ultimately be successful such that it will be relieved of liability for liquidated damages (in whole or in part) and can recover prolongation costs, or if it should take steps to fund such measures as are necessary to recover the programme absent an instruction to do so.

For the employer's part, once an extension has been granted it cannot be withdrawn, so

if the contractor has not yet substantiated its claim, it takes the risk of awarding an extension of time that may later prove to have been overly generous or may remove the incentive for the contractor to recover the delays. Instead, the employer might be tempted to withhold an extension of time on the grounds that it has yet to be substantiated properly in the hope that the liquidated damages sword of Damocles will lead the contractor to accelerate 'voluntarily' at no cost to the employer.

Each of these 'gamblers' has the potential to derail the project. Of course, on both sides there is a duty to mitigate and the Society of Construction Law (SCL) Protocol<sup>1</sup> discourages adopting a 'wait and see' approach. However, in practice each is likely to be driven by a sober assessment of its own commercial interest.

Whatever the attitude of the employer, a contractor is well advised to fight actively for an extension because even a partial extension of time (EOT) or the existence of a genuine claim will diminish its risk. To that end, a contractor needs to operate the contractual machinery and devote sufficient resources to collating its substantiation in order to apply pressure on the employer to grant an extension of time.

In the meantime, a contractor will assess its competing exposures, namely its liability for damages for late completion (ie, the rate for liquidated damages, whether there is a cap, the likely costs to accelerate and the level of prolongation costs it will incur). Very often this assessment suggests that its maximum exposure if it is wrong (about its entitlement to an extension of time and its prolongation costs) is less than the potentially irrecoverable costs it is likely to incur in accelerating, so the contractor will 'dig in' and hold out for an extension. It does so in the knowledge that an employer is unlikely to terminate for delay, particularly if there is an outstanding or genuinely disputed claim for an extension of time.

In parallel, the employer will consider the consequences of delay such as lost revenue from the asset and any exposure to delay damages of its own (eg, because of the terms of financing or from other contractors on site). The assessment the employer makes is to work out what is likely to get the project completed as quickly, efficiently and with as little acrimony as possible: holding back the extension or granting it.

Quite often it is in the employer's interests to give at least *some* extension, for example, by awarding a partial or interim extension of time pending further substantiation. Where there is a legitimate concern about whether the extension is justified or will ever be substantiated, the employer might express the relief as a liquidated damages 'holiday' in order to maintain the existing milestone or completion dates or state that the extension is granted *ex gratia* or with no entitlement to prolongation costs (particularly if there is evidence of concurrent delay). Certainly, by resisting granting a contractor any relief in a situation where there is likely to be some entitlement, an employer may not only expose the employer to a claim for breach of contract (especially if there are obligations of good faith), but may also lead to a tribunal having sympathy with the contractor and so giving more credence to what was in fact an exaggerated claim.

### Delay versus disruption

The concepts of delay and disruption should not be conflated. Although both are the effects of events, the impacts on the works are different: what should happen upon their occurrence might be governed by different provisions; they tend to require different substantiation; and they will lead to different remedies. Delay is about time, work taking longer than planned. As such, delay analysis looks at what activities are on the critical path and the extent to which the milestone or end date is pushed out. By contrast, disruption is about how the working methods and sequence of activities have been disturbed, hindered, interrupted or otherwise interfered with; so that disruption analysis focuses on assessing productivity, regardless of whether or not the relevant activity sits on the critical path.

That said, delay and disruption are inherently related. If there is a loss of productivity in completing an impacted activity that is also on the critical path, disruption may cause critical delay. However, it is also possible for work to be disrupted but the project still completed on time if the disrupted work was not actually on the critical path. Similarly, acceleration measures aimed at overcoming delays may lead to less efficient working; for example, parallel working can lead to increased congestion and lower productivity on site. In such a situation, the project needs to check that the lost productivity will be offset by the potential programme recovery.

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*An employer cannot hold a contractor to a milestone or completion date and exact liquidated damages where the employer itself has prevented the contractor from achieving those dates.*

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Where the delay and disruption claims overlap, in order to prove its entitlement a contractor may find itself having to put forward different evidence in support of each or even pursue the claims at different times. For example, while it is increasingly common for contracts to provide for prospective forecasting of delay and assessment of extensions of time, most contracts only entitle a contractor to additional costs that have in fact been incurred so it is more natural to assess disruptive claims retrospectively.

### Losing the right to liquidated damages

Most jurisdictions have a mechanism for precluding a party from insisting on performance of an obligation that it has prevented the other party from performing. Thus, an employer cannot hold a contractor to a milestone or completion date and exact liquidated damages where the employer itself has prevented the contractor from achieving those dates. The contractor does not need to prove that the employer has committed a breach of contract; such concepts apply equally where an employer legitimately invokes its contractual rights such as issuing variations and directions. In England and Wales, this is called the 'prevention principle' and it operates to set 'time at large': the completion date falls away and the contractor has a reasonable time within which it must complete its work. In other jurisdictions, it presents itself in concepts of waiver, estoppel and good faith.

However, what happens when a contractor, through its own fault, is not only late but, in the event, *never* delivers the work having contracted to do so by a specified date? In *Triple Point Technology Inc v PTT Public Company Ltd* ('Triple Point'),<sup>2</sup> the English Court of Appeal considered three possible scenarios in such a situation. In that case, the employer (PTT) withheld payment because relevant milestones were not met. The contractor suspended performance. The employer then terminated the contract and engaged a replacement contractor to complete the work instead. The



contract included a liquidated damages provision requiring the contractor to pay 'the penalty at the rate of 0.1% of undelivered work per day of delay from the due date for delivery up to the date [employer] accepts such work'.

The Court of Appeal reviewed the authorities and discovered an inconsistent approach had been adopted in that, in such circumstances, the courts had decided variously:

- the liquidated damages clause did not apply;
- the liquidated damages clause did apply but only up to the point of termination; and
- the liquidated damages clause continued to apply until the replacement contractor achieves completion.

In the event, relying on a 100-year-old Supreme Court (then House of Lords) authority<sup>3</sup> 'which had never been disapproved' but also had rarely been cited in modern cases, the Court of Appeal preferred the first approach: the liquidated damages clause did not apply where the contractor never handed over completed work to the employer so that, while the employer could recover liquidated damages in respect of the contractor's delay in delivering two completed milestones prior to termination, no liquidated damages accrued for incomplete milestones. Instead, the employer was entitled to recover general damages based on ordinary principles and subject to the employer proving its loss. Further, the employer's recovery was capped by a standalone limitation of liability clause.

During the debate at the ICP Working Weekend, it became clear that the majority of the audience disagreed with the outcome of this case. Common and civil lawyers alike favoured a more orthodox analysis whereby liquidated damages would be applied up to the date of termination and, thus, rights that have already accrued would be preserved. The English Court of Appeal had difficulty with that analysis because it considered it artificial to divide employers' rights into a period before termination (when liquidated damages applied) and after termination (only general damages). The court had also disliked the third option because it would mean that the employer and replacement

contractor controlled the period for which liquidated damages might run.

The court was at pains to stress that its decision was based on the wording of the clause and the circumstances in any particular case. At least one participant at the Working Weekend predicted that the *Triple Point* matter would come back before the English courts within a year and revert to a more traditional approach. However, a party considering terminating a construction contract where the contractual date for completion has overrun should bear in mind that termination might mean that any entitlement to liquidated damages for delay no longer applies, requiring it instead to assume the more onerous burden of proving its actual delay losses.

In the meantime, it will be interesting to see whether those who negotiate construction contracts will now include or strengthen the express wording to ensure that accrued rights are preserved on termination, particularly where works remain incomplete, for example, because a contractor suspends for non-payment or abandons the project. They may also wish to make it clear whether any cap on liability applies to liquidated and other damages, and whether the employer is entitled to claim general damages over and above the liquidated damages specified if the relevant clause falls away.

### Holding on to liquidated damages

The Working Weekend considered two scenarios in which an employer may not lose its entitlement to liquidated damages even though it may have caused delay: (1) where there is concurrent delay; and (2) where a contractor fails to comply with a condition precedent notice provision.

The decision from the Supreme Court of the Northern Territory of Australia in *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* ('*Gaymark*')<sup>4</sup> – which refused to allow the employer to recover what was described as 'an entirely unmeritorious award of liquidated damages for delays of its own making' – led to an uptick in contractors seeking to invoke the prevention principle as a defence where they had failed to comply strictly with notice provisions. However, this was dealt a blow in *Multiplex Construction (UK) Ltd v Honeywell Control Systems* ('*Multiplex*')<sup>5</sup>, which cast doubt on the its applicability. In *Multiplex*, the English Court of Appeal was concerned that a

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*Common and civil lawyers alike favoured a more orthodox analysis whereby liquidated damages would be applied up to the date of termination and, thus, rights that have already accrued would be preserved.*

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term requiring a contractor to give notice served a valuable purpose and warned against the potential danger of absolving non-compliance since it would enable a contractor to disregard any provision making notice a condition precedent with impunity and manufacture a situation where time could be placed at large at its option. That decision was endorsed in subsequent authorities in England, albeit only in *obiter dicta*. And notwithstanding *Gaymark*, the application of the prevention principle in such scenarios even remains unsettled in Australia.<sup>6</sup>

In fact, the prevailing wind tends to favour holding parties to the bargain they agreed not only in respect of condition precedent notices, but also in respect of allocating the risk of concurrent delay. In *North Midland Building Ltd v Cyden Homes Ltd* ('*Cyden*'),<sup>7</sup> a standard form of contract had been amended to allocate the risk of concurrent delay to the contractor by expressly providing that 'any delay caused by a Relevant Event<sup>8</sup> which is concurrent with another delay for which the Contractor is responsible shall not be taken into account'.<sup>9</sup>

In the event, two employer-caused delays were concurrent with delays for which the contractor was responsible. Relying on the amended clause, the employer reduced the contractor's entitlement to an extension of time accordingly. The contractor challenged this and the matter eventually came before the English Court of Appeal, which was asked to consider whether this clause contradicted the prevention principle and so was unenforceable.

The contractor lost at both first instance and on appeal. At each instance, the court described the clause as being 'crystal clear' about the parties' intention to allocate concurrent delay risk to the contractor. The Court of Appeal rejected the contractor's argument that the prevention principle was an overriding rule of law or policy, but concluded that, in any event, the principle was not engaged in this case because the contract had included 'any impediment, prevention or default, whether by act or omission, by the Employer' as one of the relevant events that would entitle the contractor to an extension, so that time was not to be set at large on the occurrence of an act of prevention. Instead, the courts upheld the clause as having effectively reversed the way the court had dealt with concurrent delay in *Walter Lilly & Co v Mackay*.<sup>10</sup> In this context, the court's *obiter* comments are also significant

as potentially opening the door for employers to argue in future that, even where a contract is silent on concurrency, a contractor should not automatically be granted an extension of time for periods of concurrent delay.

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*The prevailing wind tends to favour holding parties to the bargain they agreed not only in respect of condition precedent notices, but also in respect of allocating the risk of concurrent delay.*

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Although this was an English case, members of the global construction and engineering team at Hogan Lovells have considered how the *Cyden* approach would fare in their jurisdictions and suggest it would broadly:

- succeed in common law countries (such as Australia, Hong Kong, Singapore and the United States);
- be followed in continental European and Latin American civil law countries where clear drafting overrides general rules of fairly apportioning concurrent delays, allowing the parties' will and contractual terms entered into at arms' length to prevail (such as Germany, France, Italy, Mexico and Spain); but
- be rejected in civil law countries influenced by Sharia law because of underlying principles that focus more on outcomes – such as good faith and abuse of rights – where the courts tend to intervene so as not to allow a party that has contributed to non-performance to seek redress for such non-performance. Instead, tribunals in jurisdictions such as the United Arab Emirates and Saudi Arabia are more likely to try to reflect what the parties have agreed while apportioning delay between them.

Against that background, parties may now be encouraged to agree provisions that clearly and unambiguously allocate concurrent delay risk to one party alone or provide first to be apportioned reasonably between the parties, or to define acts of prevention and default by the employer more narrowly so as to leave open a possible route of engaging the prevention principle.

The author notes that, in fact, the clause in *Cyden* included a second precondition to the contractor's entitlement to an extension of time, namely that 'the Contractor has made reasonable and proper efforts to mitigate such delay'. On its face, the amendment looks innocuous – merely a restatement of the duty to mitigate. However, by translating

it into an obligation to demonstrate that mitigation efforts were both ‘reasonable’ and ‘proper’ (whatever that means), the contractor—perhaps inadvertently—accepted the introduction of a second gate, and arguably one that could only be unlocked with a more elusive key.

### So how do you win?

In order to best manage the risks and improve the prospects of a ‘win’ in delay cases, those responsible for collating the substantiation for a claim or evidence to pursue its case in proceedings should pay heed to the ancient Egyptians: build a pyramid, not a funnel.

The absolute foundation for a successful case is the documents – and it should be a broad foundation. The evidence of fact witnesses needs to be consistent with the documents or to explain why those documents are not the full story or accurate. An expert may help to identify which documents require further explanation and which documents can be relied on to support an analysis.

The expert’s role is a narrow peak (and the advocate’s is even an even narrower zenith). Too often the role of the expert is misunderstood: it is to provide an analysis based on the story as reflected in the documents and witness statements, not to invent one. Otherwise, the pyramid is inverted and becomes an unstable funnel: an expert dependent on a precariously narrow base of factual evidence, which is easily undermined by the introduction of contravening facts.

### Conclusion

The handful of scenarios considered in this paper, like the ICP panel session on which it is based, only scratches the surface of the practical and commercial difficulties project teams face when a major project falls into serious delay and management asks them (or their legal teams) to predict the likely outcome of a dispute over a contractor’s entitlement to an extension of time and its assessment.

The characteristics of each project and, perhaps more importantly, the individual and combined behaviour, skills and experience of the teams that execute them, are unique, so it is not surprising there is no universal solution. Given the pervasive uncertainty that surrounds such projects, it is unrealistic to believe a contract can not only provide a mechanism for every eventuality,

but also ensure a ‘fair’ outcome in every case. In truth, good contract drafting will not save a party from its poor execution of the project, just as a poorly drafted contract will not prevent a project from being executed well.

