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FEATURE ARTICLES

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FROM THE EDITORS

Dear members of the International Construction Projects (ICP) Committee,

I am glad to introduce this edition of *Construction Law International* (CLInt), which includes an array of contributions from the global construction and engineering sector.

We continue our 'FIDIC around the world' series in this issue with Chile and Russia added to our collection. With thanks to Oscar Aitken, Juan Pablo Stitchkin and Eduardo Morandé for the Chile questionnaire and Nikolay Scherbakov for the update on FIDIC in Russia. These updates provide examples of how FIDIC contracts traverse non-English speaking jurisdictions and civil and common law jurisdictions.

Moving to neutral ground, Juliette Asso and Angela Casey provide a country update from a recent Swiss Federal Supreme Court decision on staying arbitration proceedings because the parties skipped mandatory pre-arbitral steps. Continuing on our global construction journey, this update is complemented by a report from Australia in which Sam Luttrell and his colleagues consider a High Court of Australia decision that overturned a Victorian Court of Appeal decision in relation to whether a contractor may accept an owner's repudiation and elect to claim on a *quantum meruit* basis. Returning to FIDIC, Mark Grimes looks at the FIDIC suite of contracts and examines the time-barring criteria to identify a gap in the 'fully detailed Claim' time-barring procedures.

Our feature articles continue to traverse the globe, with Dimitris Mauro Rubino-Sammartano considering the various dispute resolution procedures available to parties to construction contract in light of the relevant provisions in the 2017 FIDIC General Conditions. Heading south, Salwa Fawzy, Islam El-adaway, Louis Perreau-Saussine, Mohamed Abdel Wahab and Tarek Hamed set out a comparative analysis of the provisions of the Unforeseeable Physical Conditions under FIDIC and under the Egyptian Civil Law.

Venturing away from a dispute focus, Foluke Akinmoladun provides an update on what construction companies performing construction works in Nigeria can do to prepare for the relatively new International Financial Reporting Standards No 15 in the context of recognising revenue from customers in their financial statements. From Canada, Sharon Vogel and Emira Bouhafna provide an overview of the legislative regime in respect of bribery and corruption in the construction industry.

This issue of CLInt provides another truly international perspective on construction and infrastructure issues. We thank our contributors for their insightful articles and we hope you will enjoy reading this edition.

As always, we invite you all to contribute to CLInt by submitting your articles to CLInt.submissions@int-bar.org.

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FROM THE CO-CHAIRS

Dear ICP members,

We are glad to inform all ICP members that our Working Weekend, one of the most important events in the ICP calendar, was a success. The Working Weekend this year was held in Annavysos, near Athens, and the panel speakers and chairs were selected with the support of our fellow ICP Subcommittee officers, who together organised an excellent programme for the attendees.

The Project Establishment Subcommittee addressed the use of new technologies in construction, procurement and supply chain management. Aarta Alkarimi (United Arab Emirates) and Jean-Pierre Van Eijck (the Netherlands) coordinated excellent presentations from Jaya Sharma (United States), Ana Cándida de Mello Carvalho (Brazil), Joe Moore (US) and Dimitris Kourkoumelis (Greece). They covered, among other interesting subtopics, blockchain initiatives in construction, supply chain management and smart contract solutions and new technologies in public procurement.

Another highlight of the Working Weekend was the Project Execution panel session, which addressed common pitfalls in drafting construction contracts. The panel analysed how thoroughly negotiated construction contracts could fail or bring about problems during the execution of a project. Panellists examined issues, such as 'lump sum – reality or myth', 'variations: what happens if execution does not comply with the wording of the contract/ is unable to do so/has good reasons to deviate?' and 'penalties for delay – how do they survive multiple variation orders?'. Claus Lenz (Germany) chaired this panel and the speakers were Leendert van den Berg (the Netherlands), Sarah Sinclair (New Zealand), Roberta Downey (United Kingdom) and Oscar Aitken (Chile).

Finally, the Dispute Resolution Subcommittee presented the ICC *Report on Construction Industry Arbitrations*. Aisha Nadar (Sweden), who was one of the presenters of the global launch of this report, first introduced the background and then summarised the recommendations, before engaging in a lively panel discussion with Sarah Sinclair (US) and Ioannis Vassardanis (Greece), while inviting attendees to contribute to the conversation.

During the Working Weekend, the ICP officers reported on their activities and plans. We are pleased to announce that the Project Establishment Subcommittee will be preparing a document on the new technologies that affect the construction industry and how projects are executed/managed from the legal perspective. Also, the Project Execution Subcommittee will report on the progress made in the preparation of their Anti-corruption Desk Guide. Finally, the Dispute Resolution Subcommittee will outline a new project on the use of Experts in Construction Arbitration.

ICP members are all invited to become actively involved in these projects.

We feel confident that with this edition of CLInt we fulfil our continued commitment to maintain a continuous line of communication with all ICP members. We hope that the initiatives and topics of the Working Weekend will encourage you to participate.

Jaime Gray and Helmut Johannsen
Co-Chairs of the ICP Committee

CHILE

FIDIC Questionnaire: FIDIC around the world – Chile

Oscar Aitken, Juan Pablo Stitchkin and Eduardo Morandé

Carey, Santiago

1. What is your jurisdiction?
Chile.

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 contracts are rarely used in Chile. For local and international projects, ad hoc or bespoke contracts are customary. We have occasionally seen the use of FIDIC contracts by international energy developers in construction energy projects.

3. Do FIDIC produce their forms of contract in the language of your jurisdiction? If no, what language do you use?
Yes, there are FIDIC forms of contract in Spanish (eg, Client/Consultant Model Services Agreement (2006 White Book, 4th ed); Short Form of Contract (1999 Green Book, 1st ed); Construction Contract (1999 Red Book, 1st ed); Plant and Design-Build Contract (1999 Yellow Book, 1st ed); and Works of Civil Engineering Construction (1987 Red Book, 4th Ed). However, in our experience, since these types of contracts are mostly seen within international projects, English versions of the same are more commonly used.

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?
No. There are no provisions under the FIDIC forms of contract that would make the agreement voidable or ineffective under Chilean law.

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?
Some common amendments to the FIDIC forms of contract include:
(i) adapting labour and environmental provisions to comply with Chilean laws;
(ii) adjusting the payment mechanism to adapt it to Chilean customary procedures; and
(iii) adjusting limitations of liability to improve enforceability.

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)?
No. In our opinion, failure to present the claim on an 'as soon as practicable' basis will only make the owner liable for the damages caused by the late presentation of the claim.

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)?
In our opinion, generally Section 20.1 will bar a contractor from claiming time and/or money relief (but not necessarily as a condition precedent).

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?
In our opinion, generally Section 20.1 will bar a contractor from claiming time and/or money relief (but not necessarily as a condition precedent).

9. Are dispute boards used as an interim dispute resolution mechanism in your jurisdiction? If yes, how are dispute board decisions enforced in your jurisdiction?
Dispute boards are rarely used and there is no legislation dealing with them.

DAB decisions (and other ADR decisions different from arbitration or the Arbitration Commission) may be considered to be of contractual nature, in which case they are not directly enforceable in Chile and must be recognised by an ordinary court or an arbitral tribunal as a contractual obligation in order to be enforceable.

In our experience, contracts within major infrastructure projects (such as ports and desalinisation plants) are increasingly including an independent engineer or technical review boards to resolve disputes of a technical nature. This early dispute resolution mechanism is somewhat similar to common-law adjudication procedures; but the key difference is that this mechanism is not recognised by statute (except in some few cases).

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

Local parties usually include contract clauses providing for CAM arbitration (Santiago Arbitration and Mediation Center of the

Santiago Chamber of Commerce) under Chilean law and based in Chile. The seat is normally Santiago. The CAM arbitration procedure is similar to the ICC procedure, with some differences in order to make it consistent with Chilean civil procedure laws.
Foreign parties often insert contract clauses providing for International Chamber of Commerce (ICC) arbitration normally under Chilean law and based in Chile.
Note that Arbitration tribunals are considered to be part of the judiciary and are systematically regulated in Chilean legislation. Arbitration awards are binding and directly enforceable.

11. Are there any notable local court decisions interpreting FIDIC contracts? If so, please provide a short summary.
There are none that we are aware of. Most FIDIC contracts have arbitration clauses and are normally subject to confidentiality provisions.

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?
While the FIDIC standard forms of contract are commonly used throughout the world and several of its clauses commonly construed (or interpreted by case law), the fact that Chile is a civil law country and that case law is not binding cause uncertainty on how a matter involving a FIDIC provision will be resolved.

International developers should also consider that Chilean contractors are not familiar with FIDIC contracts, so using FIDIC contracts may increase the transaction costs and lengthen the negotiation process, which is something that the parties seek to avoid by recurring to standard forms, such as FIDIC.

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RUSSIA

FIDIC around the world: RUSSIA

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1. What is your jurisdiction?
Russian Federation

2. Are the FIDIC forms of contract used for projects constructed in your jurisdiction?
Yes, they are. FIDIC forms are used for projects where both public authorities and private entities act as employers in infrastructure, especially energy projects. Sometimes the implementation of FIDIC model contracts is specified by laws or international treaties. Russian employers and contractors use 1999 Red Book, 1999 Yellow Book and 1999 Silver Book.

3. Do FIDIC produce their forms of contract in the language of your jurisdiction?
Yes, it does. All the 1999 suite of contracts are produced by FIDIC in Russian. Unfortunately, some legal notions used in the terms and conditions of FIDIC model contracts stem from common law and, as a result, do not have an equivalent when translated from English into Russian accurately and correctly. Thus, it is better to use English versions of model contracts.

4. Are any amendments required in order for the FIDIC Conditions of Contract to be operative in your jurisdiction?
No, there are not. All the basic European contract law principles are recognised and protected by Russian legislation. In addition, in 2015, the Russian Civil Code was amended, and concepts such as 'indemnity', 'retention money' and 'representation' are now known and recognised in Russia. Thus, FIDIC model contracts and agreements may operate in the Russian legal system without any binding amendments.

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?
Yes, there are some amendments. Where an employer is a public authority, Clause 20 may undergo drastic changes. The employer will exclude the application of the dispute adjudication board (DAB) and replace it with the arbitration to a state court procedure by specifying related provisions in the Particular Conditions.

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)?
Yes, it does. Entitlements described in Sub-Clause 2.5 according to the

Russian Civil Code may lead to an amendment to the terms and conditions of the contract. Any amendment shall proceed on the ground of the parties' consent. Thus, before claiming payment or extension of the defects notification period (DNP), a party should send notice and try to negotiate the matter.

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)?

Yes, it does. See the answer to question 6.

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?

Yes, it does. See the answer to question 6.

9. Are dispute boards used as an interim dispute resolution mechanism in your jurisdiction?

No, they are not. DABs are not a well-known alternative dispute resolution (ADR) procedure in the Russian legal system.

10. Is arbitration used as the final stage for dispute resolution for construction projects in your jurisdiction?

Yes, it is. The arbitration award is final and cannot be the second-guessed by a state court. A party has to appeal to a state court only to grant an enforcement order to execute the arbitration award.

Where the employer is a private (Russian or foreign) entity, all mentioned arbitrations in addition to Hong Kong and Singapore arbitrations may be used. Where the employer is a public agency, we may expect a reference to the competence of the International Commercial Arbitration Court of the Chamber of Trade and Commerce of the Russian Federation.

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

Yes, there are some:

- Judgment of the Thirteenth Arbitration Court of Appeal dated 30.08.2013, Case No A56-55092/2011: A state court interpreted the 1999 Silver Book as the set of trade customs used in the construction industry.
- Judgment of the Federal Arbitration Court of the Moscow Region dated 25.10.2007 No КГ-А41/10942-07, Case No A41-K1-8339/07: A state court stated its incompetence to proceed with the dispute, which according to Sub-Clause 20.6 of the General Conditions of the 1999 Red Book should be resolved by the Arbitration Institute of the Stockholm Chamber of Commerce.
- Judgment of the Ninth Arbitration Court of Appeal dated 11.09.2009 No 09АП-15826/2009-ГК, Case No A40-4363/09-104-30: A state court qualified that the engineer's avoidance of determining a matter and his references to the employer as an intentional omission under the General Conditions of the 1999 Red Book, and judged the recovery of damages.

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 general, from the legal standpoint, there are no serious barriers or obstacles to using FIDIC model contracts and agreements in Russia. There are more similarities than differences between Russian civil legislation and European private law.

The contractor may expect some difficulties where the employer is a public agency because, in such a case, the State Procurement Law will be applied; however, there are some differences that lie deeper.

FIDIC forms of contract reflect the project management approach to the implementation of construction projects. The system of management in the Russian construction industry differs from that approach in many ways. One difference was demonstrated in Case No A40-4363/09-104-30, where the engineer empowered to make a determination on the ground of Sub-Clause 3.5 of the 1999 Red Book and Article 749 of the Civil Code of the Russian Federation notified the contractor that he intended to apply to the employer for determination. Thus, some lawful terms and conditions of FIDIC model contracts may not work.

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FIDIC 2017: A GAP IN THE FULLY DETAILED CLAIM PROCEDURE?

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FIDIC's 2017 suite of contracts features a significantly updated Claims framework. This article examines the time-barring procedures and identifies a gap in the fully detailed Claim time-barring procedure. Through contractual analysis, this article examines the potential for stasis in the Clause 20 Claims procedure, created by the drafting of both the definition of the 'fully detailed Claim' and of the relevant time-barring criteria. It is submitted that a minor amendment may be appropriate in practice, in order to prevent unnecessary procedural difficulties arising.

Introduction

The 2017 FIDIC forms have been significantly updated since the 1999 Rainbow Suite. One aspect of this rewrite, and the subject of this article, is that the new contracts have completely changed the time-barring framework in respect of Claims. The new process has been described by commentators as 'reciprocal' because, whereas the 1999 Forms distinguished Contractor and Employer Claims, with no time-barring in respect of the latter, the 2017 suite now has a unified Claims procedure, with time-bars affecting both Contractor and Employer.

A principal change is that time-barring is no longer automatically applied and the Engineer's Notice engaging the time-bar must itself be within time limits set out in Clause 20.[1] 'Notice' is also now a defined term, meaning that the Engineer's Notice engaging the time-bar could be invalid, even if in time.

Within this framework, there are two opportunities for the Engineer to time-bar a Claim:

1. where the Notice of Claim is submitted more than 28 days from the date of awareness (or deemed awareness) of the relevant event or circumstance, (Sub-Clause 20.2.2); or
2. where the Claiming party fails to submit, within 84 days of the date of awareness, 'a statement of the contractual and/or other legal basis of the Claim' (Sub-Clause 20.2.4).[2]

This article examines the latter and identifies a gap in the contractual procedure, which could cause uncertainty in the application of the time-barring provisions.

The fully detailed Claim

As aforementioned, the time-barring provision in Sub-Clause 20.2.4 relates specifically to the statement of legal basis for the Claim. How a party satisfies this requirement will be dependent on the particular facts of any given Claim, having regard to its legal complexity. What would satisfy this requirement is, therefore, not explored in this article. The fact that this statement singularly forms the basis of time-barring in relation to the fully detailed claim is, however, important.

Unlike 'Notice' or 'Notice of Dissatisfaction', 'fully detailed Claim' (FDC) is not within the Sub-Clause 1.1 defined terms. Sub-Clause 20.2.4, though, is clearly definitional in nature and should be read as such:

> 'In this Sub-Clause 20.2, "fully detailed Claim" means a submission which includes:
>
> (a) a detailed description of the event or circumstance giving rise to the Claim;
>
> (b) a statement of the contractual and/or other legal basis of the Claim;
>
> (c) all contemporary records on which the claiming Party relies; and
>
> (d) detailed supporting particulars of the amount of additional payment claimed (or amount of reduction of the Contract Price in the case of the Employer as the claiming Party), and/or EOT claimed (in the case of the Contractor or extension of the DNP claimed (in the case of the Employer).'