#### Notes

- 1 Society of Construction Law Delay and Disruption Protocol (2nd ed, February 2017).
- 2 [2019] EWCA Civ 230, 5 March 2019.
- 3 *British Glanzstoff Manufacturing Co Ltd v General Accident, fire and life Assurance Co Ltd* (1913) SC (HL).
- 4 [1999] NTSC 143.
- 5 [2007] EWHC 447 (TCC).
- 6 As recently discussed by the New South Wales Court of Appeal in *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2017] NSWCA 151. In that case, the court noted there were conflicting decisions contrasting the *Gaymark* decision with the decision in *Turner (No 1)* where the court held that a failure to comply with contractual notice provisions prohibited the contractor from relying on the prevention principle. Rather than dealing with the apparent conflict between the *Turner* and *Gaymark* decisions, the court in *Probuild* took a different approach focusing upon *Probuild*’s unilateral power to extend time under Clause 41.9. A similar clause had been considered in *Peninsula Balmain v Abigroup Contractors Pty Ltd* [2002] NSWCA 211 in that there was a discretionary power to the superintendent to extend time even if the contractor had failed to make a claim for an extension. In *Peninsula Balmain*, Hodgson JA held that the superintendent was required to exercise that power honestly and impartially and should have done so to extend time, despite no claim being made.
- 7 [2018] EWCA Civ 1744.
- 8 ‘Relevant Events’ (those pushing actual completion beyond the contractual completion date and triggering an entitlement to an extension of time) included wide-ranging employer acts of prevention and default.
- 9 Clause 2.25.1.3(b).
- 10 [2012] EWHC 1773 (TCC). At para 47, Coulson LJ said: ‘A period of concurrent delay, properly so called, arises because a delay has occurred for two separate reasons, one being the responsibility of the contractor and one being the responsibility of the employer. Each can argue it would be wrong for the other to benefit from a period of delay for which the other is equally responsible. In *Walter Lilly* and the cases cited there, under standard JCT extension of time clauses, it has been found that the contractor can benefit despite his default. By clause 2.25.1.3(b), the parties sought to reverse that outcome and provide that, under this contract, the employer should benefit, despite the act of prevention. Either result may be regarded as harsh on the other party; neither could be said to be uncommercial or unworkable.’

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# Delays in construction projects: relevant concepts and (too many?) approaches

## Introduction

Widely used in several jurisdictions, engineering, procurement and construction (EPC) contracts tend to be a common structure of contracting to develop complex and large engineering projects, being the factor of complexity present in both the contract wording itself and performance of the contract parties' obligations. Since under the very concept of EPC contracts the contractor is held as a single point of responsibility towards the owner, this type of contract has become an overall industry preference, especially in projects being financed.

Complexity in such contracts is unavoidable, since the object of an EPC contract will generally consist in the implementation of a project of

considerable dimensions demanding large-scale investment. In their turn, the execution and planning of the necessary works will depend on interactions between various fields of knowledge,<sup>1</sup> such as engineering, architecture, economy, financial planning, legal framework and fiscal structuring, as well as between the owner and the contractor. Consequently, there is a need to allocate risks appropriately among the parties, so that each is protected from events beyond its respective scope. In some cases, where the wider project is split into various phases or sub-scopes demanding integration, consistency between the respective time schedules may be necessary.<sup>2</sup>

Due to their intrinsic interdependency, failed (or delayed) activities may result in delays in completion, leading to controversies

at several levels, many of which related to whether or not a contractor will be entitled to an extension of time (and prolongation costs), and, in respect to the owner, if liquidated damages stipulated for late completion will be recoverable. The necessary task, therefore, is determining the party responsible for the delay, which may seem a simple undertaking at first sight, but gains in complexity in cases in which both parties contributed to the delay.

With this paper, the authors aim to present some of the main aspects concerning delays they have encountered in complex construction contracts, and to outline certain approaches in the United States, England and Brazil that are used to conceptualise and deal with delays.

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*Each party will seek appropriate protection from acts and events under the other party's responsibility.*

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### **General notes on delays**

The analysis of delay can be carried out using different methods, each considering certain aspects when defining delay. Identifying causation of delay and the party responsible does often reveal itself as a difficult task.

In most projects, delays are likely to happen, given the inherent complexity of the works and possible interfaces and interactions between the owner and, at least, one contractor. Delays will result from one or more causes, which may be attributable to one or more of the involved players, or even from external factors beyond any such players' control (eg, force majeure events). The occurrence of concurrent causes of delay is an issue repeatedly faced in the construction industry as it is rarely the case of a single event attributable exclusively to one contracting party causing a delay. Whatever the case may be, each party will seek appropriate protection from acts and events under the other party's responsibility.

### **Contractor-caused delays**

Most infrastructure projects are implemented in order to meet specific market demands; for instance, a power generation plant is developed to supply energy in accordance with the increase of a market's industrial activities. Hence, punctual completion is of the essence, as is the capability of the facility to generate the amount of power to which supply

the owner has committed itself by means of power purchase agreements, in the given example. Although not comprised within the scope of this paper, the authors note the desirability of including express fitness for purpose provisions so as to mitigate potential controversies in this regard.

Non-compliance (or late compliance) with commitments undertaken towards third-party off-takers (such as power purchasers) under the relevant offtake agreements will expose the owner to losses under these contracts, and owners (and their advisers) will have to carefully address such risk when preparing and negotiating the construction contracts.

According to the authors' experience, there is a set of potential protection mechanisms complex construction contracts may provide for, which may include the ones described below.

### **BACK-TO-BACK PROVISIONS**

The ideal protection mechanism from effects of project completion delays (and, therefore, from the risk of exposure under offtake agreements) consists in reflecting, to the largest extent commercially feasible,<sup>3</sup> the sums payable by the owner to its off-takers for breach of the supply commitments in the amount of liquidated damages payable by the contractor to the owner for untimely completion. Such provision aims at securing strict alignment of schedule and cost exposure under the interrelated EPC and offtake contracts.

However, the authors note that in Brazil it is fairly uncommon (or even entirely unusual) to include back-to-back clauses in construction contracts of many industry sectors, as such would imply in the transfer of the project developer's business risks and exposures under the owner's offtake agreements but not their inherent benefits to the contractor.

### **INTERIM (OR INTERMEDIARY) MILESTONES**

Contrary to many common law jurisdictions, Brazilian law<sup>4</sup> does embrace the possibility to set forth non-compensatory penalties aimed at being coercive in nature,<sup>5</sup> and expressly admits a penalty's preventive character to safeguard a party's legitimate interest to timely completion as provided under the relevant agreement.<sup>6</sup> That means that there is no mandatory assumption that the penalties' amounts correspond to the damages that the innocent party would likely suffer (as it so happens under the concept of liquidated damages).

In light of such general admission of contractual penalties, and given the general absence of back-to-back provisions in Brazil, it is common practice in Brazil to include in the project schedule certain interim milestones that must be timely achieved by a contractor. Non-compliance with such interim milestones will cause the contractor to pay damages to the owner, which amount is generally stipulated as a percentage of either the contract price or the milestone price. In a more balanced approach, such penalty provisions triggered by an intermediary delay will generally provide that, if the contractor manages to catch up with the original time schedule and to recover its intermediary delay, the amount paid would be reimbursed to the contractor.

Thus, the idea behind such mechanism is not to asphyxiate a contractor's cash flow – as this could jeopardise the project's completion itself. The ultimate goal of the interim milestone penalty is to effectively stimulate timely completion of the project, and to provide the owner with an intermediary monitoring mechanism in order to anticipate potential delays of the guaranteed completion date, given the huge exposure under the offtake agreements related to the project which, as already mentioned, are usually not covered by back-to-back provisions.

Moreover, in Brazil, penalties or liquidated damages are not set aside entirely if they are deemed to be excessive. Instead, Article 413 of the Brazilian Civil Code provides for the court's authority to decrease proportionally the amount of the penalty determined in the contract if it deems it to be excessive considering the case's circumstances. The court may not, however, avoid its application in whole. It is worth mentioning that in arbitration, which is typically the mechanism for dispute resolution used in such complex contracts, the panel tends to be stricter in considering the *pacta sunt servanda* principle and the parties' willingness to abide to the contractual terms. Therefore, reduction of penalties in arbitration procedures governed by Brazilian law tends to be rarer.

The authors point out that this concept would likely be challenged in the common law jurisdictions considered in this article, as punitive damages (ie, penalties) would be considered void because English law traditionally rejects the enforceability of remedies considered punitive in their essence,

requiring damages to consist in a genuine pre-estimate of effective losses. It might, however, be thought that the very possibility of not reimbursing the interim milestone penalty in case the delay is not recovered would grant this penalty a true nature of liquidated damage – this discussion should, however, be exploited in more detail at a specific opportunity and exceeds the scope of this paper.

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## *The ultimate goal of the interim milestone penalty is to effectively stimulate timely completion of the project.*

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### *Owner caused delays: acts of prevention*

A contractor will typically have budgeted its cost for completion according to the project's technical specifications and the time for completion as defined by the owner. That means, for instance, that planning of resources to be allocated to the works will be made in accordance with the need of the specific project: the shorter the time for completion, the more resources (manpower and equipment) will be engaged to execute the works in order to deliver the project on time.

Hence, contractors will require protection against owner interferences constituting acts of prevention, as well as from other causes of delay whose risk has been contractually allocated to the owner. In other words, contractors will usually be considered to be entitled to an extension of time for completion in order to not incur in liquidated damages, and recovery of prolongation costs related to the period exceeding the initial completion date.

The prevention principle is an underlying concept of English law doctrine providing that 'an employer cannot insist on holding the contractor to a completion date if it is the employer itself that has prevented the contractor completing'.<sup>78</sup> It is therefore designed to protect the contractor from incurring liquidated damages for delays attributable to the employer. The consequence is that the contractor will: (1) no longer be bound to the contractual completion date, since time will be set at large and the contractor will then only be required to complete the works within a reasonable time;<sup>9</sup> and (2) not incur liquidated damages.<sup>10</sup>

However, the consequences of the appliance of the prevention principle will



not operate unless the relevant contract provides otherwise: that is, contracts, if well drafted, will provide (and most standard forms do, such as FIDIC and the Joint Contracts Tribunal (JCT) forms) that an act of prevention will entitle the contractor to an extension of time, avoiding time being set at large. If such an extension of time is then granted due to the employer's prevention act, a new completion date will have been established and completion beyond such date will cause the contractor to incur liquidated damages.

This understanding has been endorsed in *North Midland Building Limited v Cyden Homes Limited*,<sup>11</sup> and in essence provides that although the prevention principle's application is acknowledged where the contract does not stipulate a specific time extension mechanism, it will not supersede contractual provisions agreed among the parties providing that acts of prevention will entitle the contractor to extension of time: that is, in such cases time will not be set at large. Another effect of that decision is the acknowledgement that allocating the entire risk of concurrent delays to one party it is perfectly feasible and enforceable.

It is noticeable that judgments involving delay claims by US courts tend to address the essence of the prevention principle and to apply the effects generally attributable to it, without, however, referring to that nomenclature.<sup>12</sup> The decision rendered under *Corinno Civeta Constr Corp v City of New York*<sup>13</sup> points at this direction. Corinno Civetta argued to be entitled to delay damages, as it deemed the City was responsible for the contractual delays. The ruling considered that:

*'... plaintiff cannot succeed on this claim because it was responsible for a delay of several months that prevented construction quite independently of any delay resulting from the subsurface conditions. That delay involved an application by plaintiff to change the pipe specifications. Although the contract required mechanical joint pipe, in November 1979 plaintiff attempted to substitute Tyton joint pipe without indicating to the city that the request was for a substitution of materials which differed from the contract requirements. By the time the city learned of the attempted substitution and rejected it, a strike at the plant of plaintiff's supplier caused further delay in obtaining the joint pipe. By the time proper pipe was delivered, the city had authorized work to proceed*

*on the subsurface conditions [emphasis author's own].'*

The US prestige of contractual language is reinforced in the judgment of *Andron Construction Corp v Dormitory Authority of the State of New York (DASNY)*.<sup>14</sup> In summary, where the contract prevents recovery of damages for whatever reason, the contract provision must be upheld.

The Supreme Court of Albany County faced the following issue: Andron Construction had been engaged to erect a building and requested to be compensated for the additional costs it incurred due to delays and acceleration measures taken. The contract provided for a no-damages-for-delay clause, in a manner that no damages would be recoverable whatever the reason causing the delay. Such exculpatory clauses were considered by the Supreme Court to be generally enforceable even if the owner contributed to the delay, unless: (1) the delay is due to bad faith, wilful, malicious or grossly negligent conduct; (2) the delay is unanticipated; (3) the delay is so unreasonable that it characterises intentional abandonment; or (4) the delay results from breach of a fundamental obligation of the contract. The party seeking recovery is, then, required to evidence any such exception to the general rule.

Careful analysis of contractual risk allocation and precise contract language to reflect the parties' true intentions is therefore essential. As the Court of Appeals had previously acknowledged, 'the claims are claims for delay and the exculpatory clause was drafted and included in the contract to bar them.'

Article 476<sup>15</sup> of the Brazilian Civil Code essentially provides for the principle of *exceptio non adimpleti contractus* and is similar, yet not identical, to the English prevention principle, and has been applied in court rulings to reject owners' claims for damages arising from untimely completion, in case completion on time was prevented by acts of prevention perpetrated by the owner:<sup>16</sup>

*'Therefore, not having the plaintiffs previously proceeded with the rectification of the meterage of the navy's estate before the Federal Properties Management Office, which obligation was under their responsibility, having thus contributed to the unfeasibility of the registry and regularization of the incorporated and constructed units, and the granting of the respective public deeds*

related to the exchange of individual units, *article 476 of the Civil Code is perfectly applicable to the case* [emphasis author's own].

However, there are two important differences from the foregoing common law jurisdiction understandings.

First, Brazilian scholars consider the concept of prevention set forth in Article 476 to be encompassed within a wider fundamental principle of Brazilian law consisting in objective good faith,<sup>17</sup> whereby the contractual parties are bound to the duties of mutual and loyal collaboration, acting in a stable manner and without indulging contradictory behaviour; as such, the parties would not be able to avoid its application even if the contract states otherwise.<sup>18</sup> In this sense, Brazilian scholars consider that:

'As a limit to the exercise of subjective rights, objective good faith reveals itself when the exercise of such rights characterises a conduct that is incompatible with instrumental duties, notably those of loyalty and cooperation. This results in the impossibility of contract termination in case of substantial performance; in the possibility of paralysing a defaulting party's legal action filed as plaintiff by means of exception to breach of contract (*exceptio non adimpleti contractus*); and in the argument of *tu quoque* and *venire contra factum proprium* etc' [authors' translation].<sup>19</sup>

Second, from a Brazilian perspective, it would be likely to expect that a contractor would be granted the right to the extension of time only proportionally to the impact caused by the owner's act of prevention, since the duties of perpetrating loyal and collaborative demeanour would not relieve the contractor from the impacts it has caused.

## Concurrent delay

Although an issue often faced in pre-litigation and in court, even the concept of concurrent delay seems to be not entirely clear as there is still no unanimously accepted definition. Notwithstanding, many construction contracts do not address situations of concurrent delay in an adequate manner, or at all. As a result, it is also unclear how to deal with concurrent causes of delay.

The renowned English commentator and practitioner John Marrin QC<sup>20</sup> has offered a narrow but nonetheless precise description of what he considers are situations of

concurrency of delays, which is often referred to by English courts:<sup>21</sup> '*a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency*' [emphasis author's own].

The Society of Construction Law deems concurrent delays to consist in:

'... the occurrence of two or more delay events *at the same time*, one an Employer Risk Event, the other a Contractor Risk Event, and the effects of which are felt at the same time. For concurrent delay to exist, each of the Employer Risk Event and the Contractor Risk Event must be an effective cause of Delay to Completion (i.e. the delays must both affect the critical path)' [emphasis author's own].<sup>22</sup>

The attempts to define concurrent delays as per the aforementioned proposals seem to converge, but there is a major difference regarding the timeline of events. The Society of Construction Law suggests that events must happen 'at the same time' in order to configure concurrency. The Society of Construction Law's view on the matter has been endorsed in *Royal Brompton Hospital v Hammond* and others,<sup>23</sup> where it was ruled as follows:

'However, it is, I think, necessary to be clear what one means by events operating concurrently. *It does not mean, in my judgment, a situation in which, work already being delayed, let it be supposed, because the contractor has had difficulty in obtaining sufficient labour, an event occurs which is a relevant event and which, had the contractor not been delayed, would have caused him to be delayed, but which in fact, by reason of the existing delay, made no difference.* In such a situation although there is a relevant event, 'the completion of the Works is [not] likely to be delayed thereby beyond the Completion Date... *This situation obviously needs to be distinguished from a situation in which, as it were, the Works are proceeding in a regular fashion and on programme, when two things happen, either of which, had it happened on its own, would have caused delay, and one is a relevant event, while the other is not.* In such circumstances there is a real concurrency of causes of delay' [emphasis author's own].

The coincidence of two delaying events at the same time has been named 'true concurrency' and is deemed to be unlikely to happen from a technical perspective.<sup>24</sup>



John Marrin QC, on the other hand, offers an approach more likely to reflect reality in the authors' view: it refers to a scenario in which each of the employer and contractor delays may happen at different moments in time, but do overlap during a certain period.

Different jurisdictions have developed distinctive approaches when conceptualising and defining remedies to concurrent delay. In view of the foregoing, the present topic will outline some of the distinctions and similarities found in the positions adopted by the UK, US and Brazilian jurisdictions over the matter.

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*Many construction contracts do not address situations of concurrent delay in an adequate manner, or at all.*

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#### *Approaching concurrency of delays*

Further to providing the definition indicated in the preceding topic, the Society of Construction Law Delay and Disruption Protocol also aims at proposing a solution on how to handle a scenario of concurrently operating delays: 'Where Contractor Delay to Completion occurs or has an effect concurrently with Employer Delay to Completion, the Contractor's concurrent delay should not reduce any EOT due.'<sup>25</sup>

The Society of Construction Law hence considers that a contractor shall be entitled to an extension of time in case both contractor and owner have contributed to the same delay, since, notwithstanding its own risk event, it would be entitled to an extension of time due the delaying event under the owner's risk. It must be noted that although the protocol does not clearly address whether or not the contractor in such case would also be entitled to prolongation costs, it offers a perspective not often considered or misconceived by the construction industry, which is the absence of an 'absolute linkage between entitlement to an EOT and the entitlement to compensation for the additional time spent on completing the contract'.<sup>26</sup>

However, since the contractor would incur in such additional costs in any case due to its own delay, and given that the owner will not be able to recover liquidated damages under the Society of Construction Law's approach and will potentially incur in damages under offtake agreements

(therefore undertaking the risk of time), it does seem fair in the authors' views to allocate the money risk on the contractor.

#### *Malmaison approach*

The Society of Construction Law's approach was followed under the *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*<sup>27</sup> case, and has been since endorsed in subsequent rulings under English law, such as in *Steria v Sigma Wireless Communications Ltd*,<sup>28</sup> having become known as the 'Malmaison approach'.

In that emblematic case related to concurrent delay, the English court granted an extension of time to the contractor for the same duration as the delay caused by the owner (considered to be a 'relevant event'), despite the concurrent effect of the delay for which the contractor had undertaken responsibility for:

'[...] it is agreed that if there are two concurrent causes of delay, one of which is a relevant event, and the other is not, then *the contractor is entitled to an extension of time for the period of delay caused by the relevant event notwithstanding the concurrent effect of the other event*. Thus, to take a simple example, if no work is possible on a site for a week not only because of exceptionally inclement weather (a relevant event), but also because the contractor has a shortage of labour (not a relevant event) and if the failure to work during that week is likely to delay the works beyond the completion date by one week, then *if he considers it fair and reasonable to do so, the architect is required to grant an extension of time of one week. He cannot refuse to do so on the grounds that the delay would have occurred in any event by reason of the shortage of labour*' [emphasis author's own].

Although the contractor will be granted a full extension of time under the Malmaison approach, it will not be entitled to prolongation costs. This is due to the 'but-for test', which is relaxed in relation to the time claim, but not the money claim. As Marrin explains,<sup>29</sup> 'in a case of concurrent delay (as defined) the contractor is never in a position to show that he would have completed on time but-for the event relied upon'. Accordingly, it will not be possible to show the causation between time and costs.



## Dominant cause approach

The dominant cause approach's underlying logic suggests that the decision-maker, whether under the relevant contract, a judge or an arbitrator, should identify under the factual scenario which of the concurrently operating events is dominantly responsible for the delay: if an owner risk event, then the contractor would be entitled to an extension of time in accordance with the period of delay caused by the dominant event under the owner's responsibility. By contrast, a contractor would not be entitled to relief in case the dominant event is under its responsibility. Sir Anthony May stated that:

'If there are two causes, one the contractual responsibility of the Defendant and the other the contractual responsibility of the Plaintiff, *the Plaintiff succeeds if he establishes that the cause for which the Defendant is responsible is the effective, dominant cause. Which cause is dominant is a question of fact*, which is not solved by the mere point of order in time, but is to be decided by applying common sense standards' [emphasis author's own].<sup>30</sup>

However, the application of such approach was rejected in *H Fairweather & Co Ltd v London Borough of Wandsworth*,<sup>31</sup> where it was ruled that the relevant decision maker (in that case, the architect) 'has the task of allocating where the facts require it the extension of time to the various heads. I do not consider that the dominant test is correct'.

As the dominant cause approach implies that there is a set of different events leading to a delay, John Marrin QC pointed out well that 'there will be cases in which the contractor's claim for prolongation costs will be met by the employer's cross claim for liquidated damages in circumstances where, logically, both cannot succeed'.<sup>32</sup> The approach does not offer any solution if no dominant cause can be found<sup>33</sup> and, further, might conflict with the prevention principle.<sup>34</sup>

## US approach: time but not money

A compiled description of the 'time but no money' approach commonly adopted in the US will provide that where there is an excusable or compensable delay (ie, an owner risk event) operating concurrently with an inexcusable or non-compensable delay (ie, a contractor risk event), then neither party shall be entitled to financial compensation, but the contractor

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*The Plaintiff succeeds if he establishes that the cause for which the Defendant is responsible is the effective, dominant cause. Which cause is dominant is a question of fact...*

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would be granted relief in time. It is therefore thought that this concept has at least some similarities with the proposition made by the Society of Construction Law, in the sense that not all provisions granting time relief will imply in financial compensation, and seems aligned with the aforementioned Malmaison approach.

According to the *Global Arbitration Review*, in the US, concurrent delay is generally deemed 'to be excusable but non-compensable... meaning that the contractor is entitled to an extension of time for the full period (thereby extinguishing the employer's entitlement to liquidated damages), but is not entitled to prolongation costs'.<sup>35</sup>

Such understanding was endorsed in the judgment of *Commerce International, Inc v the United States*,<sup>36</sup> where the court considered that in a case of concurrent delay the owner could not recover liquidated damages and, on its turn, the contractor would not be entitled to additional costs incurred due to the delay period. It was ruled that 'we must apply the rule that there can be no recovery where the defendant's delay is concurrent or intertwined with other delays'.

## Apportionment

Apportionment can be summarised in this way: an allocation among the owner and the contractor of time and money effects arising from the delay caused by concurrently delaying events, according to the causative potency of each of such delaying events.

The Malmaison approach has long prevailed over the apportionment mechanism, which in the UK has not been well received. Notwithstanding, a notable ruling involving the apportionment approach can be found in *City Inn Ltd v Shepherd Construction Ltd*,<sup>37</sup> where the Malmaison approach was effectively challenged and the courts of Scotland held that when not possible to determine the dominant cause of the delay, the time and money effects should be apportioned among the parties in a fair and reasonable manner.

In the US, on the other hand, apportionment appears to have gained

better reception.<sup>38</sup> In *Toombs v United States*,<sup>39</sup> it was held that: 'When it is reasonably possible to apportion the delay among the various causes, liquidated damages may be assessed notwithstanding concurrent causes attributable to both parties'.

The same approach was adopted in the judgment of *Coath & Gross Inc v United States*: 'Where both parties contribute to the delay, neither can recover damage[s], unless there is proof of a clear apportionment of the delay and expense attributable to each party'.<sup>40</sup>

Therefore, when apportioning delays, US courts have considered that the recovery of damages is feasible when the proportion of responsibility attributable to each party involved is possible to be identified.

In Brazil, Article 945 of the Civil Code<sup>41</sup> may be analogically applied in case of concurrent delay, which provides that the compensation of the aggrieved party will be calculated according to the parties' degree of culpability, except if the contract has a provision otherwise. In this sense, time and cost reliefs shall be granted in a manner proportional to the degree the owner and contractor contributed to the delay. Essentially, this approach is comparable to apportionment, with the exception that for one party to be held responsible for a delay, it is required that such party's *fault* contributed to the delaying event – other jurisdictions may require only contractual responsibility not necessarily linked to fault. It is worth mentioning that Brazilian judges are granted major discretion in the apportioning exercise.

It is important to note that in cases involving breach of contract it is not necessary to evidence the breaching party's fault, as it is presumed. Scholars wrote that: 'A relevant aspect when fixing compensation is concurrent or reciprocal fault... if found that both players acted with fault, compensation occurs. It consists on the ascription of fault to the victim that also concurs to the event. Therefore, if the degree of culpability is identical, responsibilities shall be apportioned equally. That is why it is preferable to name it as concurrency of responsibilities or of causes. It is possible that one's fault [for the occurrence of the event] exceeds the others: in such a case, apportionment shall be proportional. Thus, one agent may respond for two-thirds and another for one-third of the compensation. The code

in force is an express provision in this respect, enshrining the case law of many decades [authors' translation].'<sup>42</sup>

The Brazilian courts' benchmark when ruling cases involving delay in construction contracts is to assess the degree of each party's fault and then their entitlement to compensation. In the judgment of a case that involved alleged breaches of a contract for the construction of a municipal school, the reporting justice held that:

'I consider, therefore, that the contractual obligations of both parties involved were violated, thus, fault for the breach is joint and reciprocal. It is important to clarify that in cases involving breach of a contractual clause, proof of fault is not necessary since it is presumed... Having recognized that both parties breached the contract, and, therefore, existing the presumption of reciprocal fault, it remains to consider the limits of the ancillary indemnity obligation arising from the breach of the original contractual obligation' [authors' translation].<sup>43</sup>

The same approach was adopted by another state court dealing with a construction dispute, although not specifically related to delays, as follows:

'In the case, both parties, defendant and plaintiff, impute to the other party the responsibility for having terminated the legal transaction and for the collapse of the precast structures. It is undisputed that both parties shall be held responsible for the entanglement – concurrent fault, not being feasible to consider the plaintiff's sole fault... Therefore, with the parties' reciprocal fault over the event, both shall undertake the expenses incurred in reason of the contract's termination, as set forth in the Civil Code' [authors' translation].<sup>44</sup>

Looking at concurrency of fault from a broader spectrum (ie, not linked to delays), the Brazilian Superior Court of Justice on 3 April 2007 ruled that both the engineer and the contractor engaged (in separated contracts) to erect a building were responsible for its collapsing, being both liable for the resulting damages, which were apportioned.<sup>45</sup> Such approach reinforces the discretion of state courts when facing legal actions involving concurrency of fault, and also denotes that interactions between different players within the same project are likely to contribute to the creation of hurdles to a project's successful execution.

## Conclusion

During the performance of any given construction contract of complex nature, such as EPC contracts, project delays are likely to occur – they are unavoidable. The inherent complexity will in many cases lead to interactions between the contractor and the owner, and both parties may cause delays to happen. In this paper, the authors proposed to present the approaches adopted by the UK, US and Brazil at a glance, so as to point out some similarities and differences.

The many approaches outlined do not represent an attempt to exhaust the issue – there are still others, since many jurisdictions have not been dealt with in this paper – but rather to present the lack of clarity on concepts and approaches that decision-makers and scholars have not yet been able to solve, and will continue to face. There are some prevailing approaches, however: in both the UK and US, present views sustain that in a case of concurrent delay, the contractor would be entitled to time, but not money (Malmaison approach, time-but-no-money approach); in Brazil, due to Article 945 of the Civil Code, both time and money effects will be apportioned. It is, therefore, expected that discussions on delays in general and concurrent delays will still persist for a long time. The need for proper drafting and use of precise wording when contractually allocating risks of delay is evident – but that is not always done. In this sense, as an important landmark, the 2017 FIDIC Red, Yellow and Silver Books now specifically address the issue of concurrency, which is welcomed.<sup>46</sup>

Also, case law<sup>47</sup> clearly demonstrates the prestige of contract language in the UK and US, respectively, where the contract is upheld against general principles of laws – such as the prevention principle. However, the same cannot be verified in Brazil, where acts of prevention might mandatorily excuse the contractor from its delays due to the public interest inherent to the principle of objective good faith, which unfolding reveals the *exceptio non adimpleti contractus*.<sup>48</sup>

In any case, balanced allocation of risks and precise contract wording is of the greatest importance for a project to succeed – on time.

## Notes

- 1 Fábio Coutinho de Alcântara Gil, *A Onerosidade Excessiva em Contratos de Engineering*, 146 f PhD, thesis (doctor of jurisprudence candidate), Law School, Universidade de São Paulo (2007), p 33.
- 2 ‘Schedules are highly interrelated because building construction needs to proceed sequentially – a delay on the part of one subcontractor or supplier can have domino effect through the project’: Patrick Bajari and Steven Tadelis, *Incentives versus transaction costs: a theory of procurement contracts*, p 389. apud. Lie Uema do Carmo, *Contratos de Construção de Grandes Obras* 279 f PhD thesis (doctor of jurisprudence candidate), Law School, Universidade de São Paulo (2012), p 242.
- 3 Depending on the industry sector, a full back-to-back provision might cause the contractor to include huge contingencies to its pricing that would cause the project’s economics to be commercially unfeasible from owner’s perspective.
- 4 Brazilian Civil Code, Art 411: ‘When a penalty clause is stipulated for delayed performance, or as special security for another certain clause, the creditor may, at his discretion, demand satisfaction of the penalty imposed, together with performance of the primary obligation’ [author’s translation].
- 5 Thiago Moreira, Caio Gabra, ‘Penalty Clauses under Brazilian Law: Is there a common ground with the criteria set forth by *Cavendish Square v Makdessi*?’ *Construction law International* (December 2017), Vol 12, Iss 4, p 39.
- 6 *Ibid*, p 42
- 7 Ian Yule, ‘It ain’t put your feet up time’, 15 February 2018 [www.building.co.uk/communities/it-aint-put-your-feet-up-time/5092107.article](http://www.building.co.uk/communities/it-aint-put-your-feet-up-time/5092107.article) accessed 26 June 2019.
- 8 Or, in Mr Justice Fraser’s words, in *North Midland Building Limited v Cyden Homes Ltd* (‘*Cyden*’) [2017] EWHC 2414 (TCC): ‘Essentially the prevention principle is something that arises where something occurs, for which it is said the employer is responsible, that prevents the contractor from complying with his obligations, usually the obligation to complete the works by the completion date.’
- 9 In Mr Justice Fraser’s words, in *Cyden*: ‘The concept of “time at large” does not mean that the contractor has an indefinite time to complete the works. If the completion date in the contract, and the mechanism for having that extended by means of awarding so many weeks to an originally agreed completion date, are inoperable or for some other reason no longer applicable, in general terms the contractor’s obligation becomes one to complete the works within a reasonable time. That is what the shorthand expression “time at large” is usually understood to mean.’
- 10 *Holme v Guppy* (1838) 3 M&W 387: ‘... if the party be prevented, by the refusal of the other contracting party, from completing the contract within the time limited, he is not liable in law for the default... It is clear, therefore, that the plaintiffs were excused from performing the agreement contained in the original contract... The plaintiffs were therefore left at large; and consequently they are not forfeit anything for the delay.’