It is undoubtable that these listed elements must be present for a submission to constitute a 'fully detailed Claim'.

Statement of legal basis

Despite the FDC being defined by its content, the relevant time-barring provision is explicitly limited to a failure to provide item (b) within the 84-day time limit, rather than the FDC as a whole. Seemingly then, the other parts of the FDC are not as essential:

> 'If within this time limit the claiming Party fails to submit the statement under sub-paragraph (b) above, the Notice of Claim shall be deemed to have lapsed, it shall no longer be considered as a valid Notice, and the Engineer shall, within 14 days after this time limit has expired, give a Notice to the claiming Party accordingly.'

The primacy of item (b) is reinforced by subsequent parts of Clause 20. The 'appeal' provision of Sub-Clause 20.2.4 refers to 'circumstances which justify late submission of the statement under sub-paragraph (b) above'. Further, the suggested considerations for the Engineer in exercising its time-bar discretion in Sub-Clause 20.2.5 include, specifically in relation to the FDC, 'any evidence of the other Party's prior knowledge of the contractual and/or other legal basis of the Claim'.

The idea that a clear statement of the legal basis would be fundamental to the continuation of the claims process is not surprising. Knowledge of the basis of claim is important in (1) preventing spurious claims; and (2) preventing prejudice to the Respondent in preparing its case.

It is a common requirement in court systems that pleadings must demonstrate the legal basis of the claim. In England and Wales, a civil claim that is deficient in this regard could potentially be struck out under Rule 3.4(2) of the Civil Procedure Rules, though one would expect an application to amend before it got that far. In South Africa, under similar rules in the Uniform Rules of Court, pleadings of this sort are described as 'vague and embarrassing'.

With regard to the other elements of the FDC, there are also reasons why they may not be as important. With regard to item (a), the Respondent will have already had at least some details regarding the factual circumstances, as required in the Claim Notice per Sub-Clause 20.2.1. The detailed factual circumstances under item (a) are generally of evidential value for the Claimant in proving their entitlement, rather than for the Respondent in preparing their defence. The Claim Notice should also have put both the Engineer and the Employer on notice to gather and review their own factual evidence, if they felt it necessary.

Regarding item (c), the contemporary records provisions under Sub-Clause 20.2.3 give the Engineer a right to inspect the relevant records in connection with the Claim. This gives a degree of equality and reciprocity in respect of these records. As they may not simply be withheld until the submission of the FDC, the Engineer has responsibility for being as involved in this review as it believes necessary to fulfil its duties. In any event, the drafting of this item means that a failure to provide 'contemporary records on which the claiming Party relies' would logically lead to the simple conclusion that no reliance is placed on contemporaneous records.

Item (d), in respect of cost or EOT, assists the Engineer's assessment but it is fundamentally the Claimant's burden to discharge, so a failure in this regard is to the Claimant's prejudice.

The procedural gap

A question then arising from Sub-Clause 20.2.4 is whether the Claims procedure may continue without it being submitted within the time limit. Sub-Clause 20.2.5 would appear conclusive against this and states: 'After receiving a fully detailed Claim under Sub-Clause 20.2.4… the Engineer shall proceed under Sub-Clause 3.7 [Agreement or Determination] to agree or determine…'.

Reading this together with the definition in Sub-Clause 20.2.4, there is a gap in the Claims procedure. Where the Claimant has failed to submit the full FDC, the Engineer lacks contractual jurisdiction to determine a Claim as a result of Sub-Clause 20.2.5. Yet the Engineer also cannot time-bar the Claim where the Claimant has submitted a statement satisfying item (b) of the FDC requirements, as a result of the time-barring provisions in Sub-Clause 20.2.4.

It is, perhaps, a narrow and technical point, but in the face of such a clear definition of the FDC in Sub-Clause 20.2.4, the point is unavoidable. While there has been a steady shift towards commercial, rather than strict, interpretation of contracts in recent times, the reason this is problematic in this situation is because it involves the conferring of contractual jurisdiction upon a third party. The Engineer is simply not empowered to act and the Claim is in stasis after submission of item (b) – neither barred nor able to progress.

Closing the gap?

It should be recognised that detailed procedural steps, with defined time limits and notice requirements, have been laid down. This shows an intention that should be given effect, in order to maintain the flow of Clause 20. While it is clear from the language of Sub-Clauses 20.2.4 and 20.2.5 that FDC item (b) is intended to have significance above the other required elements, it cannot have been intended that the Claim should enter a procedural stasis.

The simplest reconciliation, in this author's view, is that the Engineer should be permitted to proceed with whichever elements of the FDC have been submitted at the expiry of the 84-day limit. This would allow the Engineer to proceed to determination, except in the absence of item (b) which allows the Engineer to engage the time-barring provisions. In this way, there is always a route forward for the Engineer: either to determination or time-barring.

The tenor of FIDIC's 'Golden Principles' strongly implies that FIDIC would prefer that bespoke drafting be kept to a minimum. However, a drafting amendment seems appropriate in this instance as this is a minor amendment to rectify what seems like a clear error.

The desired effect could be achieved by relaxing the definition of the FDC in Sub-Clause 20.2.4 to be 'a submission which may include' items (a) to (d). The effect of the time-barring provisions would retain the mandatory nature of item (b), but the remaining items would no longer be contractually necessary to create an FDC. It could also be achieved by amending Sub-Clause 20.2.5, but this would require more extensive drafting, with correspondingly greater scope for error or interpretation.

The infamous 'enforcement gap' of the 1999 FIDIC forms, which caused procedural uncertainty around the enforcement of certain DAB awards, illustrates the potential for varying international approaches to issues in the drafting of standard form contracts. As a result of that gap, various jurisdictions developed differing approaches to the enforcement of final but not binding DAB awards. Enforcement is obviously a more fundamental legal issue and involves greater legal complexity in comparison to this relatively small procedural issue. Nevertheless, it is foreseeable that Engineers, DABs and even national courts may take differing views on resolving the current drafting, if required to do so. As a result, a bespoke amendment is likely to be appropriate to avoid unnecessary procedural difficulties arising.

Notes

1 This article uses the 2017 Red and Yellow book references. See FIDIC (International Federation of Consulting Engineers), Conditions of Contract for Construction, 2nd Edn (FIDIC 2017); FIDIC (International Federation of Consulting Engineers), Conditions of Contract for Plant & Design-Build, 2nd Edn (FIDIC 2017).

2 It is worth noting, athough not directly relevant to this article, that the validity of the Notice of Claim is subject to two deeming processes under Sub-Clause 20.2.4 in relation to this time-bar. The Notice of Claim is first deemed to have lapsed on the expiry of 84 days, if there is a failure to provide the required statement, and then deemed valid again 14 further days after that, provided the Engineer does not issue Notice of time-barring.

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CLAIMS PROCEDURE AND DISPUTE RESOLUTION UNDER THE REVISED FIDIC CONDITIONS

Bernd Ehle and China Irwin

LALIVE, Geneva

Introduction

The overall claim and dispute resolution framework has not changed in the most recent 2017 editions of the FIDIC Red Book (Conditions of Contract for Construction), Yellow Book (Conditions of Contract for Plant and Design Build) and Silver Book (Conditions of Contract for EPC/Turnkey Projects) (the 'revised FIDIC Conditions'). The main steps, as in the editions originally published in 1999, are: (1) notify the engineer of a claim; (2) the engineer's determination; (3) refer the claim to the dispute adjudication board (DAB) for decision; (4) attempt amicable settlement through negotiations; and (5) as a last resort, International Chamber of Commerce (ICC) arbitration.

However, there have been a number of important changes within this pre-existing framework. Most notably, the revised FIDIC Conditions separate claim provisions from dispute resolution provisions and provide a more detailed procedure for both. What was previously Clause 20 ('Claims, Disputes and Arbitration') has been divided into two distinct – and more comprehensive – clauses: a revised Clause 20 ('Employer's and Contractor's Claims'), which addresses the claim process for both employer's and contractor's claims; and a new Clause 21 ('Disputes and Arbitration'), specifically addressing dispute resolution.

The reason for this division is to make clear that submitting a claim does not automatically give rise to a dispute. To put forward a 'Claim' (defined in Sub-Clause 1.1.6) is to make a request for an entitlement under the contract; a 'Dispute' (defined in Sub-Clause 1.1.29) arises only if that claim is rejected, in whole or in part, or no determination is made. This is intended to avoid an unnecessary escalation of issues, with parties jumping straight to arbitration; instead, they must follow the mechanics of the new Clauses 20 and 21.

Changes to notice requirements

The revised FIDIC Conditions include additional notice provisions intended to help the parties address claims promptly in order to avoid disputes as far as possible. The term 'Notice' is now specifically defined as a 'written communication identified as a Notice and issued in accordance with Sub-Clause 1.3' (Sub-Clause 1.1.56). In addition, notice is now specifically required under numerous Sub-Clauses, which also explain in greater detail how and when such notice must be given (see eg, Sub-Clauses 4.7.2 and 4.12.1).

These provisions are designed to ensure that it is clear when a party is making a claim and to avoid the situation of a party trying to seek a tactical advantage by hiding a claim notice in day-to-day communications or failing to provide timely notice and later searching the project record for any communication that may be construed as notice. To this end, Sub-Clauses 4.20 and 8.3 of the revised FIDIC Conditions even expressly provide that progress reports and programmes cannot constitute notice.

It remains to be seen whether the more extensive notice requirements will encourage parties to address potential claims when they arise or whether these provisions will ultimately lead to more disputes.

Changes to the claim procedure (Clause 20)

The claim procedure, as set out in the new Clause 20, is now aligned for employer and contractor's claims. Both the employer and contractor are subject to the same time limits and time-bars for claims, including the familiar 28-day time limit for the Notice of Claim (Sub-Clause 20.2.1) and an increased 84-day time limit for submission of the 'fully detailed Claim' (Sub-Clause 20.2.4). Both parties must therefore be aware of, and able to manage this procedure, and understand the potential impact on their right to monetary or time-related relief if this procedure is not followed.

Sub-Clause 20.1 expressly distinguishes between three categories of claim, now defined as 'a request or assertion by one Party to the other Party for an entitlement or relief under any Clause of these Conditions or otherwise in connection with, or arising out of, the Contract or the execution of the Works' (Sub-Clause 1.1.6): (1) claims for additional payment (or reduction in the contract price); (2) claims for extension of time; and (3) claims for an entitlement or relief other than for money or time.

Claims falling within the first two categories (ie, payment or an extension of time) must follow the procedure set out in Sub-Clause 20.2, consisting of: (1) a Notice of Claim; (2) a fully detailed claim; and (3) the engineer's agreement or determination. Claims falling within the third category of 'other' claims are subject to a much shorter procedure; they are simply referred to the engineer for agreement or determination (pursuant to Sub-Clause 3.7).

Sub-Clause 20.2.2 includes a new requirement for the engineer to notify the claiming party within 14 days of receipt of the Notice of Claim if the engineer considers the claim to be time-barred. If the engineer fails to do so, the party's Notice of Claim shall be deemed valid. Nonetheless, the other party may, in turn, challenge that decision or indeed challenge the deemed acceptance of the Notice of Claim, in which case the engineer shall review the issue when making a determination with respect to the claim.

Following the fully detailed claim, the next step is the engineer's determination. The revised FIDIC Conditions require that, if a party is dissatisfied with the engineer's determination, it must give a 'Notice of Dissatisfaction' (NOD) within 28 days. Otherwise, the determination becomes final and enforceable directly through arbitration (Sub-Clause 3.7.5). The filing of a NOD triggers the DAB procedure, which must be commenced within 42 days after service of the NOD.

Changes to the dispute resolution procedure (Clause 21)

The new Clause 21 focuses on dispute avoidance prior to dispute adjudication. Reflecting this priority, the DAB has been renamed the Dispute Avoidance/Adjudication Board (DAAB) (Sub-Clause 1.1.22). In addition, the new DAAB Procedural Rules state explicitly that the first objective of the DAAB is 'to facilitate the avoidance of Disputes' (Rule 1.1(a)).

To more effectively prevent claims from becoming disputes, the 2017 editions of the Red Book, Yellow Book and Silver Book all provide for standing DABs, in place for the duration of the contract. The new DAAB Procedural Rules require the DAAB to meet with the parties regularly and visit the site outside the context of any formal proceedings (Rule 3). In addition, the parties may jointly request the DAAB to 'provide assistance and/or informally discuss' with the parties in an attempt to resolve issues, that is, effectively exercising a mediation function (Sub-Clause 21.3).

If a dispute is referred to the DAAB, the DAAB must issue a written and reasoned decision within 84 days (Sub-Clause 21.4.3). The DAAB's decision is binding and immediately enforceable, regardless of whether a party objects (Sub-Clause 21.4.3). Under Clauses 15 and 16, non-compliance with a DAAB decision is a ground for termination by either party or suspension by the contractor (Sub-Clauses 15.2.1(a)(iii); 16.1(d)(ii) and 16.2.1(d)(ii)).

If a party does not accept the DAAB's decision, it must issue a NOD within 28 days of the decision (Sub-Clause 21.4.4). If a party issues a NOD, the parties must attempt to settle the dispute amicably before the commencement of arbitration; however, the time period for amicable settlement negotiations has been reduced to 28 days (Sub-Clause 21.5).

The final step is ICC arbitration. The arbitral tribunal has the power to enforce the DAAB decision by issuing interim or provisional measures or a partial award (Sub-Clause 21.7).

Conclusion

Overall, the changes made in the revised FIDIC Conditions provide additional certainty through more detailed and stricter requirements. This is, in principle, beneficial, but places a greater administrative burden on the parties. The revised FIDIC Conditions may require some training, including for contract and claims managers who must understand and be fully aware of the more complex procedure for claims and dispute resolution.

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PROVISIONS OF UNFORESEEABLE PHYSICAL CONDITIONS UNDER FIDIC AND UNDER EGYPTIAN CIVIL LAW: A COMPARATIVE ANALYSIS

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Introduction

As a large proportion of work in civil engineering construction projects is usually carried out underground, contractors face a quite high risk of encountering unforeseeable physical conditions. While it may be possible to investigate and establish the properties of the sub-soil at certain locations and extrapolate from that an overview of the whole site, the actual ground conditions for the whole of the works can only be established when the contractor excavates. If the unforeseeable physical conditions are encountered, the consequences can be enormous in terms of financial costs and time delays.[1]

One of the most commonly used standard conditions of contract for international projects are published by the Fédération Internationale des Ingénieurs-Conseils (FIDIC). The FIDIC contracts are based largely on common law principles. Most of the Middle East countries source their law from a mixture of civil and Sharia law, and are most heavily influenced by Egyptian civil law.[2] It is thus rather ironic that most of the Middle East countries have based their construction contracts on the FIDIC forms. According to a study conducted by Norton Rose, 94 per cent of the contracts used in the Middle East are based on FIDIC (or a modified form of FIDIC).[3] The FIDIC contracts have been in use in the Middle East since the 1970s. In fact, FIDIC is the established form of construction contract in the region.[4]

FIDIC published the new suite of standard contracts in 1999. The new suite includes the conditions of contract for construction, which is recommended for building and engineering works designed by or on behalf of the employer, although some elements of design may be given to the contractor, known as the New Red Book or FIDIC (CONS). A second edition was issued in 2017. The FIDIC (CONS) issued in 1999 will be the subject of this research.