- 11 *Cyden*.
- 12 John Livengood, *Comparison of English and U.S. Law on Concurrent Delay* (2014), pp 3, 5.
- 13 *Corinno Civeta Constr Corp v City of New York* 67 NY 2d 297, 493 NE 2d 905, 502 NYS 2d 681.
- 14 *Andron Constr Corp v Dormitory Auth of State* ('Andron'), 38 NYS 3d 830 (NY Sup Ct 2016).
- 15 Brazilian Civil Code, Art 476: 'In bilateral contracts, neither of the contracting party may require fulfillment of the other party's obligation prior to having complied with its own' [authors' translation].
- 16 Court of Justice of the State of Santa Catarina, Civil Appeal No 00042419120138240139 Porto Belo 0004241-91.2013.8.24.0139, 4th Chamber of Civil Law, Reporting Justice Joel Figueira Júnior, judgment date 27 June 2019.
- 17 Silvio de Salvo Venosa, *Código Civil: Teoria Geral das Obrigações e Teoria Geral dos Contratos* (14th ed) Vol 2 (São Paulo: Editora Atlas SA, 2014), p 433.
- 18 Brazilian Superior Court of Justice. Interlocutory Appeal in the Special Appeal No 833224/DF, Reporting Justice Maria Isabel Galotti, judgment date 23 April 2018.
- 19 Paulo Sérgio Velten Pereira, 'A Exceção do Contrato Não Cumprido Fundada na Violação de Dever Lateral nos Compromissos de Compra e Venda de Bens Imóveis' in Alexandre Guerra, Marcelo Benacchio, *Direito Imobiliário Brasileiro* (São Paulo: Editora Quartier Latin do Brasil 2011), p 552.
- 20 John Marrin QC, 'Concurrent Delay Revisited', Society of Construction Law paper 179, 2013.
- 21 Eg, as ruled in *Cyden* and in *Saga Cruises BDF Limited, Saga Cruises Limited v Fincantieri SPA* [2016] EWHC 1875 (Comm).
- 22 Society of Construction Law Delay and Disruption Protocol (2nd edn, 2017), p 6 [www.scl.org.uk/resources/delay-disruption-protocol](http://www.scl.org.uk/resources/delay-disruption-protocol) accessed 24 July 2019.
- 23 *Royal Brompton Hospital NHS Trust v Hammond and others* [2002] UKHL 14.
- 24 Stephen Furst and Vivian Ramsey, *Keating on Construction Contracts* (10th ed, Sweet & Maxwell, 2016), [8-025] apud. Robert Gemmell and Matthew Caswell, *Conquering Concurrency, Part 1: What is concurrent delay?* (2018), p 2.
- 25 See n 22 above.
- 26 *Ibid*, pp 37–38.
- 27 *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 Con LR 32.
- 28 *Steria v Sigma Wireless Communications Ltd* [2007] EWHC 3454 (TCC): 'Furthermore, the rationale suggested by the editors of Keating appears to me, with respect, to be compelling, and to apply as much to this case as it does to the particular clause in the Henry Boot case and indeed to extension of time clauses generally. Accordingly, I propose to adopt that approach as correctly representing the proper approach to extensions of time under clause 6.1 of the sub-contract.'
- 29 See n 20 above, p 16.
- 30 *Keating* (5th edn, Sweet & Maxwell 1991), p 195.
- 31 *H Fairweather & Co Ltd v London Borough of Wandsworth* (1987) 39 BLR 106 (OR).
- 32 See n 20 above, p 13.
- 33 *Ibid*, p 14.
- 34 *Ibid*.
- 35 Erin Miller Rankin, Kim Rosenberg, Sarah-Jane Fick, 'Comparative Approaches to Concurrent Delay' in *The Guide to Construction Arbitration* (2nd edn Global Arbitration Review) <https://globalarbitrationreview.com/chapter/1175332/comparative-approaches-to-concurrent-delay> accessed 28 August 2019.
- 36 *Commerce International, Inc v United States* 338 F.2d 81 (Ct Cl 1964).
- 37 *City Inn Ltd v Shepherd Construction Ltd* [2010] BLR 473, [2010] CILL 2889, InnerHouse, Ct of Session.
- 38 Richard J Long, 'Analysis of Concurrent Delay on Construction Claims' [www.long-intl.com/articles/Long\\_Intl\\_Analysis\\_of\\_Concurrent\\_Delay\\_on\\_Construction\\_Claims.pdf](http://www.long-intl.com/articles/Long_Intl_Analysis_of_Concurrent_Delay_on_Construction_Claims.pdf) accessed 5 July 2019.
- 39 *Toombs v United States* 4 Cl Ct 535 (1984).
- 40 *Coath & Cross Inc v United States* 101 Ct. Cl.702, 714–715 (1944).
- 41 Brazilian Civil Code, Art 945: 'If the victim contributed to the damaging event due to its fault, the degree of fault in comparison with that of the person causing the damage shall be taken into account when fixing the indemnification' [authors' translation].
- 42 Silvio de Salvo Venosa, *Código Civil Interpretado* (2010 São Paulo: Editora Atlas SA), pp 897–898.
- 43 Court of Justice of the State of Minas Gerais, Appeal No 0005568-55.2012.8.13.0481, 7th Civil Law Chamber, Reporting Justice Alice Birchall, judgment date 28 March 2017.
- 44 Court of Justice of the State of Goiás, Interlocutory Appeal to the Civil Appeal No 0580212-88.2008.8.09.0051, 2nd Civil Chamber, Reporting Justice Carlos Alberto Franca, judgment date 7 July 2016.
- 45 Brazilian Superior Court of Justice, Special Appeal No 650603/MG, Reporting Justice Nancy Andriighi, judgment date 3 April 2007.
- 46 Clause 8.5 (Extension of Time) in the 2017 FIDIC Red, Yellow and Silver standard forms.
- 47 Such as *Cyden* and *Andron*.
- 48 Ie, 'exception to breach of contract' [authors' translation].

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Denmark flag depicted in paint colours on multi-storey residential building under construction. Credit: Mehaniq/Shutterstock

# Bringing the Danish general conditions into the 21st century

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The Danish general conditions in construction contracting have not been amended since the early 1990s, even though a lot has changed in the real world since then. In many ways, the general conditions needed a 'brush-up' to be brought into the 21st century. This article will highlight a few of the many changes and additions to the new Danish general conditions in construction contracting that entered into force on 1 January 2019.

## After the Cold War

A lot has changed since the fall of the Berlin Wall in 1989 – in the world order, everyday life, and in our design and construction of structures. Despite these changes, the Danish general conditions, which, to a large extent, regulate construction law in Denmark as

agreed documents, had been left untouched over the past three decades.

The previous agreed documents consisted of:

- General Conditions for consulting services, ABR 89, which were drafted with a specific focus on technical consultation and assistance within the field of building and construction;



- General Conditions for the provision of works and supplies within building and engineering, AB 92; and
- General Conditions for turnkey contracts, ABT 93.

The general conditions can be traced to 1889, when the general conditions applied solely to railroads and hydraulic constructions. Since 1915, Danish construction law has been governed by agreed documents drafted after negotiation and in cooperation between the parties in the industry. Thus, the agreed documents today have high legal value as a source of law. AB 92 was a newer version of the previous AB 72. ABR 89 and ABT 93 were entirely new agreed documents and the first versions of their kind within Danish construction law.

It is, however, very likely that nobody in 1989 or 1993 foresaw the development of, for example, partnering or public-private partnership. Also, it might have been a distant thought that the contractor should design anything if the contract was not to be a design and build contract. Nevertheless, those (and many more) types of construction contracts are not alien to the construction industry of today, though they have lacked sufficient regulation. The previous standard forms lacked sufficient regulation of especially the contract forms involving a lesser or greater degree of contractor's design, thus falling 'in between' the traditional forms of contracts where the design is already in place when the contract between the contractor and the employer is made (AB 92 contracts), and contracts where the contractor bears the main part of the design responsibility (ABT 93 contracts).

There was great demand in the construction industry for a review of the general conditions. Some even claimed to deviate from the general conditions to such a degree that there could no longer be said to be a set of general conditions.

In other words, the previous general conditions did not meet the reality of the construction industry of the 21st century.

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*There was great demand in the construction industry for a review of the general conditions ... the previous general conditions did not meet the reality of the construction industry of the 21st century.*

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## Into the 21st century

In response, a committee was established in spring 2015 consisting of representatives from across the construction industry to review the general conditions. The committee revealed the first drafts of the new agreed documents on 2 February 2018 and the new general conditions entered into force on 1 January 2019.

In many ways, the previous general conditions needed a 'brush-up' to be brought into the 21st century. A few of the many changes and additions will be highlighted.

## The new generation of general conditions – AB 18, ABT 18 and ABR 18<sup>1</sup>

### Hierarchy of documents

One of the landmarks is Clause 6(3) of AB 18, which lays down a ranking or hierarchy of documents to a construction contract, as is known from the Norwegian and Swedish standard forms of construction contracts. This is an addition to the previous AB 92, which did not include a similar clause.

The hierarchy of six groups of documents seems to be based on the principle of *lex posterior* – the newest document takes precedence in the hierarchy.

In cases of conflict between documents in different groups, the document higher up in the hierarchy stands (*lex superior*). In cases of conflict between documents within the same group, the question of which document takes precedence depends on a specific assessment based on common principles of contract interpretation. This can include the subjective will of the parties, *lex specialis* and *in dubio contra stipulatorem*.<sup>2</sup>

It is possible to deviate from the general rule set out in the clause, either by contract or by common principles of contract interpretation.<sup>3</sup> However, case law shows difficulty in deviating from the general conditions, even in cases where this has been laid down in a contract. With this in mind, it might not be preferable for the general conditions to rank last of the six documents in the hierarchy,<sup>4</sup> but it appears to follow common sense that the general conditions are the lowest-ranking document because the higher-ranking documents include deviations from the general conditions.

A concern has also been raised that placing the contractor's tender above the tender documents may lead to a more formalistic



approach from the contracting authority to any ambiguity in the contractor's tender, in that ambiguity is either considered to be a contractual reservation or an alternative tender.<sup>5</sup> It is the authors' view that this is not of concern; rather, this hierarchy of documents follows from procurement law, and it appears to be reasonable to have uniform regulation.

It is the authors' view that the employer (especially where the employer is a contracting authority) should avoid amendments to the hierarchy of documents clause, but instead set a price on the contractor's reservations.

Nevertheless, this clause sets a new standard and will – at least in some cases – force the parties to make a conscious decision as to whether the listed hierarchy of documents stands or not.

## Contractor's design

An even more interesting addition in AB 18 is the introduction of the possibility to let the contractor be in charge of part of the design – as opposed to design and build contracts, where the contractor is in charge of the entire design.

The contractor can be liable only for design that they have agreed to perform (Clause 17(1) of AB 18). This precludes the employer from 'forcing' the contractor to design through the employer's variations, unless the contractor initially had agreed to design the specific construction part that is affected by the employer's variation.<sup>6</sup>

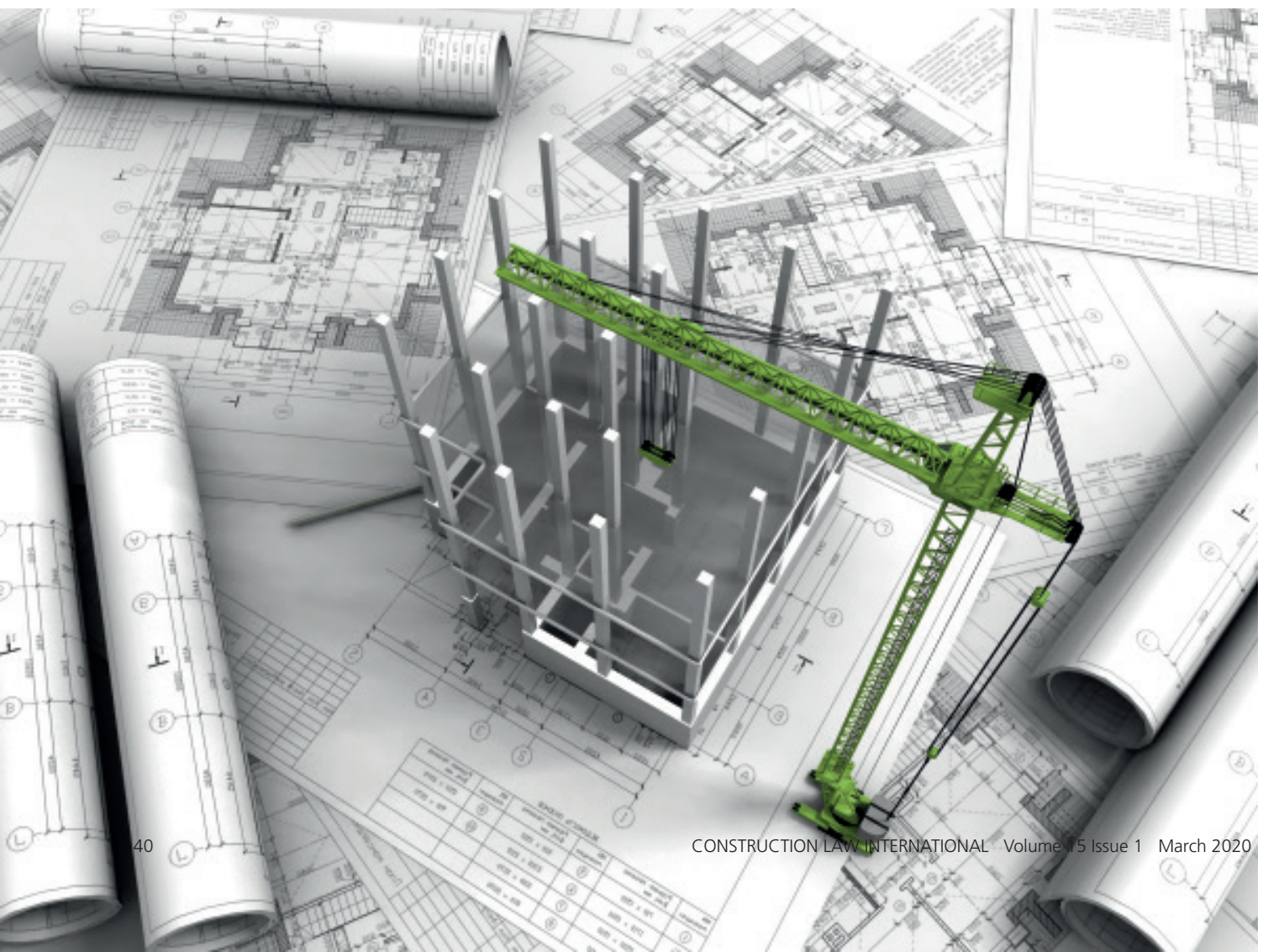
Also, an agreement by the contractor to design parts of the construction may be entered into between the parties by their conduct. However, the contractor's shop drawings are not considered to be any kind of design.<sup>7</sup>

With the new provisions, it is now clear – in a legal context – that the contractor *can* design and, when doing so, they will also bear the design liability. However, the clauses about the contractor's design leave room for new disputes.

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*With the new provisions, it is now clear ... that the contractor can design and, when doing so, they will also bear the design liability.*

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Credit: ArchMan/Shutterstock

The designer is obliged to perform the design of the entire project, unless it has been agreed that parts of the design are to be designed by others or in cases where it is common for the contractor to perform parts of the design (Clause 14(1) of ABR 18). However, the contractor is obliged to perform only the design that it has agreed to perform (Clause 17(1) of AB 18). This leaves the employer in an unfortunate situation in cases where it is usual for the contractor to perform parts of the design, but these parts of the design are not part of the contract between the employer and the contractor. This seems to be a 'hole' in the new general conditions.<sup>8</sup>

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*The clauses on the contractor's design are probably one of the most novel additions to the general conditions. However, the clauses leave some ambiguity to be resolved by case law in the future.*

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In addition, the contractor has an obligation to undertake quality assurance of its own work (Clause 17(6) of AB 18). It can be questioned whether this would be 'putting the fox to guard the henhouse' – when would a contractor ever admit to another contract party that its own work is faulty, when that might cause liability for the contractor? Also, the contractor is obliged to perform design according to good design practices and will, for that very reason, already be liable for its own design. It seems obvious for the employer to carry out a quality assurance check of the design in question.

The clauses on the contractor's design are relatively long and complicated. Professor Torsten Iversen has suggested in several articles that they should be revised and shortened.<sup>9</sup> However, the committee has chosen to follow only some of these recommendations.

The clauses on the contractor's design are probably one of the most novel additions to the general conditions. However, the clauses leave some ambiguity to be resolved by case law in the future.

### *Liability for designers*

Previously, the employer had difficulty claiming damages based on the liability of designers. If, for some reason, the designer did not include a part of the project in its design, the employer would, as a general rule, have to pay the contractor for the work anyway. The reason

was that the employer had to pay for the work under any circumstance – if the design had been done initially, the contractor's contract sum would have been equally higher. In other words, it was difficult for the employer to prove the existence of a loss.

The situation mentioned above has been called the 'value-for-money principle'<sup>10</sup> and it seems to derive from the enrichment doctrine according to which a person may not gain any unjust enrichment. In those cases, the employer would be able to claim damages for the higher price, due to the later procurement of the missing part of the work, only if the work had been included in the project from the beginning.

The value-for-money principle seems to have been a common loophole for designers to escape (most of their) liability for damages due to their faulty design. Only in severe cases would the designer be liable for faulty design.

With the new general conditions for consulting services (Clause 49(2) of ABR 18), the employer's claim for damages has been standardised. The clause states that, in case the employer has to buy a service from the contractor which derives from the designer's lack of incorporating the service in the design from the beginning, the designer is liable to pay the employer liquidated damages of five per cent of the price of the services, for which no price per unit has been set.

Clause 49(2) is limited for cases where the faulty design is discovered during the construction phase.

However, if the total amount of liquidated damages is below two per cent of the contract sum, the designer is not liable to pay liquidated damages to the employer.

The designer's liability for liquidated damages is maximised to ten per cent of the designer's aggregate fee.

The employer is given the option of claiming unliquidated damages if they can prove a loss in excess of the liquidated damages because they did not put the specific services out to competition. In such cases, the employer needs to purchase the 'forgotten' services from the designer at a very late time, which puts the employer in a weak negotiating position with the contractor, who will set a higher price for the change of work than would have been the case if the work had been part of the initial tender. However, this will in many cases be difficult to prove.

In the same way, the designer is given the option to pay unliquidated damages only in

cases where they can prove that the employer's loss is less than the liquidated damages.

In our opinion, Clause 49(2) of ABR 18 imposes a new regulation of the designer's liability for faulty design which appears to take into account the interests of both the designer (who had quite a large loophole to escape (most of their) liability for his faulty design) and the employer (who has been given an easier way of claiming damages from the designer).

## *Escalation of disputes*

The committee has observed that alternative dispute resolution has a lot to offer to the construction industry in Denmark. On this basis, the committee has put in place a 'Conflict Staircase' and a new dispute resolution regime.

First, if a dispute arises during the construction phase, the project managers of each party are to settle the dispute by negotiation not later than five working days from one of the parties' request for negotiation (Clause 64(1) of AB 18). This fits well with one of the fundamental principles of mediation, which is to hand the conflict back to the parties, who are presumed to be the ones best placed to resolve their own conflict.

Second, if the parties fail to settle the dispute in step one, or if the construction project has been completed, management representatives of the parties are to settle the dispute by negotiation (Clause 64(1) and (2) of AB 18). This must happen not later than five days after the expiry of the deadline in step one.

The parties cannot resort to mediation, conciliation, adjudication or arbitration before the parties have tried to settle the dispute according to the first two steps. This rule also applies with regard to expert opinions.

After the first two steps, the management representatives are to discuss and eventually choose between mediation, adjudication and arbitration in order to resolve the dispute.

Mediation cannot be initiated if, within ten working days (from the submission of the request for mediation), a party requests adjudication (Clause 65(2) of AB 18).

Some practitioners and clients complain about the time it takes to go through a typical arbitration process. In this regard it is interesting to find the adjudication clause in Clause 68 of AB 18. Any party to the contract can request the appointment of an adjudicator to make a decision regarding, for example,

the employer or the contractor's right to an extension of time and the employer's entitlement to withhold payments or offset amounts in the contractor's claims for payment (Clause 68(1) of AB 18).

After having received the request for adjudication, the opposing party has ten days to submit a reply. Each party can submit additional pleadings within five working days after receipt of the opposing party's pleading (compare Clause 68(4) of AB 18).

The adjudicator makes a decision no later than ten working days after the receipt of the last pleading (Clause 68(7) of AB 18). The adjudicator's decision is binding as an arbitral award (Clause 68(9) of AB 18). It can be appealed to an arbitral tribunal within eight weeks from the date of the decision. The adjudicator's decision is binding until the arbitral award is rendered and becomes binding as an arbitral award if arbitration proceedings ('appeal') have not been initiated within eight weeks after the decision has been rendered.

Arbitration proceedings cannot be commenced until four weeks after conclusion of the first and second steps (Clause 69 of AB 18).

Interestingly, if one of the parties requests mediation, the other party is obliged to participate in the mediation. Arbitration is precluded until the mediation process has been concluded, which will be either with a settlement or when the mediator concludes that it is not possible to reach a settlement between the parties.<sup>11</sup>

The rules for mediation also apply for conciliation (Clause 65(9) of AB 18).

The committee chose this set-up based on experience from other countries where negotiation, mediation and conciliation often result in the settlement of disputes. Those dispute resolution procedures are both quicker and less costly than traditional arbitration proceedings.<sup>12</sup>

The speed of solving of disputes seems to have been especially important to the committee, because having a dispute during the construction phase will in most cases destroy the foundation for cooperation between the parties and provide fertile ground for new disputes to arise.<sup>13</sup>

The procedures of negotiation, mediation, conciliation and adjudication existed long before the new general conditions; however, they have not been sufficiently applied. The committee believes this to be so because these alternative dispute resolution procedures



were voluntary for the parties and were not agreed upon prior to the dispute.

It is the authors' opinion that the alternative dispute resolution procedures have not been sufficiently applied due to the lack of agreement in advance and because of the lack of experience with alternative dispute resolution (not because it was voluntary for the parties).

In general, the new 'model' for dispute resolution in the general conditions seems to focus on settling or resolving the dispute at the lowest possible level. Also, it appears to be a central point that disputes should be resolved more quickly and at less cost than through arbitration in order to enhance cooperation between the parties to the construction project in line with the proactive approach known from the New Engineering Contract (NEC) and FIDIC suites of contracts in relation to good contract administration.

The authors expect the new rules of dispute resolution to bring a series of advantages to the construction industry in Denmark and eventually save the industry from spending enormous amounts of resources on dispute resolution even though it may be observed that, especially adjudication, due to its formal nature and non-verbal basis, may be expected to generate unpredictable results in the first adjudications under the new rules.

The new regime will also have an impact on attorneys practising within construction law. The attorneys will perform a series of new roles in addition to being arbitrators or contract drafters, such as negotiators and mediators, or at least serve their employers through the negotiation and mediation phases.

In total, the general conditions truly seem to have been brought into the 21st century – and to push the legal profession into that very century too. However, one aspect from the previous general conditions that could have inspired the committee is the concise and precise wording of the general conditions. The committee has suggested that the new general conditions, AB 18, ABR 18 and ABT 18, should be reviewed in five years<sup>14</sup> and it is the hope of the authors that the next review will bring a more precise and concise version of the new general conditions.

#### Notes

- 1 The new standard forms of agreement also include a number of appendices for special types of contract, eg, project development ('early tender'), pain/gain share contracts and commissioning. There are also two short forms of contract, ie, AB Simplified and

ABR Simplified. These two short form contracts are very similar to AB 92 and ABR 89 not including many of the contract management provisions in the new regime with one exception: the simplified versions also follow the new procedural rules of the Arbitration Board for Construction and Engineering that can be found at [www.voldgift.dk](http://www.voldgift.dk) accessed 15 November 2018.

- 2 Trafik-, Bygge- og Boligstyrelsen (Danish Transport, Construction and Housing Authority), *Betænkning nr 1570.2018* (the 'Report'), 76.
- 3 *Ibid.*
- 4 Torsten Iversen, *Om AB-udkastet og dets forhold til lovgivningen samt til andre aftaler* (2018) (TBB2018.398) (The draft general conditions and their relation to statutes and other agreements), Ch 9. Also, this place in the hierarchy seems to conflict with the text of clause 47(5), see Torsten Iversen, *Om AB-udkastet og dets forhold til lovgivningen samt til andre aftaler* (TBB2018.398), Ch 10.
- 5 Anders V Buch, *Mangler i høringsudkastet til AB 18* (TBB2018.373) (Defects/errors and omissions in the draft AB 18), Ch 3.2.
- 6 The Report, 104.
- 7 *Ibid.*
- 8 According to a case published in the *Danish Journal for Construction Law* in 2018 (T:BB 2018.285) an architect could not be held liable for defects in a sunscreen design used for a United Nations building at the port in Copenhagen. The arbitration court held that sunscreens were normally designed by the contractor and since it was not a part of the scope in the contract with the architect (nor the contractor) that any of them should design the sunscreens (that were in fact not saltwater resistant which they should have been due to the proximity to saltwater) the employer had the design liability. This case would no doubt have had the same outcome under AB 18 and ABR 18 due to the 'hole' mentioned in the new regime.
- 9 Torsten Iversen, *Strejftog i AB-udkastet – forbedringer eller forringelser? – forenklinger eller forviklinger?* (TBB2018.310) (Raid on the draft general conditions – for better or for worse? – simplifications or complications?), Ch 2, and same in Torsten Iversen, *Struktur og sprog i AB-udkastet* (TBB2018.326) (Structure and language in the draft general conditions), Ch 4.
- 10 Bo S Pedersen mentioned the 'value-for-money principle' during his period of teaching construction law at the University of Copenhagen in autumn 2014.
- 11 Under s 22.2 of the procedural rules of the permanent Arbitration Board for Construction and Engineering for AB 18, ABT 18 and ABR 18 the arbitral tribunal can ask the Board for appointment of a mediator at any given point during the arbitration process and bring the proceedings to a halt until a mediation process has been tried and concluded.
- 12 The Report, 20.
- 13 *Ibid.*, 175.
- 14 *Ibid.*, 479.

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# Enforceability of the AIA C195 indemnity provision under English law

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The enforceability of the broad language of the AIA C195 indemnity provision to negligence of an indemnitee under English law has been criticised. English courts have long considered this indemnification as being inherently improbable to be agreed upon. Being guided by the Canada Steamship rule, English courts reject the enforceability of indemnification for an indemnitee's own negligence in the absence of an express or equivalent word. Nevertheless, the Canada Steamship rule is not a rule of law under English law, but a tool for the courts to determine the intention of contracting parties. Therefore, interpreting the C195 indemnity provision in light of its language and purpose, we conclude that indemnification for an indemnitee's own negligence is the common intention of all C195 company members and enforceable.

## Introduction

The C195 document was introduced by the American Institute of Architects in 2008 as an international integrated project delivery contract form. The document requires its members to create a limited liability company for the purpose of project delivery. Sub-Clause 12.3.1 imposes a broad indemnification obligation on the company which requires it to indemnify its members for any loss, damage and claim under certain conditions. Being guided by the Canada Steamship rule, English courts reject the enforceability of indemnification for an indemnitee's own negligence in the absence of an express or equivalent word. This article investigates the enforceability of the C195 indemnity provision to negligence of an indemnitee under English law.

## AIA C195 indemnity provision

Indemnity clauses require that one party (the indemnitor) indemnify the other party (the indemnitee) against any losses the indemnitee may suffer on the construction project. The main purpose of the clauses is to shift the burden of liability onto the party whose ultimate malfeasance results in damage to another party. For instance, a contractor promises to indemnify the owner against claims brought by third parties for damage caused by its own deficient construction as the ultimate responsibility also rests on the contractor.<sup>1</sup>

The common logic behind indemnification clauses is that the risk should be shifted to the party that is in the best position to deal with and has the most control over it.<sup>2</sup> For this reason indemnification clauses are also commonly used in commercial contracts as a risk allocation method.<sup>3</sup> However, improper use of the clauses can result in unwanted situations and leave the party to whom the risk is shifted liable for the risk in circumstances outside its control.<sup>4</sup> Indemnifying an indemnitee for its own negligence is of this kind. Such an indemnification obligation is considered to be improbable to be accepted by the indemnitor, as Justice Steel in *Colour Quest Ltd v Total Downstream UK Plc*<sup>5</sup> said: 'There is in any event an inherent improbability that a party would agree to indemnify another for negligent conduct for which the latter was responsible'.

The contract form AIA C195, however, employs a broad form of indemnity clause. Sub-Clause 12.3.1 in requiring the company to indemnify its members says:

'... the Company shall indemnify a Covered Person, to the fullest extent permitted by applicable law, for any loss, damage or claim the Covered Person incurs by reason of any act or omission performed or omitted by the Covered Person in good faith on behalf of the Company and in a manner reasonably believed to be within the scope of authority conferred on the Covered Person by this Agreement. However, no Covered Person shall be entitled to be indemnified for any loss, damage or claim the Covered Person incurs by reason of its willful misconduct with respect to the acts or omissions.'