The legal concepts in the FIDIC are based on the common law system.[5] A survey of the FIDIC (CONS) users' feelings about contract policy in general, and about the FIDIC (CONS) in particular, was undertaken by Reading University in England at the request of the European International Contractors and FIDIC. The final survey report was published in June 1996 and provided, among other data, specific contractual issues relating to the Red Book including applicability to civil law jurisdictions.[6]

The construction industry in the Middle East is the centre for mega construction projects.[7] Unfortunately, contractors engaging on projects in the region often fail to appreciate that the impact of the interpretation of the contracts in view of the local laws in the Middle East could be drastic. It is suggested that local laws in the Middle East should be carefully considered by both contractors and employers, as part of a proper evaluation of the risk.[8]

In this research, the provisions of the unforeseeable physical conditions of the FIDIC (CONS) will be studied in the context of Egyptian civil law. Similarities and differences between the relevant provisions under the FIDIC (CONS) and Egyptian civil law will be recognised. Finally, recommendations will be made to amend the relevant provisions under Egyptian Civil Code (where the main provisions concerning the Egyptian contract law and provisions of construction contracts are contained). Since Egyptian civil law is heavily influenced by French law, reference will be made in some instances in this research to French law.

Under Egyptian civil law, risks are allocated among the employer and the contractor via the conditions of contract agreed upon between the parties, the provisions of law or both. In this connection, it is of importance to point out that under Egyptian civil law, building and construction contracts do not have separate rules; rather, there are certain rules that apply to all contracts for works ('*Muqawala* contracts') including building and construction ones. Nevertheless, it is of importance to highlight that building and construction contracts differ from other *Muqawala* contracts in many aspects; for instance, under building and construction contracts, the costs and expenses to execute the works as well as the time for completion thereof are much greater than those under other *Muqawala* contracts.[10]

The FIDIC (CONS) is recommended for building and engineering works designed by or on behalf of the employer, although some elements of design may be given to the contractor. Furthermore, the FIDIC (CONS) is a remeasured contract. Accordingly, when examining the unforeseeable physical provision under Egyptian civil law, this research will focus on traditional contracts designed by or on behalf of the employer and remeasured contracts. Moreover, the construction contracts in the Egyptian legal system are classified into civil contracts and administrative contracts, which are governed by two different systems of law, depending on the nature of the employer. This research will be limited to the study of civil construction contracts.

The goal of this paper is to study the provisions of the unforeseeable physical conditions under the common law based FIDIC (CONS) within the context of Egyptian civil law. Accordingly, the associated research objectives include:

- highlighting similarities and differences between the relevant provisions under the FIDIC (CONS) and Egyptian civil law; and
- providing recommendations to be made to amend the relevant provisions under the Egyptian Civil Code (ECC).

Methodology

This paper uses a multi-step interdependent research methodology. First, the provisions of unforeseeable physical conditions under FIDIC (CONS) are examined. Second, the relevant provisions under Egyptian civil law are examined. Third, the authors critically analyse and compare the relevant provisions under the FIDIC (CONS) and Egyptian civil law, being the applicable law of the contract. Finally, the authors make recommendations as to the amendments required to the relevant provisions under Egyptian civil law.

Results and analysis

Sharing of risks under FIDIC (CONS)

Primarily, it is important to examine the concept of sharing of risks under the FIDIC (CONS). Construction projects are subject to an extremely large matrix of hazards and risks. Therefore, risk management is essential for efficient and effective completion of a construction project. One important part of the risk management process is the allocation of the risk. The FIDIC (CONS) is drafted on the basis of sharing of risks among the employer and the contractor. The principles of sharing of risks in the FIDIC (CONS) are based on those in the ICE Form and they comprise the following:[10]

- the contractor should only price for those risks which an experienced contractor could reasonably foresee at the time of the tender;
- it is the right and the duty of the employer to decide and by his engineer to design and specify the obligations of the contractor, and it is the employer's duty to allow the contractor to do his obligations without hindrance;
- it is the duty of the contractor to do what the contract requires to be done, as designed and specified by the engineer, but, subject to any specific requirement in the contract. It is further the contractor's right and duty to decide the manner in which he will do it; and
- if, exceptional to the aforementioned, the contractor is to decide what to do or to design what is to be done, or where the employer or the engineer is to decide how the work is to be done, the contract must expressly provide for this and for the necessary financial consequences for the protection of the contractor.

It should not be overlooked that while risks generally imply undesirable consequences, in certain circumstances, desirable as well as undesirable consequences may occur. In such case, both negative and positive aspects must be assessed and allocated. Under the FIDIC (CONS), if a risk was allocated to a certain party, then both the positive and negative aspects shall be allocated to that party, unless explicitly stated otherwise. For example, under the FIDIC (CONS), the risk of unforeseeable physical conditions is allocated to the employer and if, during the execution of the works, the contractor encounters adverse unforeseeable conditions, which result in additional costs, then the additional cost of encountering such conditions is borne by the employer. On the other hand, should the unforeseeable physical conditions result in a more favourable and cost-saving operation for the contractor, then the effect would principally be credited to the employer rather than to the contractor, subject to the relevant provisions of the contract.[11]

It is worth mentioning that the most cost-effective method of allocation of risks from the point of view of controlling the occurrence of the risk and mitigating or eliminating its adverse effects is based on the ability to exercise such control. Risks allocated to the contractor on the basis of this method would have a cost implication if they are not their own fault, since a prudent contractor would include in his original price an element relating to this additional risk he is asked to carry. If such risk does not eventuate, the employer would have paid a larger sum than necessary. In certain circumstances, after adding such element of risk, the contractor's price for accepting a particular risk may be extremely high in comparison with the adverse effect on the employer should the risk eventuate. However, in some cases, this may be more advantageous to the employer than to assume the risk themselves and be exposed to the possibility of having to make an additional payment should the risk eventuate.[12]

Unforeseeable physical conditions under the FIDIC (CONS)

The term 'unforeseeable' is defined in Sub-Clause 1.1.6.8 of the FIDIC (CONS) as not reasonably foreseeable by an experienced contractor by the date for submission of the tender. For example, for a contract with time for completion of three years, an experienced contractor might be expected to foresee an event that occurs on average once every six years, but an event that occurs once every ten years might be regarded as unforeseeable.[13]

'Physical conditions' are explained in Sub-Clause 4.12 (Unforeseeable Physical Conditions) of the FIDIC (CONS) to mean natural physical conditions and man-made and other physical obstructions and pollutants, which the contractor encounters at the site when executing the works, including sub-surface and hydro-logical conditions but excluding climatic conditions. Thus, unforeseeable conditions off-site do not meet this criterion.[14]

Sub-Clause 4.12 of the FIDIC (CONS) allocates the risk of encountering unforeseeable adverse physical conditions to the employer. If such risk is allocated to the contractor, the employer would have to pay for risks that might not eventuate through contingency sums that the contractor would be forced to include in their tender to take account of such unforeseeable risk. The allocation of such risk to the employer is mainly based on the criteria that the employer has more control over the risk; since the employer is the one who selected to construct the project on this particular site, the employer has control over the design of the works and the timing of commencement of construction and the employer has the opportunity to carry out whatever investigations it thinks necessary to safeguard against the unknown and to identify the hazards and risks inherent in the ground conditions of a particular site. Once such hazards and risks are identified, if unacceptable, they can be mitigated or eliminated by the employer either directly through the selection of an alternative site or indirectly by changing the design of the project.[15]

According to Sub-Clause 4.10 (Site Data) of the FIDIC (CONS), the employer is required to make available to the contractor for their information all relevant data in the employer's possession on sub-surface and hydrological conditions at the site, including environmental aspects. The contractor shall be responsible for interpreting all such data. The burden of proof lies with the contractor who must demonstrate successfully, not only that the reasonable contractor would not have foreseen the physical condition which caused the delay, but also that the experienced contractor would not have included the risks of encountering such a physical condition in preparing his programme and tender.[16]

If the contractor encounters physical conditions which are both unforeseeable and adverse, the contractor is required to give notice to the engineer as soon as practicable. However, the contractor needs to consider if he should give notice under other clauses; such as Sub-Clauses 8.3 (Programme), 8.4 (Extension of Time for Completion), 13.2 (Value Engineering), 19.2 (Notice of Force Majeure) and 20.1 (Contractor's Claims) of the FIDIC (CONS).[17]

The contractor is required to continue executing the works, and not await instructions from the engineer, unless the physical conditions constitute *force majeure* and notice has been given under Sub-Clause 19.2 of the FIDIC (CONS). When an experienced contractor encounters adverse unforeseeable physical conditions, they are expected to use their expertise; overcome the conditions, and execute and complete the works using such proper and reasonable measures as are appropriate for the physical conditions. Although an experienced contractor should typically not require guidance on construction techniques; the engineer should consider whether there is any need for variations or other instructions. The contractor should comply with any instructions given by the engineer, including an instruction for variation.[18]

If the contractor suffers delay to completion and/or incurs cost as a result of encountering unforeseeable physical conditions, the contractor shall be entitled to extension of time and payment of such cost, subject to Sub-Clause 20.1 (Contractor's Claims) of the FIDIC (CONS). It is noted that the contractor shall not be entitled to profit.

The engineer may also review whether other physical conditions in similar parts of the works were more favourable than could reasonably have been foreseen when the contractor submitted the tender, before additional cost is finally agreed or determined.

Unforeseeable physical conditions under Egyptian civil law

Delays

In relation to the unforeseeable physical conditions under Egyptian civil law, Article 215 of the ECC states the following:

> 'When specific performance by the debtor is impossible, he will be ordered to pay damages for non-performance of his obligation, unless he establishes that the impossibility of performance arose from an external cause beyond his control. The same principle will apply, if the debtor is late in the performance of his obligation'.

According to the aforementioned article, if the contractor was delayed in the performance of his obligations, the contractor will be under the obligation to compensate the employer for his consequent damages, unless the contractor proves that the delay in performance was due to an external cause beyond their control.[19]

It is submitted that if the building was totally or partially destructed or if damages occur to the building due to problems in the soil on which the building was constructed and the appropriate measures were not taken by the consultant and the contractor, then the consultant and the contractor will be responsible for the destruction or damage, as the case may be, unless the problems in the soil could not have been discovered by precise technical inspection or tests by experienced engineers. In the latter case, the problems in the soil would be considered a force majeure event and the consultant and the contractor would not be responsible for the destruction or the damage.[20]

Thus, Article 215 of the ECC will be applicable if the contractor encounters unforeseeable physical conditions that delay performance. As a result, the contractor shall not be held responsible for the delays, if such event results in delays to completion. Consequently, the contractor will be exempted from paying damages for failure to fulfill his commitments.

It is noted that generally, under civil law jurisdictions, there is no clear system of claims for extension of time. Time extension is usually not claim based. Usually, at the end of the project, the parties will discuss each event which prevented the contractor from completing within the contract duration, in order to reduce the total time overrun.[21] It is thought that this also applies to Egyptian civil law.

Furthermore, it is noted that although the general principles of contract law of the ECC provide that the debtor (in the case at hand, the contractor) would be exempted from paying damages for their delay in performance, if they prove that the delay in performance was caused by an external cause beyond their control, yet the ECC does not provide any express provision for the contractor's entitlement to extension of time and a mechanism for such extension, either in the *Muqawala* contracts section or in the general principles of contract law. Thus, although the contractor is relieved from the damages for delay by means of a judicial award, yet, at the time of execution of the works the time for completion is unclear neither to the employer nor to the contractor, which could result in disputes between the parties.[22]

Additional cost

The FIDIC (CONS) is a remeasured contract. It is noted that remeasured/unit price contracts under Egyptian civil law are subject to the provisions of Article 657 of the ECC. Accordingly, the said Article needs to be examined in this context.

Article 657 of the ECC states:

> '1. When a contract is concluded in accordance with an estimate drawn up on a unit price basis and it becomes apparent, during the course of the work, that it will be necessary, in order to complete the works according to the agreed design, to tangibly exceed the estimated price, the contractor must immediately notify the employer accordingly and inform him of the anticipated increase in price; if the contractor fails to give such notice he forfeits his right to recover the expenses incurred in excess of the estimate.
>
> 2. When the increase in the price for the execution of the designs is considerable, the employer may rescind the contract and stop the work, provided that he does so without delay and pays the contractor for the value of the work he has executed, estimated in accordance with the terms of the contract, without the employer being liable to compensate the contractor for the profit he would have earned if he had completed the works.'

In order for the contractor to be entitled to increase in costs under unit price contracts resulting from the increase in executed quantities that was not perceived at the date of entering into the contract, Article 657 of the ECC provides the following three conditions.[23]

Condition 1: The contract is entered into in accordance with an estimate on a unit price basis. This excludes contracts entered into on a lump sum basis and contracts entered into without agreement between the parties on the price. That is because contracts entered into on a lump sum basis are regulated in Article 658 of the ECC, whereas contracts entered into without agreement between the parties on the price shall be determined by the judge, thus there is no increase to a pre-agreed contract price.

Condition 2: The estimated contract price shall be tangibly exceeded for a reason that was not foreseeable at the time of entering into the contract.

It is intended in Article 657 that the estimated contract price is exceeded due to a tangible increase in the actual quantities compared to the estimated quantities in the bill of quantities. It is not intended that the estimated contract price is exceeded due to a tangible increase in the costs. So, for example, if there was a specific estimated quantity for excavation in the bill of quantities and, upon execution, it turned out that the actual quantities exceeded the estimated quantity, and such excess was tangible, so the second condition will be fulfilled. However, if the cost of excavation to the contractor has increased, the second condition will not be fulfilled. That is because it is considered that the contractor has taken into consideration before pricing the tender all the reasonable factors that could lead to changes in costs.

It is noted that for the second condition to be fulfilled the tangible increase in quantities should not have been foreseeable at the time of entering into the contract, as the Article states that:

> '… and *it becomes apparent*, during the course of the work, that it will be necessary, in order to complete the works according to the agreed design, to tangibly exceed the estimated price'. [emphasis added]

Condition 3: The contractor should give notice to the employer of such increase as soon as the contractor has been aware of the increase.

Such condition needs to be fulfilled for the contractor to be entitled to an increase in the estimated contract price as the Article states that 'the contractor must immediately notify the employer accordingly and inform them of the anticipated increase in price; if the contractor fails to give such notice they forfeit their right to recover the expenses incurred in excess of the estimate'. It is noted that no specific form of notice is mentioned; thus the notice could be written or oral, with the burden of proof on the contractor to prove that the notice has been given. Yet, the notice should be given immediately; otherwise it is deemed that the contractor has waived their right to be reimbursed the increase in price and the contractor price shall remain as provided in the bill of quantities. It is further noted that the notice should include the expected increase in quantity and the consequent expected increase in price. If the actual increase exceeded the expected increase stated in the notice, the contractor shall be only entitled to the expected increase stated in the notice. Accordingly, it would be of the contractor's benefit to include, in the notice, only the basis of the expected increase, not a specific figure for the increase, leaving the actual increase to be determined upon executing the works.

It should be noted that if the aforementioned three conditions of applicability of Article 657 of the ECC were fulfilled, the tangible increase in price could be considerable or inconsiderable. Article 657 of the ECC did not tackle the case of inconsiderable increase in price, however, by visiting paragraph 2 of Article 657, which states that 'When the increase in the price for the execution of the designs is considerable, the employer may rescind the contract and stop the work'. Thus, it could be concluded that if the increase in price was inconsiderable, the employer would not be entitled to rescind the contract and the employer shall be under the obligation to increase the contract price in proportion to the inconsiderable increase. It is up to the judge to determine if the increase in price was considerable or not; if the increase is about ten per cent, this could be treated as an inconsiderable increase in price and is not onerous to the employer. On the other hand, if the increase in price was considerable, Article 657/2 of the ECC entitles the employer to:

> '… rescind the contract and stop the work, provided that he does so without delay and pays the contractor for the value of the work he has executed, estimated in accordance with the terms of the contract, without the employer being liable to compensate the contractor for the profit he would have earned if he had completed the works.'

It is, therefore, apparent that if the increase in price was considerable, the employer would have two options:

- either instruct the contractor to continue execution of the works and the contract price would be increased as detailed earlier; or
- rescind the contract if the considerable increase in price is onerous to the employer. In such case, the employer should, without delay, instruct the contractor to stop the work. Thus, if the employer is delayed in giving such instruction, the contractor would proceed with the works and assume that the employer has selected the first option and has decided to continue with the works. However, if the employer rescinds the contract in such case, they shall be under the obligation to pay the contractor for the value of the work they have executed, estimated in accordance with the terms of the contract, without the employer being liable to compensate the contractor for the profit they would have earned had the contractor completed the execution of the works.

Finally, it is worth noting that, as provided in this section, when a contract is concluded in accordance with an estimate drawn up on a unit-price basis, if the estimated contract price is exceeded due to a tangible increase in costs, the price cannot be modified. It is intended in Article 657/1 of the ECC that the estimated contract price is exceeded due to a tangible increase in the actual quantities, not due to a tangible increase in the costs. However, the Article does not explicitly stipulate the above. According to legal jurisprudence writings, it is considered that the contractor has taken into consideration before pricing the tender all the reasonable factors that could lead to the increase in the contract price.[24] It is up to the parties to include provisions contrary to the above and to allow for fluctuation in prices. However, Egyptian civil law exceptionally allows the parties in certain situations to request an adjustment to their agreement through the application of the theory of unforeseen exceptional circumstances, 'Théorie de l'imprévision', provided in Article 147/2 of the ECC. The Article states:

> 'If, however, as a result of exceptional and unpredictable events of a general character, the performance of the contractual obligation, without becoming impossible, becomes excessively onerous in such a way as to threaten the debtor with exorbitant loss, the Judge may, according to the circumstances, and after taking into consideration the interests of both parties, reduce the onerous obligation to reasonable limits. Any agreement to the contrary is void.'

In order for the above theory to be applicable, the following conditions must be fulfilled:

- the existence of a contractual relationship stretched over time;
- the occurrence of an exceptional event that has a general character after the conclusion of the contract, for example, occurrence of war or sudden strike or flood;
- the exceptional event should have not been foreseen at the time of conclusion of the contract;

- the event is inevitable and unavoidable;
- the event renders the performance of the contractual obligation excessively onerous and threatens exorbitant losses; and
- the event should not render the performance of the contractual obligation impossible, otherwise this would be considered a force majeure event.

If the above conditions were fulfilled, the theory would apply and the judge may reduce the onerousity of the exorbitant obligation to reasonable limits. The judge has a wide discretion in this regards; they may reduce the obligations of the party suffering from the exceptional event, increase the contract price, or suspend the works until the exceptional event has stopped. If the judge increases the contract price, they would only decrease the losses of the party suffering from the exceptional event, but shall not reimburse them for all the losses incurred due to the event. It is further noted that the judge may not rescind the contract. Further, the theory of unforeseen exceptional circumstances, as stipulated under Article 147/2 of the ECC, is mandatory and is applicable to contracts entered into both on a unit price basis and lump sum basis.

If the contractor encounters unforeseeable physical conditions and this results in additional costs to the contractor (ie, there is an increase in the price of the execution of the works), it is important to differentiate in such a situation between the case when the increase in price is due to an increase in the quantities caused by unforeseeable physical conditions and the case when the increase in price is due to increase of costs of executing the same quantities by reason of unforeseeable physical conditions.

In the first case, if the increase in price is due to an increase in the quantities caused by unforeseeable physical conditions and such increase in quantities was intangible, then the contract price shall increase in proportion to that increase in quantities and the employer has no other option in such situation.[25] However, if there is a tangible increase in the actual quantities compared to the estimated quantities in the bill of quantities at the time of entering into the contract, for example, if there was a specific estimated quantity for foundation in the bill of quantities and, upon execution, it turned out that the actual quantities exceeded the estimated quantity due to encountered unforeseeable physical condition, and such excess was tangible, then the contractor's entitlement to the increase in price, if a contract is entered into in accordance with an estimate on a unit-price basis, as per Article 657 of the ECC, will be fulfilled. Thus, if the contractor gives notice to the employer of such increase as soon as the contractor has been aware of it, the contractor should be entitled to the increase in the contract price, as a result of such tangible unforeseeable increase in the quantities attributed to the encountered unforeseeable conditions.[26] Furthermore, if the increase in the price is considerable, the employer may rescind the contract, in accordance with the provisions of Article 657/2 of the ECC.

In the second case, under Egyptian civil law, when the increase in price is due to increase of costs of executing the same quantities of work by reason of unforeseeable physical conditions encountered, the contractor, in such case, shall not be entitled to increase in the contract price, even if the increase in price is tangible. That is because it is considered that the contractor has taken into consideration before pricing the tender all the reasonable factors that could lead to price increase.[27]

It is interesting to note in the above connection that the scholars differ in their legal basis of the case when the contractor encounters unforeseeable physical conditions that result in increase in their costs, that such increase is unforeseeable, of a general character, is inevitable and unavoidable and the event renders the performance of the contractual obligation excessively onerous and threatens exorbitant losses.

Some scholars argue that, under Egyptian civil law, the theory of unforeseen exceptional circumstances does not apply to the case when the soil on which the building is to be constructed includes groundwater table, which entails using foundation that would result in additional costs than estimated. Such opinion submits that the legal basis in such a case is that the contractor may request annulment of the contract on the basis of the commitment of a material mistake. That is because the contractor accepted to enter into the contract at the estimated contract price, based on the material conditions of the soil. Thus, if the conditions turned out to be different, the contractor is considered to have committed a material mistake. If the employer was willing to continue performing the contract, they can negate such annulment by increasing the contract price by an extent proportional to the increase in costs as a result of such mistake. That is in accordance with the provisions of Article 124/1 of the ECC which provides that: 'A party who has committed a mistake cannot take advantage of the mistake in a manner contrary to the principles of good faith'.[28]

The aforementioned argument coincides with the provisions of French law, where Article 1147 of the FCC stipulates that: 'If the debtor does not prove that the non-performance/the delay in performing is due to an external cause, he shall be ordered to pay damages even in absence of bad faith'. It is contended that the corollary of this rule is that damages should not be due if the debtor was prevented from performing by reason of force majeure or of a fortuitous event, as provided in Article 1148 of the FCC. However, it is submitted that:

> '[T]he concept of force-majeure does not include the unforeseeable physical conditions, eg, those related to the ground (risque du sol). The most important consequence of this rule is that in the case of lump sum contracts (marché à forfait), the contract price is quasi-untouchable, as additional works caused by unforeseeable conditions have to be carried by the contractor as long they are necessary and do not affect the object and general economy of the contract'.[29]

In addition, the employer does not have to bear the additional costs related to unforeseeable physical conditions of the soil, under French consumer law. That is in accordance with the Code de la Construction et de l'Habitation (CCH), where the responsibility for unforeseeable physical conditions related to the ground shall be borne by the contractor, who has a general duty of inspecting the site while working in the so-called secteur protégé.[30]

On the other hand, some scholars argue that, under Egyptian civil law, if the contractor encounters unforeseeable physical conditions that result in increase in his costs, then the theory of unforeseen exceptional circumstances will be applicable. For instance, if the soil on which the building is to be constructed includes ground water table, which entails using foundation that would result in additional costs than estimated, then this would be considered an exceptional event, subject to the theory of unforeseen exceptional circumstances. It is further an event of general character, as it is not related to this contractor in specific. It is noted in this regards, that there is no difference if the event did not occur after entering into the contract, but existed before entering into the contract, yet was not foreseeable; both cases are considered not to have been taken into consideration at the time of entering into the contract. This opinion further states that, under French law, the first opinion is the one applicable, however, that is because the theory of unforeseen exceptional circumstances does not exist in French law, thus, the theory of material mistake provides a fair solution in the absence of an express provision, yet, under Egyptian law, there is an express provision in the law, thus there is no need to find another legal basis.[31]

It is thought that the second opinion is the one more applicable to Egyptian civil law. That is because first, there is an express provision related to unforeseen exceptional circumstances. Second, if it is well accepted, under Egyptian civil law, that the case if the building was totally or partially destructed or if damages occur to the building due to problems in the soil that could not have been discovered by precise technical inspection or tests by experienced engineers, is a *force majeure* event,[32] and since such event is considered not to have been taken into consideration at the time of entering into the contract, then it is envisaged that such event would be exceptional, as per the provisions of the theory of unforeseen exceptional circumstances, if the remaining conditions of the theory are fulfilled. Thus, the second opinion will be adopted in this research.

It is worth noting that the provisions of Sub-Clause 4.12 (Unforeseeable Physical Conditions) of the FIDIC (CONS) are to a large extent echoed in a theory under the administrative law, known as the 'theory of unforeseen physical obstructions' or 'Théorie des sujétions imprévues';[33] however, the said theory is out of the scope of this article, as it applies only to administrative contracts.

The provisions of the unforeseeable physical conditions under the FIDIC (CONS) and under Egyptian civil law – comparative analysis

As aforementioned, Sub-Clause 4.12 (Unforeseeable Physical Conditions) of the FIDIC (CONS), provides that if the contractor encounters physical conditions which are both unforeseeable and adverse and provided that the contractor gives a notice to the engineer under this Sub-Clause 4.12, and if the contractor suffers delay to completion and/or incurs cost as a result of such event, the contractor shall be entitled to an extension of time and payment of such cost, subject to Sub-Clause 20.1 (Contractor's Claims) of the FIDIC (CONS).

By checking this provision against the provisions of Egyptian civil law, being the applicable law of the contract, it is noted that according to the provisions of Article 215 of the ECC, if the contractor proves that the performance of their obligation was delayed by an external cause beyond his control, the contractor would be exempted from paying damages for the delay in performance. The external cause in such event is the contractor encountering unforeseeable adverse physical conditions. Thus, under both the FIDIC (CONS) and Egyptian civil law, the contractor is relieved from the damages for delay, noting that the claim could be time barred under Sub-Clause 20.1 of the FIDIC (CONS), which states that: 'If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim'.

However, and as mentioned earlier in this paper, the ECC does not provide any express provision for the contractor's entitlement to extension of time and a mechanism for such extension, either in the *Muqawala* section or in the general principles of contract law. Thus, although the contractor is relieved from the damages for delay by means of a judicial award, yet, at the time of execution of the works, the time for completion is unclear neither to the employer nor to the contractor, which could result in disputes between the parties.

As for the costs incurred by the contractor as a result of a delay caused by such event, the FIDIC (CONS) entitles the contractor to the additional costs they incur as a result of such event. As for Egyptian civil law, under remeasured/unit price contracts, according to Article 657 of the ECC, the contractor shall not be entitled to an increase in the contract price, if the estimated contract price is exceeded due to any increase in the costs. However, if the theory of unforeseen exceptional circumstances provided in Article 147/2 of the ECC becomes applicable, the judge may reduce the onerous obligation to reasonable limits. However, if the judge increases the contract price, they would only decrease the losses of the party suffering from the exceptional event, but shall not fully compensate them for all the losses incurred due to the event. Thus, in such a case the contractor will bear some losses due to the said event.

However, since such losses were caused by exceptional events that were not foreseeable at the time of entering into the contract, then as aforementioned, this does not accord with the discussed concept of allocation of risks. Accordingly, such unforeseeable risk should have been allocated to the employer because the employer has more control over the risk. It is thus recommended to amend the contractor's entitlement under Egyptian civil law, so as to allocate the losses to the employer, as per the concept of allocation of risks elaborated here.

It was further mentioned that, under Sub-Clause 4.2 of the FIDIC (CONS), the engineer may review whether other physical conditions in similar parts of the works were more favourable than could reasonably have been foreseen when the contractor submitted the tender, before additional cost is finally agreed or determined. In connection with the aforementioned, it is noted that under Egyptian civil law, if the parties agree on the contract price or a basis for determining the price, that price cannot be modified, except by the agreement of the parties or as provided by law.[34] This provision stems from the general rule stipulated in Article 147/1 of the ECC, which states that: 'The contract is the law of the contracting parties. It can be revoked or altered only by mutual consent of the parties or for reasons provided for by law'. Thus, the engineer is not empowered to review whether other physical conditions in similar parts of the works were more favourable than could reasonably have been foreseen.

Recommendations

Since a large proportion of work in civil engineering construction is usually carried out underground, the risk of encountering unforeseeable physical conditions is quite high. Thus, it is recommended to introduce a new Article to the ECC to tackle this risk, to be based on the allocation of risk in Sub-Clause 4.12 of the FIDIC (CONS). The wording of the recommended Article is as follows:

> '1. 'If the contractor encounters physical conditions, whether natural or man-made and including sub-surface and hydrological conditions, which are both unforeseeable and adverse, the contractor is required to give notice of existence of such conditions to the employer as soon as practicable. The contractor shall continue executing the works, using such proper and reasonable measures as are appropriate for such physical conditions, and shall comply with any instructions which the employer may give.
>
> 2. If the contractor suffers delay to completion and/or incurs cost in the execution of the works as a result of encountering such unforeseeable physical conditions, and/or of any employer's instructions related thereto, the contractor shall be entitled to extension of time and payment of such cost. It shall be taken into consideration in such cost, if other physical conditions in similar parts of the works were more favourable than could reasonably have been foreseen at the time of entering into the contract, however, this should not result in a net reduction in the contract price.'

Conclusion

Although, most of the Middle East countries source their law from a mixture of civil and Sharia law, and are most heavily influenced by Egyptian civil law, FIDIC, which is based on legal concepts rooted in the common law system, is the established form of construction contract in the region. Thus, awareness of the local laws and the mandatory provisions thereof is a must for the stakeholders operating with FIDIC contracts in a civil law jurisdiction.

When examining the provision of the unforeseeable physical conditions under the FIDIC (CONS) and under Egyptian Civil Law, it is concluded that the solutions related to the contractor's relief from the damages for delay due to the case, when the contractor encounters unforeseeable physical conditions that result in increase in delays, under Sub-Clause 4.2 of the FIDIC (CONS) are similar in many instances to those under Egyptian civil law. However, the FIDIC

(CONS) is more favourable in that, under Egyptian civil law, the time for completion is unclear neither to the employer nor to the contractor, which could result in disputes between the parties. On the other hand, Egyptian civil law is more favourable to the contractor in terms of having no time barring provision, compared to such provision in Sub-Clause 20.1 of the FIDIC (CONS).

As for the additional costs to which the contractor would be entitled, the solutions in Egyptian civil law are much less favourable to the contractor as they allocate the increase in prices resulting from such event, even if tangible, to the contractor. The exception is only if the theory of unforeseen exceptional circumstances under Article 147/2 of the ECC is applicable. Nevertheless, in such case, the judge could only decrease the losses of the contractor, but shall not fully compensate them for all the losses incurred due to the event.