The broad language of the provision as it requires the company to indemnify 'any loss, damage or claim' can impose an indemnification obligation on the company for a negligent act or omission of its members. Because of the improbability of the intention for such the result,<sup>6</sup> English courts generally require express words or equivalent words for negligence in indemnity clauses in order to ensure the meeting of minds. In this regard, the Court of Appeal in *Walters v Whessoe*<sup>7</sup> said: 'It is well established that indemnity will not lie in respect of loss due to a person's negligence or that of his servants unless adequate or clear words are used or unless the indemnity could have no reasonable meaning or application unless so applied.'

Having said that, since the result of indemnifying an indemnitee for its own negligence, in general, is not favoured among English courts, the enforceability of the C195 indemnity provision is controversial.

## English law

There is no anti-indemnity statute in English law governing contracts between businesses. Section 4 of the Unfair Contract Terms Act 1977 was applicable to indemnifications in consumer contracts; however, it was recently revoked by the enactment of the Consumer Rights Act 2015.<sup>8</sup> The House of Lords, with regard to commercial indemnity provisions, also held that 'there is no substantive rule of law which empowers the court to strike down an indemnity clause merely because it is unreasonable or because the consequences of the breach are serious'.<sup>9</sup> Therefore, as the validity of the indemnity provisions is not



barred by any statute, contracting parties can agree on indemnifications as a means of risk allocation by exercising their freedom of contract right. Nevertheless, the enforceability of such agreements will ultimately be a question of construction of the relevant clauses.<sup>10</sup>

## Canada Steamship rule

Encountering vague and ambiguous wording of contract terms, courts apply the longstanding rule of construction of contracts known as *contra proferentem*. The rule requires the courts to interpret the words and clauses against the party that is seeking relief by relying on them and shifts the burden of proof to that party.<sup>11</sup>

Applying the rule to indemnity provisions to the effect of an indemnitee's own negligence where the word 'negligence' is not expressed, English courts are guided by the Canada Steamship rule.<sup>12</sup> The rule provides three tests on the interpretation of the indemnity provisions. First, if the language expressly exempts the indemnitee from the consequences its own negligence, effect must be given to that provision. Second, if there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servant of the indemnified person. *Contra proferentem* will apply. Third, if the words used are wide enough to cover negligence, the court must then consider whether the head of damage may be based on some other ground than that of negligence.<sup>13</sup>

The Canada Steamship rule is not a rule of law in the United Kingdom, though it has a long history in English law. In fact, the rule is generally applicable in English courts; however, the courts deviate from the rule in certain situations. For example, recently in *Greenwich Millennium Village Limited v Essex Services Group PLC* (SCs),<sup>14</sup> which was an appeal against the decision of the trial court which enforced the broad language of an indemnity provision contained in the sub-sub-sub-contract between the Health and Safety Executive (HSE) and Robson to the indemnitee's own negligence as to failure to detect the defect and consequently failure to provide notice in due time, the appellate court said that the Canada Steamship rule:

'is of general application. Nevertheless, it is based upon the presumed intention of

the parties. In applying that rule the court must have regard to the commercial context of the contract under consideration. In the case of a construction contract a failure by the indemnitee to spot defects perpetrated by its contractor or sub-contractor should not ordinarily defeat the operation of an indemnity clause, even if that clause fails expressly to encompass damage caused by the negligence of the indemnitee.'<sup>15</sup>

The case law suggests that the Canada steamship rule is no longer strictly applied in English law. Although the rule has long been applied by English courts, as noted by some courts,<sup>16</sup> like all rules of construction, it functions to guide the courts to achieve the intention of the parties. Thus, it should not be applied strictly to create a result which is not intended by the parties. The House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society*<sup>17</sup> stated that as a matter of construction, courts have to find out the intention of the parties in each case with regard to the purpose of the provisions and their words.

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*The broad language of the C195 indemnity provision creates an understanding that it covers the indemnitee's own negligence.*

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## Interpretation

The broad language of the C195 indemnity provision creates an understanding that it covers the indemnitee's own negligence. Being contrary to the traditional fault-liability pattern of commercial contracts, courts, in general, would be reluctant to enforce such provisions to the negligence of an indemnitee in the absence of clear words.<sup>18</sup> Therefore, because of the courts' unwillingness in holding the company (indemnitor) liable for an indemnitee's own negligence by way of the mere broad language of the indemnity provision, proving the effect of the provision to negligence demands interpretation.

In interpretation of a contract term the priority is with the plain meaning of its language and in case of ambiguity, courts have to consider its purpose. The House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society*<sup>19</sup> stated that if a clear meaning of a clause cannot be extracted from its wording, the courts are required to interpret the clause based on its aim or purpose.

The plain language of the C195 indemnity provision suggests that the indemnification for negligence is intended as the provision limits the indemnification expressly to the good faith conduct and excludes indemnification for the wilful misconduct of an indemnitee. Parties to such contracts are sophisticated and the drafter is assumed to intend the clear meaning of its employed words and the other parties are aware of such a meaning. Silence about the negligence indicates that the drafter did not intend to exclude liability from its coverage. In addition, the drafter did not express the indemnitee's own negligence as it expectedly did not want to create an impression of careless performance among the project participants by expressly entitling them to indemnification in case of their own negligence.

However, the Court of Appeal in *Dorset County Council v Southern Felt Roofing Co Ltd*<sup>20</sup> reasoned that the draftsmen of an indemnity clause, especially businesses, are aware of the court's general reluctance towards indemnifying an indemnitee for its own negligence and that, therefore, if the clause does not express the indemnitee's negligence then it is assumed that the drafter of the clause cautiously intended not to entitle the indemnitee to be indemnified for its own negligence. Therefore, not expressing the word 'negligence' in the C195 indemnity provision with the knowledge of the courts' general reluctance to enforce such the broad language to negligence of indemnitees can indicate the parties' intention not to entitle an indemnitee to be indemnified for its own negligence.

This argument can be in line with a reasonable meaning of the provision which is to be achieved based on the understanding of a reasonable person. As such, the interpretation is a rule of contract interpretation in common law.<sup>21</sup> Therefore, as indemnification for an indemnitee's own negligence encourages careless behaviour from the indemnitee, a reasonable person will not intend to expose the contract performance to such careless behaviour of the other party

who is relieved of liability for their negligence. By analogy to the C195 indemnity provision, the argument still exists as all the participants are entitled to be indemnified by the company. Since the company is a legal entity established and managed by the participants, exposing it to such a great risk of liability means exposing all the participants to the same dangerous situation. Reasonable members will not intend to encourage careless performance of other members by indemnifying them for their negligent act or omission and endanger the project progress.

On the other hand, as the English Supreme Court recently emphasised in *Wood v Capita Insurance Services Ltd*,<sup>22</sup> contract interpretation is to be consistent with business common sense. The courts should interpret broad indemnity provisions in the light of their commercial context and therefore with regard to their purpose and aim. Since the aim of Integrated Project Delivery is to deliver fast and high-quality work through creation of a highly collaborative environment among the participants during the project,<sup>23</sup> the C195 indemnification provision is designed to remove the fear of liability arising either from negligence or contractual breaches which bar the project participants from cooperation.<sup>24</sup> The effect of the indemnity provision is in fact the sharing of liability among the members as Sub-Clause 12.3.1 limits the indemnification obligation of the company to its assets which are contributed to by its members (Sub-Clause 4.2). In other words, the purpose of the indemnity provision is to reduce the burden of liability for negligence which the indemnitee has committed during project performance so as to remove the fear of openly sharing information which is important for the overall success of the project. As a result, as the commercial purpose of the C195 indemnity provision demands indemnification for an indemnitee's own negligence, it indicates that the parties to the C195 contracts do not intend that one party alone bears the liability for damage or loss defined in the provision even if it occurred from its own negligence.

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*If the clause does not express the indemnitee's negligence then it is assumed that the drafter of the clause cautiously intended not to entitle the indemnitee to be indemnified for its own negligence.*

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## Conclusion

There is no statute barring the enforceability of the AIA C195 indemnity provision to negligence of an indemnitee. However,

English courts are guided by the Canada Steamship rule in rejecting the enforceability of a broad indemnity provision in the absence of an express or equivalent word for negligence. Nevertheless, the rule is not a rule of law but a guideline for English courts to achieve the intention of the contracting parties. Therefore, interpretation of the C195 indemnity provision is useful to find out if the indemnification for an indemnitee's own negligence is intended. Although some courts give weight on improbability of intention of an indemnitor to indemnify an indemnitee for its own negligence and so demand express or equivalent words for negligence, both the plain language of the provision and its purpose indicate the intention of the contracting parties to entitle themselves to be indemnified for their own negligence by the company.

## Notes

- 1 See WR Allensworth, RJ Altman, AL Overcash, CJ Patterson, American Bar Association Forum on the Construction Industry (2009) 'Construction Law' Chicago, IL: American Bar Association, 1361.
- 2 See JM Adams and KK Milhollin, 'Indemnity on the Outer Continental Shelf – A Practical Primer' (2002), Tul Mar LJ 27(1), pp 43–48.
- 3 JG Cooper and M Leonard, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, 'Indemnification Clauses in Commercial Contracts (GA)', *Practical Law Commercial Transactions* (2017).
- 4 *Ibid.*
- 5 [2009] EWHC 540 (Comm) at [369].
- 6 See *Colour Quest Ltd v Total Downstream UK Plc*, [2009] EWHC 540 (Comm) at [369].
- 7 [1968] 1 WLR 1056; cited by the court in *Stent Foundations Ltd v MJ Gleeson Group Plc*, 2000 WL 1151439 at 9.
- 8 Consumer Rights Act 2015 [www.legislation.gov.uk/ukpga/1977/50](http://www.legislation.gov.uk/ukpga/1977/50) accessed 4 December 2019.
- 9 Y Aubin and T Portwood, 'Mutual Indemnity and Hold Harmless Agreements' (2001) 6 *International Business Law Journal*, 671–698.
- 10 JW Carter and W Courtney, 'Indemnities against Breach of Contract as Agreed Damages Clauses' (2012) 7 *The Journal of Business Law*, 555–578.
- 11 *Ibid.*, 4–5.
- 12 *Ibid.*, 5.
- 13 *Canada Steamship Lines Ltd v R*, [1952] 2 DLR 786 (Jud Com of Privy Coun); A Wallace and V Merritt, 'Contractual Indemnities in Construction Contracts: A Contractor's Perspective' (2017), *J Can C Construction Law*, 17.
- 14 [2014] EWCA Civ 960.
- 15 [2014] EWCA Civ 960 at 13.
- 16 *Monarch Airlines Ltd v London Luton Airport Ltd* [1997] CLC 698. See also *Lamport & Holt Lines Ltd v Coubro & Scrutton (M&I) Ltd* [1982] 2 Lloyd's Rep 42 at 49 and 51.
- 17 [1997] CLC 1243 HL.
- 18 CS Ugwuanyi, 'Examining the Exclusionary Nature of Oil and Gas Contract Mutual Indemnity Hold Harmless Clauses' (2012) 4 *International Energy Law Review*, 136.
- 19 [1997] CLC 1243 HL; M Tedjani, 'Indemnities in private share deals' (2019), *Comp Law* 40(2), 3.
- 20 (1989) 48 BLR 96 at 106; the reasoning recently followed by High Court of Justice Queen's Bench Division Technology and Construction Court in *Scottish & Newcastle Plc v G D Construction (St Albans) Limited* 2001 WL 395267 at 10.
- 21 See R Catterwell, 'Striking a Balance in Contract Interpretation/The Primacy of the Text' (2019), *Edinburgh Law Review*, 23(1), 52–74; *Arnold v Britton* [2015] AC 1619.
- 22 [2017] AC 1173.
- 23 Martin Fischer, Atul Khanzode, Dean P Reed and Howard W Ashcraft Jr, *Integrating project delivery* (Hoboken, New Jersey: John Wiley & Sons 2017), 47.
- 24 See HW Ashcraft, 'Negotiating an Integrated Project Delivery Agreement' (2011) *The Construction Lawyer* 31(3), 6–7.

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A construction site in Seoul, South Korea, November 2019. Credit: Obs70/Shutterstock

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# Preventive legal measures under Korean law against unjust bond calls

This article analyses the preventive legal measures under Korean law against an unjust bond call by the beneficiary/employer (the 'Beneficiary') upon the various unconditional bank guarantees that have been issued by financial institutions located in Korea (the 'Issuing Bank').

## Introduction

Unconditional bank guarantees are typically requested to be submitted by the applicant/contractor (the 'Applicant') for various purposes in accordance with the underlying contract, in this context a construction contract with regard to an international construction project.

Since Korean courts have jurisdiction over preventive legal measures against unjust

bond calls insofar as such a bond has been issued by a financial institution in Korea, it is worth being aware of the preventive legal measures that the Korean courts can advance. This article also looks at how unjust bond calls are different in the other developed jurisdictions based on English law.

Similar to the other civil law jurisdictions, there are two preventive legal measures mainly issued by a Korean court to prevent

the payment by the Issuing Bank upon the Beneficiary's unjust bond call: a preliminary restraining order (지급금지가처분); and a provisional attachment (채권가압류). These measures are provided for under Article 300 and Article 276, respectively, of the Civil Execution Act of Korea<sup>1</sup> (the 'Execution Act'). This article considers the two measures in respect of the prospects of success and expected cash out, which the Applicant and the Beneficiary should assess before initiating or objecting to any preventive legal action before the Korean courts.

## Preliminary restraining order

### General

A preliminary restraining order, as well as the provisional attachment, is made during proceedings known as provisional, interim, preliminary or interlocutory proceedings. Such injunctions are provisional in the sense that they can be revoked during the main proceedings. However, in the event of an unjust bond call, the parties tend to have the dispute in provisional proceedings, rather than the main proceedings. The purpose of this is to prevent the Issuing Bank's payment to the Beneficiary. Otherwise, the Issuing Bank will make a payment immediately to the Beneficiary and request the Applicant to reimburse the amount that has been paid to the Beneficiary. The main proceedings may take more than a year to reach a final decision.

Since the respondent of the preliminary restraining order is the Issuing Bank domiciled in Korea, Korean courts have international jurisdiction over such preliminary restraining orders pursuant to the relevant procedural law provisions (Article 2 of the International Private Act of Korea;<sup>2</sup> Articles 303 and 23(1) of the Execution Act; and Article 2 of the Civil Procedure Act of Korea<sup>3</sup>).

### Requirement: express abuse of rights

The preliminary restraining order requires the Applicant to satisfy two elements: (1) the Beneficiary's express abuse of rights; and (2) the necessity of the preliminary restraining order (Article 300 of the Execution Act). In order to meet the second element, the Applicant should demonstrate that it will suffer an imminent or irreparable injury unless the court grants the order. However, it is already well recognised that the unjust bond

call will lead to an immediate reimbursement request by the Issuing Bank and that the Applicant is de facto unable to refuse such a request from a financial institution due to various reasons. These reasons may include cross-default provisions in finance documents or set-off by the Issuing Bank with the Applicant's other funds in the account opened at the Issuing Bank.