Notes

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2 Annelise Riles, *Rethinking the Masters of Comparative Law*, (Hart Publishing: 2001) 153.
3 Norton Rose, 'Boom and recovery: Understanding the Middle East construction market', Norton Rose Fulbright, (2009).
4 Hani Sarie-El Din, 'Operation of FIDIC Civil Engineering Conditions in Egypt and Other Arab Middle Eastern Countries' (1994) 28(4) The International Lawyer 951.
5 Jaeger Axel-Volkmar and Hok Gotz-Sebastian, *FIDIC: A Guide for Practitioners*, (Springer – Verlag Berlin Heidelberg 2010) 99; See also n 1, 15.
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15 See n 1 309–310; Brian Totterdill, *Fidic User's Guide: A Practical Guide to the 1999 Red and Yellow Books*, (Thomas Telford LTD 2006) 135.
16 Jeremy Glover and Simon Hughes, *Understanding the New FIDIC Red Book – A Clause-By-Clause Commentary*, (Sweet & Maxwell 2006) 111.
17 See n 15, Totterdill 135.
18 See n 13, 117–118.
19 Abdel Razak Al-Sanhuri, A Treatise on Civil Law [Al-Wassit Fi Sharh' Al-Kanoun Al-Madani], Part 7, Volume 1, (2nd ed, Dar El Nahda El Arabiya Publisher 1989) 96.
20 *Ibid* 142 and 173; Mohamed Shanab, *Commentary on Muqawala Contract*, (Dar El Nahda El Arabiya Publisher 1963) 136–137.
21 See n 5, Axel-Volkmar and Gotz-Sebastian 100 and 242.
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29 See n 5, 25; French Court of Cassation. 27.09.2006, D.2006, I.R.2416 by Jaeger Axel-Volkmar and Hok Gotz-Sebastian, *FIDIC: A Guide for Practitioners*, (Springer – Verlag Berlin Heidelberg 2010) 25 note 29.
30 See n 5, 25; French Court of Cassation. 20.01.1993, no. 91-10-900/C, no. 115 P + F, Voisin c/Correia: Bull. Civ. III, no. 5 by Jaeger Axel-Volkmar and Hok Gotz-Sebastian, *FIDIC: A Guide for Practitioners*, (Springer – Verlag Berlin Heidelberg 2010) 25 note 30.
31 See n 19, 230.
32 *Ibid* 142 and 173; see also n 28, 136–137.
33 See n 1, 119; Ali El-Shalakany, 'The Application of the F.I.D.I.C Civil Engineering Conditions of Contract in a Civil Code System Country: A Comparison of Legal Concepts and Solutions' (1989) International Construction Law Review, 270–271.
34 See n 28, 163.

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FEATURE ARTICLE

The Swiss Federal Supreme Court stays arbitration proceedings because the parties skipped mandatory pre-arbitral steps

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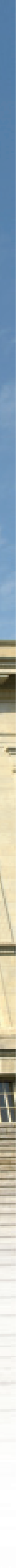
Introduction

The Swiss Federal Supreme Court (the 'Supreme Court') has revisited an earlier decision of 2014 on the consequences for arbitration proceedings seated in Switzerland if the parties have skipped mandatory pre-arbitral steps.

In a decision dated 7 July 2014 (4A_124/2014),[1] the Supreme Court held that the proceedings under the Dispute Adjudication Board (DAB) according to Clause 20 of the FIDIC conditions of 1999 were a mandatory pre-arbitral step. However, the ad hoc DAB had not been constituted for more than 18 months.



Consequently, the Supreme Court did not allow the party challenging the arbitral tribunal's jurisdiction to rely on the argument that the DAB procedure was mandatory in the present case.[2]

In the more recent landmark decision, FSC 142 III 296, dated 16 March 2016 (4A_628/2015),[3] the Supreme Court seized the opportunity to clarify one important aspect that had not been decided in the previously mentioned decision: the consequences to the arbitration proceedings if the parties have skipped mandatory pre-arbitral steps. In the 2016 decision, the Supreme Court ordered the arbitral tribunal to stay the arbitration proceedings, but it did not annul the award entirely because this would have made it necessary for the arbitration to be commenced again with a completely new arbitral tribunal.

In the 2016 decision, the Supreme Court ordered the arbitral tribunal to stay the arbitration proceedings, but it did not annul the award entirely.

Facts of the decision

Both parties to the arbitration are involved in the exploration and production of hydrocarbons in Algeria. The contract of association between the parties contained the following dispute resolution and arbitration clause:

> 'Any disagreement between the Parties as to the performance or the interpretation of this Contract, which cannot be settled by the parties, shall firstly be the object of an attempt at conciliation pursuant to the ADR (Alternative Disputes Resolution) Rules of the International Chamber of Commerce (ICC).
>
> Any disagreement between the Parties as to the performance or the interpretation of this Contract, which is not resolved by way of conciliation, shall be decided in last instance by arbitration in accordance with the UNCITRAL arbitration rules by three (3) arbitrators appointed in conformity with such rules.
>
> Applicable law shall be the law of [*name of country omitted*]. The place of arbitration shall be Geneva, Switzerland. The language of arbitration shall be French. However, English may be used if necessary.'[4]

Following disagreements between the parties, the Respondent initiated conciliation proceedings under the ICC Amicable Dispute Resolution Rules of 2001 (the 'ADR Rules').[5]

The appointed 'Neutral' (in the language of the ADR Rules) asked a series of questions pertaining to the conduct of the conciliation and proposed a meeting. The Respondent requested that the meeting took place by way of telephone conference, to which the Appellant agreed. The Respondent's counsel suggested using its conferencing system to facilitate the participation of the Respondent's representatives. The Appellant firmly opposed this suggestion, as the conference was scheduled between the parties' legal representatives only. Following this, the conciliation meeting was postponed, but subsequently never rescheduled.

After the Neutral inquired about the continuation of the conciliation, the Respondent filed a request for arbitration. On the same day, the Respondent sent a letter to the Neutral stating that the conciliation had failed due to the Appellant's behaviour.

During the first stage of the arbitration, the Appellant reserved the right to challenge the jurisdiction of the arbitral tribunal insisting that the mandatory pre-arbitral conciliation according to the ADR Rules had not been complied with. Following an exchange of submissions on the issue, the arbitral tribunal issued an interim award, according to which it accepted its jurisdiction.[6]

Subsequently, the Appellant filed a motion to set aside the interim award before the Supreme Court for the lack of the arbitral tribunal's jurisdiction *ratione temporis* according to Article 190(2)b of the Private International Law Act (PILA).

The Supreme Court's ruling

First, the Supreme Court had to assess whether or not the conciliation was mandatory. In confirmation of its earlier ruling pertaining to the FIDIC conditions,[7] the Supreme Court held that conciliation is a mandatory pre-arbitral step if the parties have agreed to a structured institutional framework with a procedure that covers every step in the process, such as the ADR Rules of the ICC.[8]

The Supreme Court held that the Respondent did not comply with the mandatory conciliation. According to the ADR Rules, the parties may not withdraw from the conciliation procedure before the parties have met with the Neutral.[9] The exchange of several letters and emails concerning the coordination of a date for a meeting was not considered to be a sufficient attempt at conciliation.[10]

Second, the Supreme Court assessed whether the Appellant invoked the arbitral tribunal's failure to abide by the pre-arbitral steps in an abusive way as prohibited under Article 2(2) of the Swiss Civil Code.[11] The Supreme Court noted that the manifest abuse of a (procedural) right was not protected by the law. However, the Supreme Court did not consider the Appellant's behaviour as obstructionist. Rather, the Supreme Court accepted the Appellant's explanation that it was taken aback by the proposal that the Respondent's party representatives were going to take part in the telephone conference that was scheduled to start ten minutes later.[12]

Third, the Supreme Court answered the unsettled question on how such a breach of a mediation agreement should be sanctioned. It considered three alternatives:

- *To continue the arbitration proceedings and to sanction the party refusing to comply with the pre-arbitral steps with damages:* The Supreme Court considered this solution to be unsatisfactory because it would deprive the mediation proceedings of its purpose to reach a settlement. Further, the Supreme Court considered the difficulties in establishing the quantum of such a damage.[13]
- *To declare the claim inadmissible and close the arbitration proceedings:* The Supreme Court did not consider this appropriate either, as it would close the arbitral tribunal's mandate and the arbitral tribunal would have to be reconstituted. Furthermore, the proceedings would be prolonged, which would create additional costs to the detriment of both parties. Since conciliation procedures do not stop or interrupt the statute of limitations, there is also the potential danger that a claim could be rejected because, by the time the new request for arbitration has been filed, the action may be time barred.[14]
- *To set aside the interim award on jurisdiction and stay the arbitration proceedings until the conciliation procedure is concluded:* This practical approach was the preferred solution by the Supreme Court. It further set a time limit of multiple months to enable the parties to proceed with the conciliation proceedings.[15]

After the decision by the Supreme Court was rendered, the parties held the necessary conciliation meetings but were unable to reach an amicable solution. The arbitration thus continued before the arbitral tribunal.[16]

Commentary and outlook

This landmark decision is particularly relevant for international construction contracts because they frequently contain multi-tier dispute resolution or escalation clauses, which set out that parties must resort to mediation, conciliation or dispute resolution boards before proceeding to arbitration.

The Supreme Court confirms that in arbitration proceedings conducted in Switzerland, the parties should carefully follow the dispute resolution clause and the required pre-arbitral steps to avoid an appeal of the arbitral tribunal's award on jurisdiction, which inevitably would prolong the proceedings.

At the earlier stage of the drafting of the dispute resolution clause, it is important to come up with realistic and practical steps that hold up in multiple scenarios. Later, when a party is already preparing for arbitration proceedings, the parties should carefully check whether any dispute resolution clauses could have been incorporated by reference in the arbitration clause, a practice that is widely accepted in Switzerland.

The parties should carefully follow the dispute resolution clause and the required pre-arbitral steps to avoid an appeal of the arbitral tribunal's award on jurisdiction.

Considering this ruling of the Supreme Court, parties should not take for granted that they can instrumentalise the pre-arbitral proceedings to delay the arbitration. In its analysis, the Supreme Court emphasised that the Appellant, who made the objection against the arbitral tribunal's jurisdiction and requested the setting aside of the interim award, had sufficiently participated in the conciliation proceedings. It further held that the Appellant did not abuse any rights, although it refused to participate in the telephone conference after learning that the other side's party representatives would be present.

A few examples of institutions that contain pre-arbitral steps that could be included in arbitration clauses for arbitrations seated in Switzerland are:

- FIDIC[17] – the new editions of the FIDIC Red Book, Yellow Book and Silver Book came into force in December 2017. While the new FIDIC conditions are generally intended to increase clarity and certainty, they now also provide for standing dispute adjudication boards (formerly DAB, now the Dispute Avoidance/Adjudication Board (DAAB)). According to Clause 21, disputes need to be referred to the DAAB within 42 days.
- ICC Mediation Rules of 2014[18] – the ICC Mediation Rules provide users with clear parameters for the conduct of the mediation proceedings but at the same time seek to maintain flexibility. The ICC also publishes several mediation clauses that parties can include in their contract.[19]
- Swiss Rules of Commercial Mediation[20] – the Swiss Rules of Commercial Mediation provide for a detailed procedure and offer a multitude of arbitration clauses.

Notes

1 See the decision of the Supreme Court, 4A_124/2014, dated 7 July 2014 (the decision was issued in French, but an English translation is available at www.swissarbitrationdecisions.com).

2 Adrian Bell, 'Swiss Court considers effect of FIDIC, clause 20 where no DAB has been constituted' *IBA Construction Law International*, Vol 9, Issue 4, December 2014, 4.

3 The decision was issued in French and is translated to English at www.swissarbitrationdecisions.com accessed 15 October 2019.

4 Decision of the Supreme Court, ATF 142 III 296, dated 6 March 2016, cons A.b.

5 *Ibid*, cons A.c.

6 *Ibid*, cons B.

7 Decision of the Supreme Court, 4A_124/2014, dated 7 July 2014, cons 3.4.3.3.

8 Decision of the Supreme Court, ATF 142 III 296, dated 6 March 2016, cons 2.4.1.2. The ICC ADR Rules of 2001 are available at http://gjpi.org/wp-content/uploads/icc-adr-rules.pdf, accessed 15 October 2019, but have been replaced by the ICC Mediation Rules of 2014; see paragraph 19 at https://iccwbo.org/dispute-resolution-services/mediation/mediation-rules accessed 15 October 2019.

9 *Ibid*, cons 2.4.2.

10 *Ibid*.

11 *Ibid*, cons 2.4.3.2.

12 *Ibid*.

13 *Ibid*, cons 2.4.4.1.

14 *Ibid*.

15 *Ibid*.

16 After it was established that the conciliation procedure has not led to a settlement, the arbitral tribunal resumed with the proceedings and issued two procedural orders regarding the second phase of the arbitration. The Respondent, however, filed another motion before the Supreme Court to annul both procedural orders and to hold that the arbitral tribunal did not have jurisdiction *ratione temporis* between 22 May 2015 and 1 June 2016 (decision of the Supreme Court, 4A_524/2016, dated 20 September 2016). Within less than a week, the Supreme Court issued a ruling holding that a procedural order is not capable of an appeal (unless the arbitral tribunal implicitly ruled on its own jurisdiction). The Supreme Court further explained that the content of the procedural orders had corresponded with the scope the Supreme Court intended to give its earlier decision in the same case and thus rejected the appeal without any further ado.

17 See, for a detailed overview: Ben Mellors, 'Second editions of the FIDIC Rainbow Suite' *IBA Construction Law International*, Vol 13, Issue 1, March 2018, p 64 et seq.

18 See https://iccwbo.org/dispute-resolution-services/mediation/mediation-rules accessed accessed 15 October 2019.

19 *Ibid*.

20 See www.swissarbitration.org/Mediation/Mediation-rules accessed accessed 15 October 2019.

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Nature and articulated effects of the decisions of dispute adjudication boards

Construction projects have historically been fertile grounds for disputes and conflicts. Due to the complex nature of risks on a project, whether on a large-scale commercial or residential project, along with myriad other factors, conflicts can develop between the parties to a contract leading, most often, to increased costs. To respond to this, the construction industry has adopted less adversarial methods of resolution. This article considers various dispute resolution processes in other jurisdictions in light of the relevant provisions in the FIDIC General Conditions.

Nature of Dispute Boards

The surplus value brought by the Dispute Board

The flourishing litigation, to which large construction projects have given birth, has necessitated the international construction community to look for alternative solutions to avoid or at least to reduce such litigation. Examples of these include mediation and partnering.

In the second half of the 19th century, the construction industry developed mechanisms which through time have acquired a more limpid dimension, including:

- Dispute Review Boards (DRB), which are tasked with making recommendations to the parties;
- Dispute Adjudication Boards (DAB), which at the end of their enquiry make a decision; and
- Combined Disputes Boards (CDB), which generally make recommendations, but which may also – upon request by one of the parties, not opposed by the other one – make a binding decision.

These developments in dispute avoidance and dispute resolution have been used since 1981 when the first Dispute Board was used in relation to the El Cajon Dam contract in Honduras.[1]

The remarkable advantage of the DAB is that it inserts itself in the dynamics of the relationship between the parties, reviewing the prior decision of the Engineer (who inevitably has the vocation to be and is the faithful custodian of the interest of the Employer, who has hired them).[2] It amounts then to an additional step in the ladder to settle the disagreements within the internal level of the construction project.

The surplus value of the DAB is that because its members are generally appointed at the beginning of the works and can follow the progress of the works, should a disagreement arise the DAB is familiar with the works and is well known to the parties.

The decisions of the DAB

The DAB operates under instructions given to it by the parties to the construction contract. In the broad sense, the relationship of the DAB to the parties seems to be based on a joint mandate.

The nature of the DAB's decision is characterised by it being treated as a decision of the parties themselves, since it is made under their mandate.

The FIDIC Conditions of Contract 2017 (the 'FIDIC Conditions') provide for two contractual mechanisms before a dispute may be referred to arbitration: a decision by the Engineer and a decision by the DAB. If a party is dissatisfied with the DAB's decision, then the dispute may be referred to arbitration.

It has been debated whether the referral of a dispute to a DAB amounts to the commencement of legal proceedings. It is advocated here that its contractual nature excludes it from being characterised as legal proceedings.

To deepen this analysis, it is useful to compare the DAB with other dispute resolution methods.

> *The remarkable advantage of the DAB is that it inserts itself in the dynamics of the relationship between the parties, reviewing the prior decision of the Engineer.*

Comparison between the DAB and other dispute resolution processes

DAB and arbitration

The DAB's decision is totally different from an arbitral award, since it has a contractual nature while arbitrators are entrusted with making a decision that has the same nature and effect of a state court's judgment.

A more specific remark as to the nature of a DAB's decision is that the arbitral award, made as a result of the challenge of the DAB decision, may not be treated as an appeal against it, since the claims and defences of the parties before the arbitrators may, at least partly, be different from those raised by them in the proceedings before the DAB.

Expert determination

The DAB process is not dissimilar to expert determination, a dispute resolution process in which a neutral third party is entrusted by the parties with the task to use their experience to decide a disagreement between them, based on technical, factual or even legal issues.

Expert determination originated in the United Kingdom[3] and tends to be used in other countries of the Commonwealth.

The general view is that whoever is entrusted with an expert determination must act as an expert and not as an arbitrator.[4]

Expertise amiable

Another dispute resolution method, similar to the DAB, is the *expertise amiable*, originating in France, which consists of instructions given by the parties to an independent third party to resolve a disagreement between them. Generally, technical or factual issues are submitted to them.

The distinction between the procedural nature of arbitration and the contractual world in which the expertise operates is straightforward.[5]

Schiedsgutachten

In Germany and Switzerland, another method of dispute resolution is used, the *Schiedgutachten*. This method operates at the contractual level and consists of the parties entrusting a neutral third party to solve issues of fact and sometimes points of law.

The *Schiedsgutachten* has no procedural effects and, to enforce it, the parties must enliven the jurisdiction of a competent state court.

Contractual expertise

In Italy, one frequently resorts in such circumstances to a *perizia contrattuale* in which the parties refer a dispute to a contractual expert, who has to provide a technical solution or to *arbitrato irrituale*.

Various laws are eligible to govern a DAB clause. The first and immediate candidate is the law of the relevant contract (lex contractus). Other candidates are the law that governs the arbitration clause and eventually the law of the state in which the construction project is located.

Arbitrato irrituale

Arbitrato irrituale is a specialty of the Italian jurisdiction and consists of the appointment by the parties of a neutral third party to settle a dispute.

From this originates its definition as a 'joint mandate to settle' which has previously been advocated by this author.[6]

An alternative object of a joint mandate to settle may consist of instructions by the parties to such a neutral third party to make a decision that will be treated by them as their own decision.

What is common in all such proceedings is that they are quite distinct from the procedural nature of arbitration.

In *Cinisello Balsamo*,[7] the Court of Cassation, the last instance in the Italian judicial system, held that *arbitrato irrituale* and procedural arbitration are similar tools. Five years later, that decision was abandoned and it has been affirmed that while *arbitrato irrituale* has a contractual nature, the procedural arbitration was equated to a state court judgment.

Analysis of some aspects of the proceedings

Applicable law

Once it is established that the DAB's decision is a contractual mechanism to resolve a dispute, which has the same effect as a decision made directly by the parties, its precise characterisation will necessarily depend on the applicable law.

On this basis, the DAB's decision may be treated as corresponding to an *arbitrato irrituale* in the Italian system, to an *expertise amiable*, a *Schiedsgutachten* or to an expert determination in the various other jurisdictions.

Various laws are eligible to govern a DAB clause. The first and immediate candidate is the law of the relevant contract (*lex contractus*). Other candidates are the law that governs the arbitration clause and eventually the law of the state in which the construction project is located.

It is suggested that best practice is to exclude the law of the arbitration clause because the DAB is a step prior to arbitration which has just a contractual nature.

In the absence of a different reference in a given construction contract, the location of the construction site should not be the decisive element in making such choice.

In the absence then of a provision expressly governing the DAB, or the disputes clause, the safest choice seems to be the *lex contractus*.

The DAB as a precondition to arbitration

As it is well known, the referral of a dispute to a DAB is provided for by the FIDIC Conditions as a step prior to arbitration. It is therefore to be considered as a precondition to arbitration. The English House of Lords had no difficulty in *Channel Group*[8] in asserting that when the parties have decided to refer a dispute to experts and then to arbitration, this is the proper course of action when a dispute has arisen.

Difficulties may arise when the DAB, which is provided for by the parties, is not in place.

Clause 20.8 of the FIDIC Conditions 1999 provides that parties may refer the dispute directly to arbitration if there is no DAB in place.

If the DAB has not been constituted because one party has not cooperated, it ought to follow from this that the non-cooperating party be foreclosed by its conduct from opposing the absence of a DAB.

If the non-constitution of a DAB is the result of lack of action by all the parties concerned, it is suggested that they have waived by conduct the right to constitute it and that the dispute may be directly referred to arbitration. The Swiss Federal Court has expressed support for this approach.[9]

Provisions that regulate the conduct of DAB proceedings

The DAB proceedings are generally not regulated by statutory provisions but depend on the terms agreed by the parties in the contract (or subsequently with the consent of the DAB). This gives much latitude to the DAB.

Even if the notion of due process does not apply to contractual proceedings, the DAB is nevertheless required to be impartial, to allow the parties to present their views, to oppose the position of the other parties and to provide evidence of its allegations, that is, to act fairly and expeditiously.

The DAB will also be entitled to decide whether it has the authority to make a finding on the issue submitted to it, either because there is a dispute or on other grounds.

Non-compliance with the duty to refer a dispute to a DAB

Non-compliance by a party with its duty to refer a dispute to the DAB, or conduct that should obstruct or prevent the DAB's decision, will amount to a breach of a contractual commitment and make that party liable for damages.

From the point of view of the arbitrators with regard to cases of non-compliance with the precondition to refer the dispute to the DAB, they generally have an option to dismiss the referral to arbitration or to suspend it, until the DAB proceedings take place.

The authority of the arbitral tribunal when a DAB decision is challenged before it

In the absence of different governing provisions, the arbitral tribunal has the authority to review and revise any decision of the DAB.[10]

A common ground, by which an arbitral tribunal can set aside a decision of the DAB, is where there has been non-compliance with its fundamental duties to act impartially, fairly and expeditiously.

Effects of a DAB decision

On the aforementioned grounds, it is noted that the DAB's decision has no procedural effect. Since the mandate of the parties to the DAB is to make a decision of the same nature as their own decision, such as a settlement agreement entered into directly by the parties, the remedy in case of non-compliance with the DAB's decision seems to be to institute court proceedings in which to claim specific performance or damages or to treat the contract as repudiated. This remedy will be granted by a state court, unless the parties have agreed that the dispute be referred to arbitration.

The state court or the arbitrator may render an interim decision on this issue – instead of dealing with it in its final decision – or, as in England, issue a summary judgment or elect to decide it at the end of the project together with the merits of the dispute.

> *The starting position in the FIDIC Conditions is that the DAB's decision is, from its issue, binding on the parties.*

The FIDIC Conditions, which are the general conditions most used in international construction, regulate in quite an articulated way the effects of a DAB decision, which has given rise to different judicial interpretations.

The starting position in the FIDIC Conditions is that the DAB's decision is, from its issue, binding on the parties (Sub-Clause 21.4.3).

The FIDIC Conditions provide that, in the absence of a Notice of Dissatisfaction by the parties with the DAB decision, it becomes final and binding (Sub-Clause 21.4.4). On the contrary, in the event of a party being dissatisfied with the DAB's decision, a remedy is available to it, which FIDIC has identified as arbitration (Sub-Clause 21.6).

By reference to the aforementioned, since the DAB's decision is always binding on the parties, they are bound to promptly comply with the decision, unless and until such decision is terminated or amended by a settlement agreement or by an arbitral award (FIDIC Conditions, Sub-Clause 21.4.3).

If a party does not comply with a decision of the DAB, which, as aforementioned, is always *binding* – even if not yet final – the other party is expressly entitled to refer the breach to arbitration (FIDIC Conditions, Sub-Clause 21.7). By comparison, under Sub-Clause 20.7 of the 1999 FIDIC Conditions, only 'final and binding' DAB decisions are expressly provided for.

This aspect of the 1999 FIDIC Conditions has given rise to large discussions regarding non-compliance with a DAB decision, which was just binding, but not final and binding and has given birth to the *Persero*[11] saga, which consists of two separate arbitral proceedings.

The construction literature has dealt twice with the *Persero* case.[12] Relevantly, an arbitral tribunal was constituted arising out of a dispute between the Employer and the Contractor relating to the construction of a pipeline and an optical fibre system in Indonesia, namely of the challenge of a DAB decision. The DAB ordered the Employer to immediately pay to the Contractor the amount decided by the DAB, even if it had been challenged.

Both the Singapore High Court and then the Court of Appeal (which is the last instance in such jurisdiction)[13] held – even if on different grounds – that the arbitral tribunal had erred, since before ordering the Employer to pay the Contractor, it should have re-examined the DAB decision.

The second *Persero* litigation[14] started with a referral by the Contractor to another arbitral tribunal, in line with the finding of the Court of Appeal in the first litigation, of its claim that the Employer be ordered to comply with the DAB decision and that the entire dispute be re-examined.

The High Court considered the various options, consisting of the alternative between conducting two separate arbitral proceedings, one to enforce the DAB decision and the other one to review the merits of such litigation, and deciding them in only one proceeding.

The High Court held that both issues had to be decided in the same proceedings and that, in the first phase of such arbitral proceedings, an interim or partial award concerning the compliance with the DAB decision could be made.

The Court of Appeal, before which the judgment of the High Court was challenged, has clearly stated that the decision of the DAB was binding independently from the result of the decision on the merits and that the interim award, which had ordered the Employer to make the payment decided by the DAB, was valid and dismissed the challenge.

The 2017 FIDIC General Conditions have then expressly provided (Sub-Clause 21.7) that even a merely binding DAB resolution, if not promptly complied with, entitles the other party to refer the matter to arbitration to obtain an order that the failure to comply with it be sanctioned.

Such new clause and the *Persero* saga seem to give an adequate response to queries concerning the rights of a party when faced with a lack of immediate compliance with a DAB decision by the other contracting party.

Notes

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2 M Rubino-Sammartano, 'The Role of the Engineer – Myth and Reality', end ed, *Transnational Dispute Management*, Vol 14, Issue 2, May 2017.

3 J Bailey, *Construction Law*, Vol 3, Informalaw, London, 2011.

4 C Freedman, 'Expert Determination', in De Ly and Gelinas, eds, *Dispute Prevention and Settlement Through Expert Determination and Dispute Boards*, ICC, Kluwer Law International, Vol 15.

5 M De Boisseson, *Le droit français de l'arbitrage interne et internationale*, GLN-Joly, 1990, 182.

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7 Comune di Cinisello Balsamo c. Azienda Energetica Municipale SpA, Cass. Sez. Un., 1 agosto 2000, n. 527, Foro pad. 2001, I, 42.

8 *Channel Group v Balfour Beatty Construction Ltd* [1993] AC 334.

9 Swiss Federal Court, 7 July 2014, Docket No 4A-124/2017.

10 See Sub-Clause 21.6 of FIDIC Conditions 2017.

11 *CRW Joint Operation (Indonesia) v PT Perusahaan Gas Negara (Persero) TBK* ('*Persero I*') (CA) [2011] SGCA 33, [2011] 4 SLR 305.

12 See C Seppala, 'How not to interpret the Fidic Disputes Clause. The Singapore Court of Appeal Judgment in Persero', *International Construction Law Review*, 29, 2012, id. 'Commentary on Recent ICC Arbitral Awards Dealing with Dispute Adjudication Boards under Fidic Contract', *ICC Dispute Resolution Bulletin*, 2015; F Gillion, Enforcement of DAB Decisions under the 1999 Fidic Conditions of Contract. A Recent development: (*CRW Joint Operations v PT Perusahaan Gas Negara Persero TBK, International Construction Law* 2011, 388); id. 'The Court of Appeal decisions Persero II: Are We Not Clear About the Steps to Enforce a Non Final Dab Decision Under Fidic?', *International Construction Law Review* 2016, 4.

13 ICC Case no 16948.

14 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)* ('*Persero II*') (CA) [2015] SGCA 30.

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FEATURE ARTICLE

Supreme Court of Victoria, Australia. Credit: Alex Cimbal/Shutterstock

Australia: quantum meruit and building contracts clarified

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Introduction

In Australia, there has been long-standing authority[1] that a Contractor could accept a Principal's repudiation and elect to claim on a *quantum meruit*[2] or contractual damages and, if it chose the former, the amount recoverable was not limited by the contract price.

In *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 ('*Mann*'), Australia's highest court, the High Court of Australia (the 'High Court'), considered this controversial principle, which is premised on the 'rescission fallacy' – the notion that upon the Contractor's acceptance of the Principal's repudiatory breach of the construction contract, the contract is *void ab initio*. This principle has been widely criticised, including on the basis that it is inconsistent with principles regarding the application of restitutionary remedies.[3]

In its decision handed down on 9 October 2019, the High Court significantly narrowed the application of the long-standing principle.

As a general principle, a Contractor who establishes that there are no accrued rights for payment for works carried out under a contract is entitled to a *quantum meruit* in respect of those works and is able to recover the fair and reasonable value of the benefit conferred on the Principal by the work carried out.

However, now the *prima facie* position is that courts will restrict *quantum meruit* recovery to amounts otherwise recoverable

as contractual damages – in other words, there is a contractually specified ceiling.[4]

Despite the newly narrowed scope of the principle, Principals and lead Contractors should continue to take note the remaining risk that a Contractor could seek to claim a *quantum meruit* for works for which there is no accrued right to payment and also seek to avail itself of the exception to the *prima facie* position that the contractual price limits the amount recoverable. Building disputes are factually complex and often robustly fought. Defending such a claim will be more difficult and costly than defending a contractual damages claim, based on a contract containing specified rates for labour, plant and equipment.

The proceedings

The dispute in *Mann* arose from the construction of two double-storey townhouses on land in Blackburn, Victoria. The owners of the land, Mr and Mrs Mann, entered into a domestic building contract as Principals with Paterson Constructions Pty Ltd ('Paterson') as Contractors. Before Paterson had completed the second townhouse, the Manns alleged that Paterson had repudiated the contract and purported to accept such repudiation thereby terminating the contract. Paterson denied that it had repudiated the contract and claimed that the Manns' wrongful termination itself amounted to a repudiation of the contract, which Paterson purported to accept.

The Victorian Civil and Administrative Tribunal (VCAT), in assessing Paterson's entitlements by way of a *quantum meruit*, required 19 days of evidentiary hearings (and it should be noted that a *quantum meruit* assessment in a major commercial construction project, with multiple layers of Contractors and Subcontractors, could be considerably more complex and costly than the domestic building property at issue in *Mann*). The VCAT held that, notwithstanding the Manns' claim that the total contract price was less than AU$1.1m, Paterson was entitled to a *quantum meruit* of approximately AU$1.6m, less payments already made.[5] The Manns unsuccessfully appealed to the Supreme Court of Victoria, and then to the Court of Appeal, contending that the principles of *quantum meruit* had been applied incorrectly and the principle that a Contractor may claim a *quantum meruit* upon its acceptance of a Principal's repudiation of the contract is incorrect.

Justices of Appeal Kyrou, McLeish and Hargrave issued their judgment on 12 September 2018. The Court of Appeal held that while it was sympathetic to the Manns' contention, and the 'growing chorus of criticism – judicial as well as academic – of the availability of quantum meruit as an alternative to contract damages where a repudiation is accepted',[6] the Court followed *Sopov v Kane Constructions Pty Ltd* (No 2) (2009) 24 VR 510 and ultimately found that notwithstanding its inclination to agree with the criticism of the principle, it was constrained by previous authority.[7]

Subsequently, the Manns successfully appealed to the High Court, which handed down judgment on 9 October 2019. Three separate reasons were given by Kiefel CJ, Bell and Keane JJ, Gageler J, and Nettle, Gordon and Edelman JJ. While all justices rejected the principle as it stood, the majority (Gageler, Nettle, Gordon and Edelman JJ) agreed that it applied in more limited circumstances.