Furthermore, it would be difficult to recoup the reimbursement amount from a foreign Beneficiary, whose assets are all outside Korea, through the main proceedings.<sup>4</sup> Therefore, the main argument point in the proceedings for the preliminary restraining order becomes the first element, the express abuse of rights, rather than the second element.

In the Korean Supreme Court (KSC) decision 2013DA53700 dated 26 August 2014, the KSC detailed and supplemented the requirements for the preliminary restraining order against the unjust bond call which had been established by the KSC under its earlier decision (KSC decision 93DA43873 dated 9 December 1994) as follows:

'In a case where it is objectively evident that beneficiary's demand is made by abusing the abstract and independent features of this particular type of bank guarantee, when in fact the beneficiary does not have any rights vis-à-vis the applicant, such demand constitutes an abuse of rights, and thus, impermissible. In such cases, the guarantor may withhold the payment demanded by the beneficiary. However, in consideration of the intrinsic features of first demand bank guarantee (ie, its abstract and independent features that are separated from the underlying transaction) *an abuse of rights should not be easily acknowledged unless it can be recognised as it is objectively evident that the beneficiary lacks any rights whatsoever against the applicant at the time of demand for payment, without any doubt, without any needs to look into the dispute under the underlying transaction in detail, but only with the immediately available materials*' [emphasis author's own].<sup>5</sup>

The KSC explicitly detailed the stringent legal requirements for the preliminary restraining order against an unjust bond call. It follows that it would be very difficult on any count to obtain the preliminary restraining order from the court insofar as the Beneficiary avers that its claims against the Applicant are ostensibly rightful and justifiable with the supporting materials being well prepared.

### Prospects of success

Notwithstanding the aforementioned stringent legal requirements, it is often said that the high prospects of success in obtaining the preliminary restraining order<sup>6</sup> still exist. Most preliminary restraining orders successfully granted so far have been made before the Beneficiary recognising and joining the proceedings as an interested third party and raising an objection.<sup>7</sup> This is because the Applicants have utilised the swiftness and the structure of the preliminary restraining order. The main parties to the preliminary restraining order against the unjust bond call to whom notice is given by the court for a hearing are the Applicant and the Issuing Bank, not the Beneficiary.

However, as the Beneficiary may join the proceedings (Article 23(1) of the Execution Act; and Articles 71 and 76 of the Civil Procedure Act of Korea<sup>8</sup>) and raise an objection against the preliminary restraining order (Articles 283 and 301 of the Execution Act) whenever thereafter, the order will be revoked in the end, unless the Applicant is successful in satisfying the requirement of the express abuse of rights, clearly prevailing over the Beneficiary's counter arguments.

As such, unless the Beneficiary merely asserts its claims without any sophisticated grounds, it is very unlikely the application for the preliminary restraining order against the unjust bond call will pass the KSC's high legal threshold: the express abuse of rights.

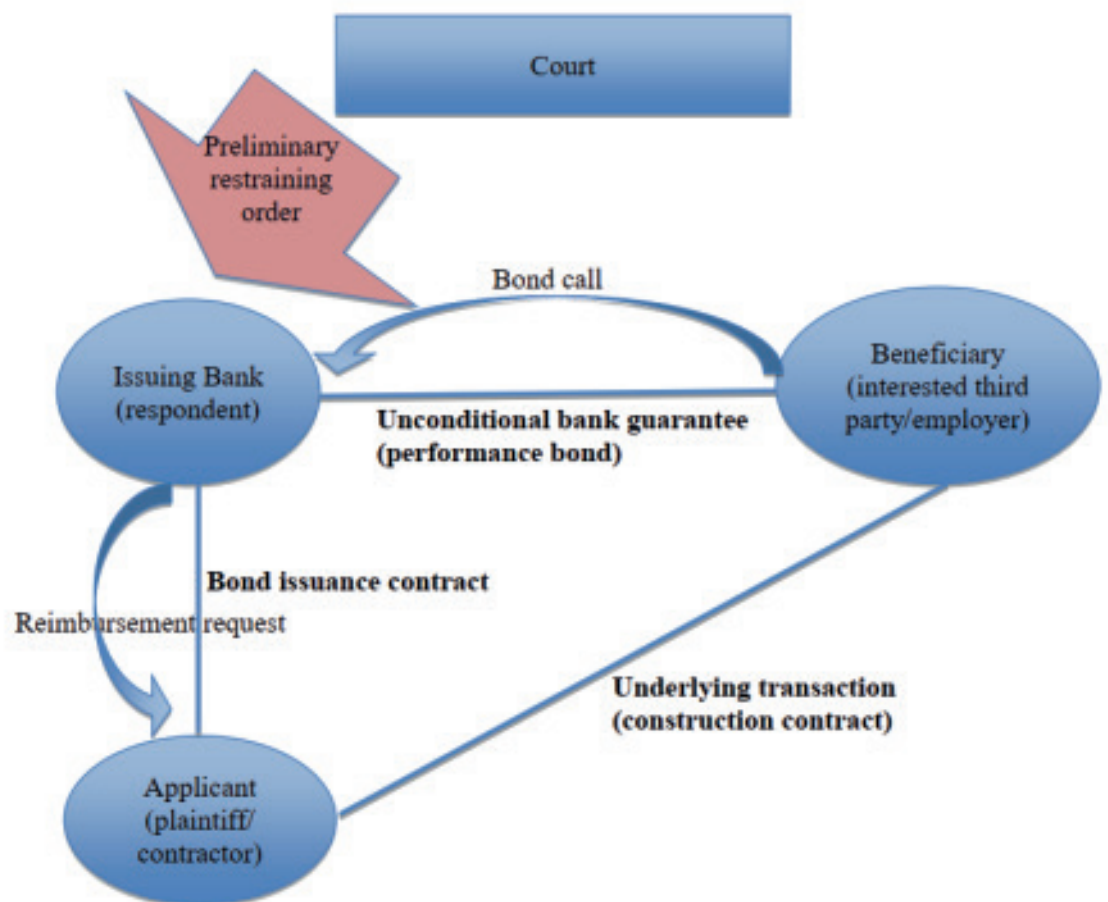


Figure 1: structure of preliminary restraining order



### Comparison to English law

As regards the preliminary restraining order, English courts base the threshold on the fraud rule instead of the abuse of rights. The English courts require that the fraud must be ‘very clearly established’ or ‘clear and obvious’, and it must be immediately available without the need for lengthy and in-depth investigation into the underlying transactions.<sup>9</sup>

However, as to the question of whether the fraud rule under English law is stricter than the abuse of rights under Korean law, it appears that the former requires a higher standard. English courts have referenced in many previous cases<sup>10</sup> the terms ‘dishonesty’, ‘*mala fide*’ intentions and so on. This suggests a subjective test, which decides whether the Beneficiary has subjective intent when it makes a bond call, and is not required for the abuse of rights under Korean law.<sup>11</sup>

### Provisional attachment

#### General

The provisional attachment, as regulated in the Execution Act, is aimed at the preservation of assets belonging to the debtor/respondent (in the present context, the Beneficiary) in order to avoid the risk that the debtor/respondent has disposed of its assets by the time that the creditor/plaintiff (in the present context, the Applicant) obtains a final judgment, which is often rendered only after protracted proceedings.

The debtor/respondent’s assets subject to the provisional attachment encompass real property, chattels, accounts and rights to payment from the third party (in the present context, the Issuing Bank). In general, the provisional attachment order is readily and quickly granted in *ex parte* proceedings (Article 280(1) of the Execution Act), sometimes within only a few days of the application, compared to the preliminary restraining order which requires an *inter parte* hearing (Article 304 of the Execution Act).

If the Applicant has plausible monetary claims against the Beneficiary such as outstanding progress payments, and the amount of these claims are equal to or more than the called amount, the Applicant may apply for the provisional attachment on the Beneficiary’s right to payment from the

Issuing Bank of the called amount by satisfying the requirements under the Execution Act.

The Beneficiary’s right to payment from the Issuing Bank, which is the asset subject to the provisional attachment, is deemed to be located at the Issuing Bank’s domicile in Korea. Thus, even if the Beneficiary is domiciled outside Korea, the Korean court has international jurisdiction over such provisional attachment order pursuant to the relevant procedural law provisions (Article 2 of the Act on Private International Law of Korea;<sup>12</sup> and Articles 278 and 21 of the Execution Act).

### Requirements and prospect of success

The provisional attachment requires the creditor/plaintiff (the Applicant) to satisfy two elements: (1) a *prima facie* monetary claim against the debtor/respondent (the Beneficiary); and (2) the necessity of the provisional attachment that an execution of the judgment on merits would be impossible or difficult without the provisional attachment (Articles 276 and 277 of the Execution Act).

In the context of an unjust bond call, the Applicant shall demonstrate before the court that: (1) it has plausible monetary claims against the Beneficiary arising out of the underlying transaction (ie, construction contract secured by the unconditional bank guarantee) or any other transaction not secured by the concerned guarantee; and (2) unless the court grants the provisional attachment it would be difficult or impossible to recoup the monetary claims from the foreign Beneficiary whose assets are all outside Korea except its right to payment from the Issuing Bank arising out of the bank guarantee. These arguments have been typically made by the Applicant and recognised by Korean courts in multiple precedent cases. Compared to the preliminary restraining order, the provisional attachment order has been far easier to obtain in *ex parte* proceedings within a shorter period.

### Legal uncertainty over provisional attachment

Over the past decade, many criticisms have been raised in Korea about the appropriateness of the provisional attachment as a preventive legal measure against the unjust bond call.

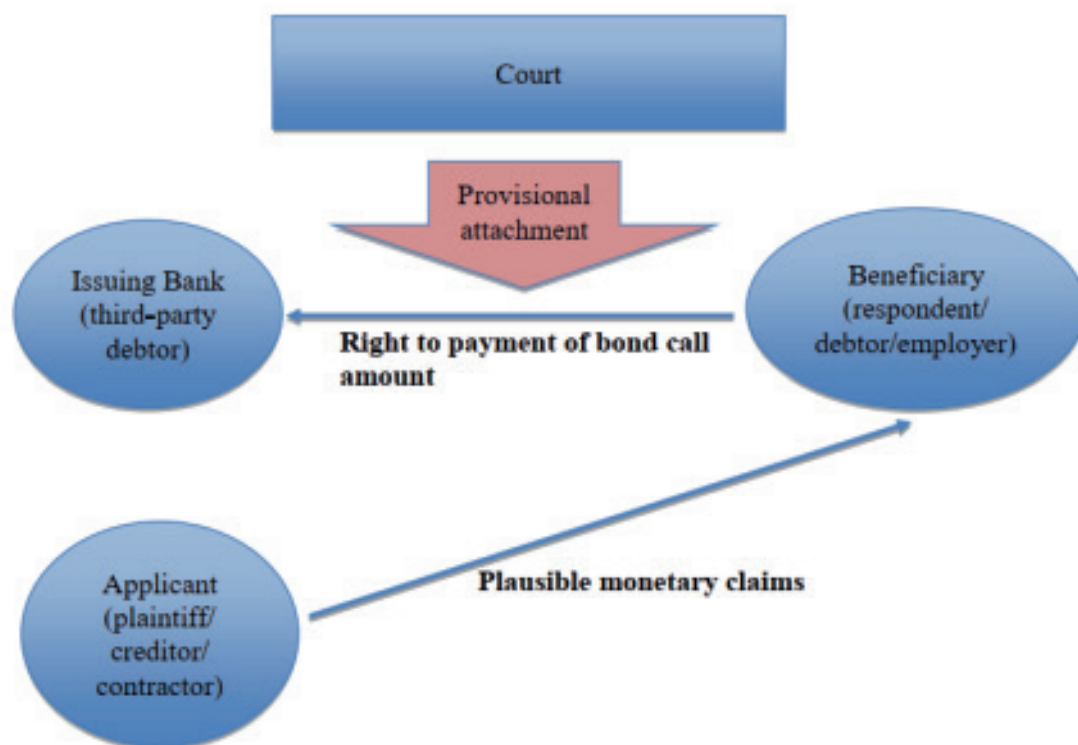


Figure 2: structure of provisional attachment

Many consider that the provisional attachment undermines the credibility of the unconditional bank guarantees issued by Korean financial institutions by subverting the intrinsic nature of the unconditional bank guarantee<sup>13</sup> because it has been often utilised by the Applicant as a measure to bypass the high legal threshold required for the preliminary restraining order: the express abuse of rights.

In light of this, it should be considered that as time goes by Korean courts might become more reluctant to grant a provisional attachment order against the unjust bond call. In 2014, one of the lower courts in Korea ordered the Applicant to change its application for the provisional attachment against the unjust bond call to the application for the preliminary restraining order, though it was an oral order.<sup>14</sup> In another case in which the Applicant had applied for a provisional attachment and succeeded in obtaining the provisional attachment order, the Beneficiary thereafter joined the procedure and raised an objection, disputing heavily the appropriateness of the provisional attachment as a preventive legal measure against the unjust bond call. However, as the parties to the dispute settled prior to the

final ruling of the KSC, this issue still remains a grey area.<sup>15</sup>

### Comparison with other developed jurisdictions

The English technique of a freezing (Mareva) injunction serves the same purpose as the Korean provisional attachment, namely the preservation of the debtor's assets pending litigation. There is a technical difference in that the freezing injunction is an action *in personam* whereas the European continental conservatory attachment, including the Korean provisional attachment, is an action *in rem*. Moreover, English courts will not grant the freezing injunction in order to prevent payment under the unconditional bank guarantee in a 'before payment situation' since they treat the unconditional bank guarantee as cash but will only grant the freezing injunction enjoining the Beneficiary from removing the proceeds of the bond call in an 'after payment situation' (*Intraco v Notis Shipping Corp*, [1981] 2 Lloyd's Rep 256, 258).<sup>16</sup> Thus, it is not appropriate to compare in parallel the provisional attachment with the freezing injunction under English law as a preventive legal measure against an unjust bond call.

In the case of a conservatory attachment in European continental jurisdictions, which is almost the same as the provisional attachment in Korea, it appears that whether or not the conservatory attachment can be granted in order to prevent payment under the unconditional bank guarantee still remains a grey area, similar to Korea. There have been instances where some courts granted a conservatory attachment in order to secure payment, which the employer/Beneficiary owed to the contractor/Applicant, after having identified that the Applicant's promise to renounce defences against the Beneficiary's right to payment under the unconditional bank guarantee did not imply that the Applicant was prohibited from attaching the guarantee funds.<sup>17</sup> On the other hand, some courts refused to grant the same after having observed that the attachment frustrates the envisaged purpose and effect of the unconditional bank guarantee. Thus, they came to the conclusions that the conservatory attachment is incompatible with the agreement between the Applicant and the Beneficiary and that the guarantee shall remain in full force and effect (*Rb Breda*, 22 July 1992, KG 1992, 301).<sup>18</sup>

## Other factors to consider

### Security ordered by the court

In practice, when the court grants the preliminary restraining order or provisional attachment against the unjust bond call, it almost always orders the Applicant to furnish security for potential damages to the Beneficiary which might be caused by the wrongful preliminary restraining order or provisional attachment (Articles 280 and 301 of the Execution Act). The amount and composition of such security is determined at the discretion of the court. However, when the attached property is a monetary claim (ie, the Beneficiary's receivables from the Issuing Bank under the unconditional bank guarantee), it is generally known that the court orders the Applicant to furnish about 40 per cent of the attached monetary claim as security with the condition that a certain percentage<sup>19</sup> of that amount is cash.<sup>20</sup>

### Issuing Bank's position

In the event of an English court having non-exclusive or exclusive jurisdiction over the unconditional bank guarantee, it may order

the Issuing Bank to make a payment to the Beneficiary despite a preliminary injunction, provisional attachment, restraint order or any other decision of a similar nature previously made by a foreign court.<sup>21</sup> Further, non-payment of the Issuing Bank upon the Beneficiary's bond call may undermine the commercial reputation of the unconditional bank guarantee issued by Korean financial institutions, whether or not it is due to the order of Korean court.