Justice Gageler found a *quantum meruit* is not available for work done by the Contractor in respect of the plans and specifications set out in the Contract for which the Contractor had accrued a contractual right to payment under the Contract at the time of its termination.[8] Justices Nettle, Gordon and Edelman found that *quantum meruit* is available where there has been a total failure of consideration for the works performed.[9] For example, if the contract provides that a party is entitled to payment upon completion of any part of the work, or if the contract is divisible into several entire stages (ie, contracts with progress payments and the Contractor has a right to be paid for the works performed by way of a progress payment at the time of termination), there is no entitlement to claim a *quantum meruit*.[10]

On the other hand, Gageler J said that a *quantum meruit* is available for work done by

Mann has severely limited the longstanding and controversial principle that upon acceptance of a Principal's wrongful repudiation, a Contractor is entitled to claim a quantum meruit, with such recoveries not limited to contractual entitlements.

the Contractor in respect of the plans and specifications set out in the Contract for which the Contractor had not yet accrued any contractual right to payment under the Contract at the time of its termination.[11] According to Nettle, Gordon and Edelman JJ, the Contractor would be entitled to claim a quantum meruit where there had been a total failure of consideration, for example, where works had been carried out prior to termination but no right to a progress payment for those works had yet arisen.[12]

Most significantly, Gageler, Nettle, Gordon and Edelman JJ (a majority of the Court) also said that the contract price is a ceiling on the amount recoverable pursuant to a *quantum meruit*.[13] Justices Nettle, Gordon and Edelman said this is the prima facie position, and it does not exclude the possibility of cases where, 'in accordance with principle', the circumstances will dictate that it would be unconscionable to confine the Contractor to the contractual measure (for example on the basis of the Principal's continuing breaches being responsible for a cost overrun that rendered the contract unprofitable). Even then, however, in many such cases it would appear wrong that a Contractor should be entitled to a better result in restitution than would have been available to them under contract.[14]

Conclusion

Mann has severely limited the longstanding and controversial principle that upon acceptance of a Principal's wrongful repudiation, a Contractor is entitled to claim a *quantum meruit*, with such recoveries not limited to contractual entitlements. Nevertheless, Principals should still consider the residual risk of wrongful termination and repudiatory breach. The residual risk now is that the Contractor seeks to claim a *quantum meruit* and seeks to set aside the *prima facie* position that the contractual price limits the amount recoverable.

On the other hand, a Contractor that has suffered significant delays or disruption at the hands of a Principal could argue that the *prima facie* contractual price ceiling does not apply to any applicable *quantum meruit* claim. Principals may well seek to manage this risk either by the selection of 'termination for convenience' provisions, ensuring that Contractors accrue rights to payment for work performed, for example by including progress payments or a well-drafted payment in the event of termination clause or including an exclusion clause that carves out *quantum meruit*. Likewise, lead Contractors may wish to exclude the principle in a similar way in their agreements with their Subcontractors.

Notes

1 One of the earliest cases in which the principle was recognised was by the Privy Council in *Lodder v Slowey* [1904] AC 442. In that case, the Contractor was excluded from a work site and entitled to rescind the agreement and elect to sue on a quantum meruit
2 Nettle, Gordon and Edelman JJ noted that the use of the term quantum meruit in this context is to refer to a remedy arising by operation of law in that category of actions concerned with restitution in the category of unjust enrichment. For consistency, where in this article 'quantum meruit' is referred to, it is a reference to a claim in this sense (ie, a claim not made under the relevant contract).
3 See *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 256 (Deane J).
4 Note that the majority of the High Court did not agree on this point (Gageler J said there was a contractual price limit and Nettle, Gordon and Edelman JJ said there was a prima facie limit with narrow exception). However, it is to be expected that lower courts will adopt the plurality's findings that there is a prima facie contractual price limit with exceptions.
5 Note that the contract sum was, in effect, AU$916,779 plus additional orally agreed variations. At the time the contract was terminated, Paterson had been paid AU$945,787 and had submitted a final claim for AU$63,000 as well as a claim for variations in the sum of AU$48,403.07.
6 Quoting *Sopov v Kane Constructions Ptd Ltd (No 2)* (2009) 24 VR 510, [9].
7 The authorities that the Court in *Sopov v Kane Constructions Ptd Ltd* (No 2) (2009) 24 VR 510 felt constrained by were *Brooks Robinson Pty Ltd v Rothfield* [1951] VLR 405, *Iezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd* [1995] 2 Qd R 350 and *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.
8 *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 [61] (Gageler J).
9 *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 [110] (Nettle, Gordon and Edelman JJ).
10 *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 [173]-[176] (Nettle, Gordon and Edelman JJ).
11 *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 [61] (Gageler J).
12 *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 [173]-[176] (Nettle, Gordon and Edelman JJ).
13 *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 [105] (Gageler J) and [204] (Nettle, Gordon and Edelman JJ).
14 *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 [216] (Nettle, Gordon and Edelman JJ).

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Men working on a construction site in Ikoyi, Lagos State, Nigeria. Michael Adegoke / Shutterstock.com

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IFRS 15 and its legal implications for Nigerian construction companies

The International Financial Reporting Standards No 15 was issued in May 2014 and became applicable to the annual financial reporting of companies from 1 January 2018. This standard modified, to some extent, how a company is to recognise revenue from its customers in its financial statements. This article attempts to highlight the way in which this standard has, and may, affect the manner in which construction companies in Nigeria recognise revenue and possible ways to address the change and avoid claims that may arise thereof.

Introduction

In Nigeria, every business entity has the legal responsibility to prepare a statement of accounts or financial statements at the end of its financial year under sections 370 and 375 of the Companies and Allied Matters Act (Cap 20) Laws of the Federation of Nigeria (LFN) 2004 (CAMA). Section 335(2) of CAMA also states: 'The balance sheet shall give a true and fair view of the state of affairs of the company as at the end of the year; and the profit and loss account shall give a true and fair view of the profit or loss of the company for the year.' Any company that does not comply runs the risk of being delisted as a company by the Corporate Affairs Commission (CAC) under section 525 of CAMA among other risks such as payment of penalty (CAMA, s 378) and being rendered dormant (CAMA, s 7(1)(e)).

In the preparation of financial statements in Nigeria, certain standards are followed for ease of interpretation and use of financial statements. One such body of financial standards is the International Financial Reporting Standards (IFRS). These standards are developed by a body known as the International Accounting Standards Board, which creates the IFRS within a set of theoretical principles known as the Conceptual Framework for Financial Reporting. These standards are administered in Nigeria by the Financial Reporting Council of Nigeria.

History of the adoption of IFRS in Nigeria

Before 2012, the Nigerian Accounting Standards Board (NASB) produced and regulated the Statement of Accounting Standards, which lay out the standards for the preparation of companies' financial statements. The NASB was established in 1982 as a private sector initiative and it became a government agency in 1992, reporting to the Federal Ministry of Commerce.

The NASB was given a legal backing by its inclusion in section 335(1) of the Companies and Allied Matters Act 1990, which mandated all companies to prepare financial statements that complies with the Statement of Accounting Standards (SAS) as developed and issued by NASB from time to time. In 2003, the NASB was given the full autonomy as a legal entity with the enactment of the Nigerian Accounting Standards Board Act of 2003 (the 'NASB Act') on 10 July 2003. The NASB Act provided the legal framework under which NASB set accounting standards. The primary functions as defined in the NASB Act were to develop, publish and update Statements of Accounting Standards to be followed by companies when they prepare their financial statement and to promote and enforce compliance with the standards.

Based on the premise of NASB to promote general acceptable published financial reports and high-quality accounting standards that are consistent with international practices, it inaugurated a Stakeholders' Committee on the Roadmap to the Adoption of the International Financial Reporting Standards (IFRS) in Nigeria on 22 October 2009. In July 2010, the Nigerian Federal Executive Council approved the Roadmap to the Adoption of IFRS in Nigeria where it iterated in its report that it would be in the interest of the Nigerian economy for reporting entities in Nigeria to adopt globally accepted, high-quality accounting standards by fully converging the Nigerian National Accounting Standards with the IFRS by following a phased transition effective from 1 January 2012.

In the preparation of financial statements in Nigeria, certain standards are followed for ease of interpretation and use of financial statements. One such body of financial standards is the International Financial Reporting Standards.

It was a three-phase transition programme. Phase 1 related to publicly listed entities and significant public interest entities. They were to prepare their financial statements using applicable IFRS by 1 January 2012. Phase 2 related to other public interest entities, which were expected to mandatorily adopt the IFRS, for statutory purposes, by 1 January 2013. Phase 3 related to Small and Medium-Sized Entities (SMEs) which were expected to mandatorily adopt IFRS for SMEs by 1 January 2014.

In accordance with this road map, the NASB, being the body responsible for developing, issuing and regulating accounting standards since 1982, was changed into the Financial Reporting Council of Nigeria with the passage into law of the Financial Reporting Council Bill on 20 July 2011.

Mr Olusegun Aganga, then the Minister of Trade and Investment under the Obasanjo administration, in explaining the benefits for the adoption of the IFRS financial reporting system in Nigeria, stated that:

> 'More meaningful and decision enhancing information can now be arrived at from financial statements issued in Nigeria because accounting, actuarial, valuation and auditing standards, used in the preparation of these statements, shall be

issued and regulated by this Financial Reporting Council. The FRC is a unified independent regulatory body for accounting, auditing, actuarial, valuation and corporate governance. As such, compliance monitoring in these areas will hence be addressed from the platform of professionalism and legislation.'

Jim Obazee, Executive Secretary and Chief Executive Officer of the Financial Reporting Council, speaking at a forum put together by the Capital Market Correspondent Association of Nigeria (CAMCAN) in agreement with the Aganga, stated that:

> 'Lower information asymmetry would also lead to lower costs of equity and debt financing. The benefits of implementing IFRS include higher comparability, lower transaction costs and greater international investment. IFRS also assist investors in making informed financial decisions and predictions of [an] entity's future financial performance and give a signal of higher quality accounting and transparency. Therefore, IFRS would tend to reduce earnings manipulation, enhance stock market efficiency and positively impact on [an] entity's stock returns and stock related financial performance measures.'

Definition, scope and objective of IFRS 15 – revenue from customers

According to the IFRS Foundation and the International Accounting Standards Board, the project objective for setting up IFRS 15 is because:

> 'Revenue is a crucial number to users of the financial statements in assessing a company's performance and prospects. The objective of this project [is] to clarify the principles for recognising revenue from contracts with customers. It applies to all contracts with customers except leases, financial instruments and insurance contracts.'

IFRS 15 specifies how and when a company will recognise revenue in its financial statements, as well as requiring such entities to provide users of financial statements with more informative and relevant disclosures. The standard provides a single, principles-based, five-step model to be applied to all contracts with customers. IFRS 15 was issued in May 2014 and applies to an annual reporting period beginning on or after 1 January 2018.

IFRS 15 has five steps before revenue is to be recognised in the books of a company and these are listed below.

Identify the contract with the customer

A contract with a customer falls within the scope of IFRS 15 when there is first the existence of a contract whether written, verbal or implied. The contract must have commercial substance and *the payment terms for the goods and services must be identified*. It must also be probable that the entity will collect the consideration to which it is entitled and each party's right regarding the goods and services to be transferred must be identifiable.

Lastly, the parties must have approved the contract and be committed to carrying it out. It is not a contract if any party can walk away from it without any consequences or without the other party requiring such party to be penalised. From the legal perspective, the Court of Appeal has given the criteria within which it can be held that a contract is in existence.

The Court of Appeal, in the case of *Enemchukwu v Okoye and Anor* (2016) Lpelr-40027 (CA), defined a contract as,

> 'an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. According to Black's Law Dictionary 8th Edition, *a contract is defined as a promise or a set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty*'[1] [emphasis added].

For a contract to be valid in law, it must have some essential elements. In the case of *Alfa System Co Ltd and Ors v Orisajimi and Ors* (2016) Lpelr-40295 (CA), the Court held that:

> 'First, to be able to establish a valid contract, five ingredients must be present. They are offer, acceptance, consideration, intention to create legal relationship and capacity to contract. All the five ingredients must be present before a valid contract can exist in law. A contract cannot be formed if any of the ingredients is absent'.[2]

It is not enough to have a valid contract. Parties must ensure that they fulfil their obligations for they cannot enter such agreements and then after reaping the benefit raise the defence that the contract was not valid. Indeed, the same Court in the case of *Amadi v Obiajunwa* (2016) Lpelr-40461 (CA) stated that once the validity of a contract is proved a party cannot claim that it was not valid especially where such party induced the other into the contract.

Specifically, the Court of Appeal stated that:

'The Supreme Court and indeed this Court had held that: A party who induced another party to enter into a contract cannot subsequently deny the validity of that contract. See *Okechukwu v Onuorah* (2000) 12 SC (pt. 11) 104 at 109; and to re-echo the illuminating dictum of my Learned brother in the recent case of *Chachangi Airlines (Nig) Ltd v AP Plc* (2015) 4 NWLR (pt.1449) 256 at 274-275 paras D-A, no person after reaping the benefit from a transaction of which he is a party shall be heard to say that such transaction is void or illegal or voidable, when it comes to fulfilling his obligation under the transaction so far as the rival party has done all that he pledged to do under it.'[3]

Identify the separate performance obligations

A contract in practical terms is a promise to provide goods and/or services to a customer. Due to the fact that these undertakings are for a future event, the promises or undertakings are regarded under IFRS 15 as 'performance obligations'. An entity would account for a performance obligation separately only if the promised good or service is distinct. A good or service is distinct if it is sold separately or if it could be sold separately because it has a distinct function and distinct profit margin.

Determine the transaction price

The transaction price is the amount of consideration an entity expects to be entitled to in exchange for transferring goods or services. The transaction price would reflect the company's probability-weighted estimate of variable consideration – including reasonableness estimates of contingent amount – in addition to the effects of the customer's credit risk and the time value for money, if material.

Allocate the transaction price to the performance obligations

Where a contract contains more than one distinct performance obligation, a company allocates the transaction price to all separate performance obligations in proportion to the stand-alone selling price of the good and service underlying each performance obligation. If the good or service is not sold separately, the company would have to estimate its stand-alone selling price. This is especially important for a construction company that sells site and infrastructure as a bouquet with its buildings for sale.

Recognise revenue when (or as) a performance obligation is satisfied

The entity satisfies a performance obligation by transferring *control* of a promised good or service to the customer. A performance obligation can be satisfied at a point in time, such as when goods are delivered to the customer, or over time. The amount of revenue recognised is the amount allocated to that performance obligation as recognised as a performance obligation.

An entity must be able to reasonably measure the outcome of a performance obligation before the related revenue can be recognised. In some circumstances, such as in the early stages of a contract, it may not be possible to reasonably measure the outcome of a performance obligation, but the entity expects to recover the costs incurred. In these circumstances, revenue is recognised only to the extent of costs incurred.

An entity must be able to reasonably measure the outcome of a performance obligation before the related revenue can be recognised.