Traditionally, Korean Issuing Banks had a tendency to avoid being involved in the disputes between the Applicant and the Beneficiary; and, accordingly, it was normal that they had no position in the proceedings in which the Issuing Bank was the respondent (ie, the preliminary restraining order).<sup>22</sup> This was one of the reasons why the preliminary restraining order was granted relatively easily in the past at the lower court before the Beneficiary recognising and joining the proceedings as an interested third party. Recently, however, some Korean Issuing Banks have expressed that they do not want any preliminary restraining orders or provisional attachment orders, after having recognised the concerns discussed in above. Further, some Korean Issuing Banks participate actively in the proceedings in order to prevent the orders being granted by a Korean court based on the limited and biased information that has been submitted by the Applicant.

## Conclusion

Given the well-established high legal threshold for a Korean court to grant the preliminary restraining order against the unjust bond call (ie, the express abuse of rights), unless the Beneficiary merely asserts its claims without any sophisticated grounds, it would be arduous to obtain the preliminary restraining order in the same way as other developed jurisdictions.

In the past, the provisional attachment order was far easier to obtain in ex parte proceedings within a shorter period compared to the preliminary restraining order. However, due to the absence of a KSC ruling on this issue and many criticisms that have been recently raised in Korea with respect to the appropriateness of the provisional attachment as a preventive legal measure against the unjust bond call, whether or not the provisional attachment can be granted in order to prevent payment under the unconditional bank guarantee remains a grey area.



## Notes

- 1 Act No 13952/2016.
- 2 Act No 1375/2016.
- 3 Act No 14966/2017.
- 4 대법원 (Korean Supreme Court) Decision 93DA43873 decided 9 December 1994.
- 5 Author's translation.
- 6 Seung Woo Shim, 'Preservative Measures Concerning Letters of Credit and Independent Bank Guarantees', *Journal of Civil Judgment Enforcement Law* (2015) 11, 369, pp 379–380.
- 7 *Ibid*, pp 390–391.
- 8 Act No 14966/2017.
- 9 *Harbottle v Nat Westminster Bank* [1977] 2 All ER 862; *Edward Owen v Barclays Bank* [1978] 1 All ER 976; and *Bolivent Oil v Chase Manhattan Bank* [1984] 1 WLR 392.
- 10 Roeland IV F Bertrams, *Bank Guarantees in International Trade* (4th edn, Kluwer Law International 2013), p 366; *State Trading Corp of India v ED & F Man (Sugar)* Lord Denning [1981] Com LR 235; *GKN Contractors v Lloyds Bank Plc* [1985] 30 BLR 48; and *Deutsche Rückversicherung AG v Walbrook Insurance* [1994] 4 ALL ER 181 at 196, 197.
- 11 Seung Hyeon Kim, 'A Study on How to Cope with the Abusive Call on On-demand Bonds', *The International Commerce & Law Review* (2016) 69, 261, pp 273–274.
- 12 Act No 1375/2016.
- 13 Jin Su Yune, 'Economic Rationality of the Independent Bank Guarantee and the Abuse of Right Doctrine' *Bup Jo* (2014) 63–5, p 5.
- 14 Case No 2014KADAN201638, 서울남부지방법원 (Seoul Southern District Court).
- 15 Case No 2014KADAN812746, 서울중앙지방법원 (Seoul Central District Court).
- 16 See n 10 above, Bertrams, para 17.9.
- 17 Trib gr inst Paris, 13 May 1980, D 1980 J p 488.
- 18 See n 16 above, paras 17.4 and 17.5.
- 19 It is hard to provide a definite figure, as it varies depending on various factors, including, inter alia, each court's internal non-binding guideline, financial credibility of the Applicant, and the amount of the attached monetary claim.
- 20 In general, the rest of the security amount may be furnished with the other bank guarantees as per the sanction of the court.
- 21 *Power Curber Int'l Ltd v National Bank of Kuwait* [1981] 1 WLR 1233.
- 22 See n 6 above, pp 388–389.

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Supreme Court of South Korea. Credit: Rémi Cormier [CC BY-SA (<https://creativecommons.org/licenses/by-sa/3.0/>)]



## ***Construction Insolvency: Security, Risk and Renewal in Construction Contracts***

**Author: Richard Davis**

Publisher: Sweet and Maxwell: Sixth Edition 2017

ISBN: 978-0-414-06291-7

1134 pages, £275

*Reviewed by Bill Barton*



**C**onstruction Insolvency: Security, Risk and Renewal in Construction Contracts is focused on the law as it stands in England and Wales, but as the author himself points out, previous editions of the book have been the subject of government reports in Hong Kong, Australia and Canada. While the focus is on English law, it has clear application to common law jurisdictions.

The previous edition was in 2014 and so the book provides a focused update on changes to insolvency and the further development of cases under the Housing Grants, Construction and Regeneration Act, not to mention the new versions of Joint Contracts Tribunal (JCT) Standard Form contracts, issued in 2016.

In light of recent high profile insolvencies involving Carillion and Condotte d'Acqua, construction lawyers need to be able to advise their clients, particularly subcontractors, quickly as to the impact of the insolvency regime to be applied. Will there be a moratorium on actions/debts? How long will that be in place? Is the insolvency final or to be seen as a route for the company to seek temporary protection before returning to trade? Can your client bring claims during this period and should they be an active creditor? Can you negotiate direct payment for your client?

The book is divided up into meaningful and relevant chapters that any practitioner specialising in construction will appreciate immediately. While there are effectively introductory chapters – on historical background and the variety of securities available and applicable – the ability to have insolvency placed in immediate context of plant and equipment, goods and materials adjudication and termination, to give but a few examples, enables the reader to locate

and extract relevant information quickly.

Each chapter starts with an introduction and explanation as to what is dealt with and reference to any applicable procedure, definitions and applicable statutes and immediately brings you up to date with relevant case law.

Thus, while the experienced and specialist construction lawyer will derive guidance and clarity, the book can be used by practitioners with little or no experience and knowledge in a particular area, due to the fulsome text and rich application of case law and examples.

Clearly, any book on this subject will cover mainstream topics, but the extent of detail and explanation in niche areas, such as novation and completion contracts, demonstrates the strength of this book. These are areas where you may struggle to identify relevant cases, without exhaustive searches and an existing detailed knowledge of the area. However, that is why you are no doubt researching such points, as you lack that detailed knowledge and or understanding. What you need is an accelerated learning course, reference to the main cases, guidance as to which standard form contracts can be used or are applicable and then an analysis of the most common situations.

Too often in legal text there is a presumption that the reader is an expert already. That can make text overly complex and incomprehensible to read and understand. Davis manages to provide a logical progression through the subject. Of course, if you have enough prior knowledge you can skip the first few sections of a chapter and there will certainly be a subsequent heading 'on point'.

For the technical geeks, the layout is

fantastic. You have individual chapters, and then numbered paragraphs, with clear use of bullet points and diagrams, and no footnotes! The text is clean and spaced and it is surprisingly easy to read.

The chapters on adjudication and termination cover not only the obvious cases, but provide subsets that are enough to ensure you stop and consider any advice you may have been planning to give and check that you have indeed covered all eventualities. Read the section on repudiation and you obtain guidance on whether that unequivocal act is present, what may or may not amount to acceptance and the added complexity of anticipatory

breach, all with cases summarised, explained and applied.

There may be books which deal in greater detail with a particular area covered by *Construction Insolvency*. Indeed, Davis does refer to some of them. However, given that the rate of construction insolvency is at its highest for five years, with the public demise of construction giants, such as Carillion, this book should be considered as essential for any lawyer working in or advising on construction.

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## ***UNIDROIT Principles of International Commercial Contracts: An Article-by-Article Commentary***

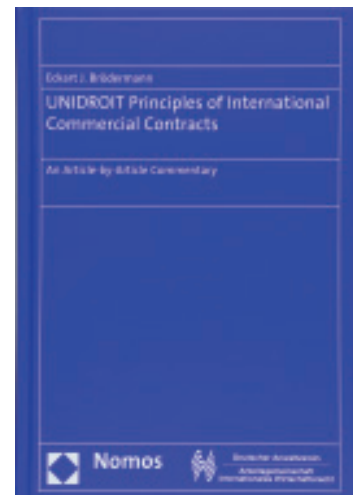
**Author: Eckart J Brodermann**

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Alphen aan den Rijn 2018.

ISBN: 978-90-411-9956-0

433 pages, £115

*Reviewed by Thayananthan Baskaran*



Various laws may be relevant to an international construction contract, for example, the law of the state in which the site is situated, the law of the contract and the law applicable to dispute resolution proceedings. The law of the state in which the site is situated is dependent on the geographical location of the site and not on the agreement between the parties. The law of the contract and the law applicable to the dispute resolution proceedings are, however, dependent on the agreement between the parties. The parties may find it difficult to agree on the law applicable to the contract, as they may be from different legal traditions, for example, the employer may be from a civil law jurisdiction, while the contractor may be from a common law jurisdiction. Even if both parties are from a common law jurisdiction, a

party may be uncomfortable agreeing to the law of the other party's state being applicable to the contract, simply because the party is not familiar with such laws.

The UNIDROIT Principles of International Commercial Contracts (the 'Principles') seek to address these difficulties by offering a codified set of rules that are drawn from various legal traditions. By way of background, UNIDROIT, or the International Institute for the Unification of Private Law, as the organisation is known in full, was founded as an organ of the League of Nations. At present, it is an international organisation with 64 member states acting on the basis of the UNIDROIT Statute.

The origins of the Principles can be traced to 1968, when based on a dialogue initiated by the Secretary-General of UNIDROIT that



year, the Governing Council of UNIDROIT included in its working programme for 1971 the goal of 'progressive codification of the law of contractual obligations'.

The goals of the *Commentary* under review are expressly stated to be:<sup>1</sup>

- to convey trust in a developed, both pragmatic and sophisticated contractual regime, conveying personal experience of trust in the quality of the Principles and the process of their making;
- to provide short and 'compact' comments to key issues; and
- to emphasise practical aspects of using the Principles including a discussion of the limits of any given rule and the options for practitioners.

The *Commentary* achieves these goals admirably. In particular, it provides a concise and insightful explanation of the Principles, coupled with several practical examples, which bring the Principles to life. A practising construction lawyer would be able to easily relate to many of the examples provided.

The Official Comments on the Principles confirm that they are not limited to 'ordinary exchange contracts', but extend to 'complex transactions in particular long-term contracts'.<sup>2</sup> The Principles may therefore be adopted for international construction contracts, which are long-term complex transactions. In this context, two articles of the Principles are of particular interest.

The first is Article 2.1.8, which provides for the modification of the terms of a contract: 'A contract in writing which contains a clause requiring any modification or termination by agreement to be in a particular form may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has reasonably acted in reliance on that conduct.'

Article 2.1.8 strikes a reasonable balance between the commercial need for certainty, on one hand, and preventing unconscionable conduct, on the other, by providing, generally, that if a contract provides for modification of its terms in a particular form then that form must be complied with if the modification is to be effective. To this general rule there is then the exception that a party may be stopped from insisting on such requirements of form due to its conduct, if the other party has relied on such conduct.<sup>3</sup> This will apply to

international construction contracts, which often provide that any modification of the terms of the contract is to be in writing and signed by the concerned parties.

The second is Article 5.1.3, which provides for a duty to cooperate in the following terms: 'Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations.'

Again, a good balance is struck between a general duty to cooperate, which is then tempered by a limit of reasonableness. The reasonable limit, as the *Commentary* explains,<sup>4</sup> may be viewed from the following aspects: (1) costs; (2) the economic balance agreed upon in the contract; and (3) any possible information asymmetry of the parties.

The duty to cooperate is particularly applicable to international construction contracts, where both the employer and the contractor must cooperate in terms of information, instructions and the site to ensure that the project is completed.

Article 5.1.3 is similar, in this regard, to Clauses 2.2 and 4.6 of the FIDIC Conditions of Contract for Construction (2nd edition, FIDIC 2017), which provide:

## '2.2 Assistance

If requested by the Contractor, the Employer shall promptly provide reasonable assistance to the Contractor so as to allow the Contractor to obtain:

(a) copies of the Laws of the Country which are relevant to the Contract but are not readily available; and

(b) any permits, permissions, licenses or approvals required by the Laws of the Country (including information required to be submitted by the Contractor in order to obtain such permits, permissions, licenses or approvals):

(i) which the Contractor is required to obtain under Sub-Clause 1.13 [Compliance with Laws];

(ii) for the delivery of Goods, including clearance through customs; and

(iii) for the export of Contractor's Equipment when it is removed from the Site...

## 4.6 Co-operation

The Contractor shall, as stated in the Specification or as instructed by the Engineer, co-operate with and allow appropriate opportunities for carrying out work by:

- (a) the Employer's Personnel;
- (b) any other contractors employed by the Employer; and
- (c) the personnel of any legally constituted public authorities and private utility companies,

who may be employed in the carrying out, on or near the Site, of any work not included in the Contract. Such appropriate opportunities may include the use of Contractor's Equipment, Temporary Works, access arrangements which are the responsibility of the Contractor, and/or other Contractor's facilities or services on the Site.

The Contractor shall be responsible for the Contractor's construction activities on the Site, and shall use all reasonable endeavours to co-ordinate these activities with those of other contractors to the extent (if any) stated in the Specification or as instructed by the Engineer.

If the Contractor suffers delay and/or incurs Cost as a result of an instruction under this Sub-Clause, to the extent (if any) that

co-operation, allowance of opportunities and coordination was Unforeseeable having regard to that stated in the Specification, the Contractor shall be entitled subject to Sub-Clause 20.2 [Claims For Payment and/or EOT] to EOT and/or payment of such Cost Plus Profit.'

The *Commentary* provides a concise and practical explanation of the Principles, which may be adopted for international construction contracts. The balance struck by the Principles in defining the duties and obligations of the parties is reasonable and in line with the practice of the international construction industry.

#### Notes

1 *Commentary*, p 9, para J2.

2 *Ibid*, p 13, para A1.

3 *Ibid*, pp 60–61, Art 2.1.8, paras A, B.

4 *Ibid*, pp 123–125, Art 5.1.3, paras A–D.

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## The eyeWitness mobile app; seeking justice for the worst international crimes

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The eyeWitness to Atrocities app is available to download for free on Android smartphones. For more information, visit [www.eyewitnessproject.org](http://www.eyewitnessproject.org), follow @eyewitnessorg on Twitter or Facebook, or watch the eyeWitness YouTube channel.





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