Such obligation in accounting must be subsisting. Under Nigerian law, however, where there is a variation, the obligation can be said to be nullified. In the case of *Ashaka Cement Plc v Asharatul Mubashshurun Investment Ltd* (2016) LPELR-40196 (CA), the Court of Appeal in defining a variation and its effect stated:

'Variation of contract involves a definite alteration of contractual obligations by the mutual agreement of both parties. Variation is analogous to the entry by the parties into a new contract. The requirements of offer, acceptance and consideration are thus imposed… For a variation to be effective, there must be a valid and subsisting contract… between the parties; there must be some form of consensus between the parties as to the obligations which are to be altered; and it must be supported by consideration – Oriloye v Lagos State Government (2014) LPELR-CA/L/839 /2007, Unity Bank Plc v Olatunji (2014) LPELR-CA/K/300/2012.'

A 'construction contract' is defined under IAS 11 (the prior accounting standard for construction companies) as a contract specifically negotiated for the construction of an asset, or combination of assets, including contracts for the rendering of services directly related to the construction of the asset (such as project managers and architects services). Such contracts are typically fixed price or cost-plus contracts.

When the outcome of the contract cannot be estimated reliably, revenue was recognised only to the extent of costs incurred that it is probable will be recovered; contract costs were recognised as an expense as incurred. When it is probable that total contract costs will exceed total contract revenue, the expected loss was recognised as an expense immediately. However, under IFRS 15, such cannot be fully expensed if the performance obligation is defined. The remaining will be held as contract liability that will be recognised as non-current liability in the company's statement of financial position where the obligation is more than one year and in current liability where the performance obligation is within the next financial year.

The stage of completion of a contract can be determined in a variety of ways – including the proportion that contract costs incurred for work performed to date bear to the estimated total contract costs, surveys of work performed, or completion of a physical proportion of the contract work. An expected loss on a construction contract should be recognised as an expense as soon as such loss is probable.

What should construction companies in Nigeria do to prepare for the application of this standard from a legal perspective?

In the author's opinion, there are certain steps that a company that is involved in construction and real estate development should do to prepare for this new standard of accounting for revenue from customers:

- do a legal audit of its construction contracts for an analysis of the type of expenditure to categorise such contracts;
- do a legal audit of their present performance obligations to avoid possible litigation;
- do a legal audit of already existing litigation as some of the defence options available to construction companies with this new standard will no longer be applicable;
- engage in negotiation, mediation or arbitration to timeously deal with the pending and impending disputes with clients/customers. Court litigation should be a last resort;
- liquidate companies whose debt profile on construction contracts in terms of performance obligations will not enable it to continue to be a going concern;
- seek professional advice to ensure future construction truncations and performance are compliant with the IFRS 15 reporting standard and ensure performance for continued revenue recognition in their financial statements; and
- get professional assistance to put in place the internal processes that will ensure the gathering of proper information both for the figures in the financial statement and the disclosures for the preparation of the company's financial statements.

Notes

1 Per Ogunwumiju, JCA, pp 12-13, paras E–A.
2 Per Owoade, JCA, pp 25-26, paras C–A.
3 Per Agube, JCA, p 87, paras A–E.

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FEATURE ARTICLE

Corruption in Quebec's construction industry: cleaning the Augean stable

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In Canada, the Province of Quebec has been the focus of investigation in relation to corruption on construction projects. In October 2011, a public inquiry (the 'Charbonneau Commission') was established, led by Justice France Charbonneau. The Charbonneau Commission found that corruption pervaded the Quebec construction industry and made 60 recommendations to the Quebec government aimed at increasing oversight of the industry and enhancing investigative and enforcement mechanisms. This article provides a brief overview of Canada's legislative regime in respect of bribery and corruption, summarises some of the key findings of the Charbonneau Commission and analyses the legislation introduced to date to implement the Charbonneau Commission's recommendations. Corruption in the construction industry is not a problem unique to Quebec, and some of the solutions implemented there can serve as a model for other jurisdictions both inside and outside Canada.

Introduction

Corruption is a global phenomenon with serious repercussions for governments, their economies and communities. In many jurisdictions, efforts to curb corruption have increased significantly over the past two decades, albeit with mixed success.[1] It is likely that globalisation and the loosening of international trade barriers have led to a heightened awareness of the pervasiveness of corruption on the global stage and its serious consequences on developing economies in particular. However, corruption is not a phenomenon that is confined to developing economies: Transparency International's 2017 Corruption Perceptions Index shows a high level of corruption in more than two-thirds of the 180 countries surveyed.[2] The most recent Foreign Bribery Report issued by the Organisation for Economic Cooperation and Development (OECD) contains some telling findings.[3] The OECD found that the construction sector is one of the four sectors most affected by corruption and its associated risks: 'two thirds of the foreign bribery cases occurred in four sectors: extractive (19%); construction (15%); transportation and storage (15%); and information and communication (10%)'.[4]

This article seeks to provide insight into the Canadian experience of fighting corruption in the construction industry. First, we provide an overview of the legislative framework applicable to Canadian companies involved in construction projects abroad and to foreign and Canadian companies involved in construction projects in Canada. Next, we examine the Canadian Province of Quebec, where a spate of corruption scandals involving the construction industry led to a public inquiry: the Charbonneau Commission of Inquiry.[5] After summarising some of the key findings and recommendations of the Charbonneau Commission, we describe the legislative developments that have ensued.

The legislative framework

Canadian companies engaged in construction projects abroad

Pursuant to the OECD Convention on Combating Bribery of Public Officials in International Business Transactions,[6] Canada enacted the Corruption of Foreign Public Officials Act (CFPOA),[7] which entered into force on 14 February 1999. The CFPOA features two offences: (1) bribing a foreign public official; and (2) accounting and record-keeping fraud. The CFPOA applies to all businesses and individuals that engage in corrupt practices with 'foreign public officials', defined as persons holding legislative, administrative or judicial positions in a foreign state; persons performing public duties or functions in a foreign state; and officials or agents of public international organisations.[8]

Canadian companies and individuals involved in a construction project in a foreign jurisdiction can be charged and prosecuted in Canada under the CFPOA.

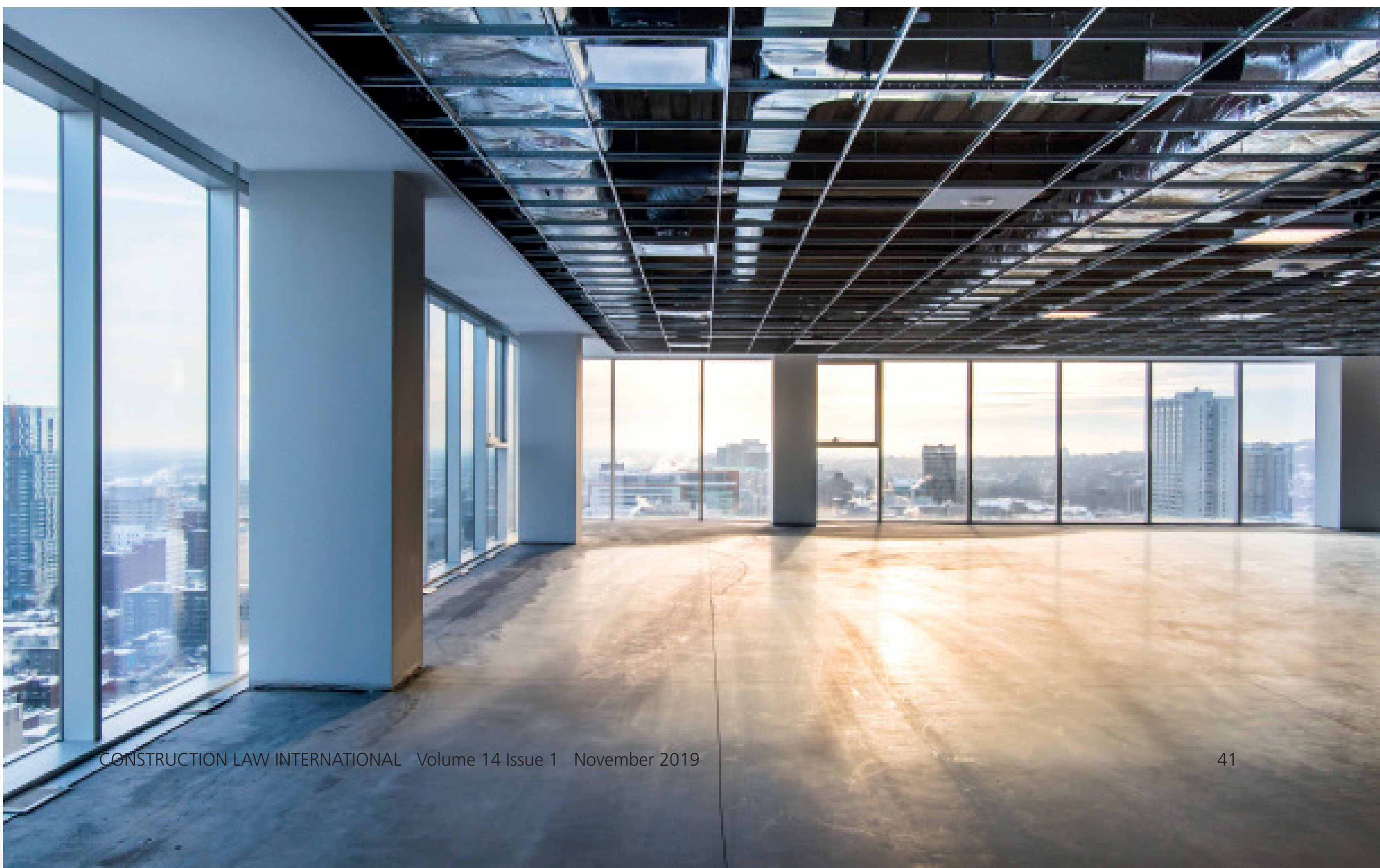
Under the CFPOA, it is an offence to bribe a foreign public official to obtain an advantage, whether or not the bribe is paid or the advantage is obtained. In addition, it is an offence both to offer and accept a bribe. In addition, under the CFPOA, accounting offences include forging accounting records and destroying records so as to conceal the bribery of a foreign public official.

Canadian companies and individuals involved in a construction project in a foreign jurisdiction can be charged and prosecuted in Canada under the CFPOA and therefore should be cautious when operating in markets with higher risks of corruption.[9]

Foreign and Canadian companies engaged in construction projects in Canada

Foreign and Canadian companies operating in Canada are subject to the bribery and corruption offences in Canada's Criminal Code (the 'Code').[10] Among other corruption-related offences, the Code criminalises the bribery of judges,[11] members of parliament,[12] government officials,[13] municipal corruption,[14] fraud[15] and private sector bribery.[16] Particularly noteworthy are the provisions that specifically address

Newly-constructed office space in downtown Montreal, Quebec, Canada. Credit: Raphael Rivest/Shutterstock.com



bribery to obtain government contracts by withdrawing one's tender or having another entity withdraw its tender.[17]

Canadian courts have held that the sentencing principles of denunciation and general deterrence are the most important objectives in sanctioning corruption offences, and the absence of an upper limit on the fines that the court can impose means that companies can be subject to hefty fines.[18]

Debarment for corruption offences

A serious consequence of conviction for corruption offences under both the CFPOA and Code provisions is the risk of being disqualified from bidding on government contracts. In July 2012, Public Works and Government Services Canada (now Public Services and Procurement Canada) added the offence of bribing a foreign public official under the CFPOA to the list of offences that render companies and individuals ineligible to bid for Canadian government contracts, and in 2014 the list was expanded to include foreign convictions for equivalent offences.[19]

The Quebec construction industry and the Charbonneau Commission of inquiry

Background to the Charbonneau Commission

In the 1990s and 2000s, a number of highly publicised corruption-related scandals shook Quebec and flooded Canadian media.[20] Leading up to the creation of the Charbonneau Commission, notable scandals included: allegations of a price-fixing scheme orchestrated by 14 construction companies using a gang (known as the Hells Angels) to intimidate competitors; bribery in the awarding of construction contracts in the city of Montreal through kickbacks to political parties, councillors and city bureaucrats; and infiltration of the construction industry by organised crime.[21]

Creation and mandate of the Charbonneau Commission

The Charbonneau Commission was created on 19 October 2011 by the provincial government of Quebec and was chaired by Quebec Superior Court Justice France Charbonneau. Its mandate was threefold: (1) to inquire into the existence of schemes that may have involved activities of collusion and corruption in the awarding and management of public contracts in the construction industry, including possible connections to the financing of political parties; (2) to explore the possible infiltration of organised crime into the construction industry; and (3) to examine potential solutions and to make recommendations aimed at establishing measures to identify, eliminate and prevent collusion and corruption in the awarding and management of public contracts in the construction industry, as well as infiltration of the construction industry by organised crime.[22]

A serious consequence of conviction for corruption offences under both the CFPOA and Code provisions is the risk of being disqualified from bidding on government contracts.

The Charbonneau Commission heard from approximately 300 witnesses over 263 days of hearings and cost taxpayers close to C$45m.[23] The Charbonneau Commission delivered its voluminous report (1,741 pages) on 24 November 2015. It found that corruption and collusion permeated the Quebec construction industry, and made 60 recommendations to the Quebec Government. Below is a summary of some of the Charbonneau Commission's key findings.

Types of schemes identified by the Charbonneau Commission

The Charbonneau Commission defined collusion as a secret agreement, implicit or tacit, between private sector actors (contractors, consulting engineering firms and suppliers) responding to a public call for tenders or in some cases, an invitation to bid, with a view to reducing or eliminating competition to gain control over a public contract. It defined corruption as situations in which private actors obtain benefits (contract, payment of extras and confidential information) from public actors within the administrative or political apparatus. In exchange for the advantage provided to the 'corrupter', the 'corrupted' receives consideration that can take various forms (bribes, employment, favours, gifts, etc).[24]

The Charbonneau Commission identified three categories of schemes in Quebec's construction industry.

1. Schemes involving collusion and corruption;[25]
   (i) simple collusion-based schemes, which involved:
   - colluders rotating successful bidders among themselves, by having others submit 'soft' bids (also referred to as 'cover', 'courtesy' or 'complementary' bidding);
   - colluders rotating successful bidders by having other colluders not submit bids;
   - the winning firm agreeing to subcontract to other colluders;
   - colluders dividing the market (by type of work, client and geographic area) and agreeing not to bid competitively in other markets; and
   - preventing competitors outside the cartel from participating in procurement through various schemes, such as intimidation, vandalism or sabotage on the competitor's job sites, and bidding very low to prevent the competitor from winning contracts;

   (ii) simple corruption-based systems, which involved;
   - political corruption: for example, a firm would finance a specific municipal candidate's election to obtain quasi-exclusivity on municipal contracts after the election;
   - bureaucratic corruption: a bureaucrat or other member of the public service is corrupted, for example;
     – agreement to provide the appointed or elected official with a specific kickback on the amount of the contract, as well as various gifts;
     – officials influencing proposal/bid criteria so as to benefit a particular firm through directed tendering schemes; and
     – officials manipulating the composition of selection committees by adding people in favour of a particular firm;
   - private corruption: private actors (contractors) were found to charge a public contracting authority for work that had not been performed, or for quantities of material not used, while private engineering firms responsible for contract administration would approve false quantities or false extras;

   (iii) complex schemes, which combined both collusion and corruption practices, were mainly observed in large cities (eg, Montreal) where the larger political and administrative machinery of government require a combination of collusion and corruption to maintain successful schemes and cartels; the report confirmed that elected officials and public employees played a central role in protecting against the detection of complex schemes;
2. schemes linked to the financing of political parties;[26]
   - the Commission found that links between financing of political parties and awarding of public contracts were both direct and indirect: direct links included schemes in which a specific private benefit was given to an official in exchange for a specific contract (most often seen in Quebec municipal politics), while indirect links included schemes in which private parties provided general support in exchange for some general advantage to be awarded at a later date;
3. schemes involving activities by organised crime;[27] the Charbonneau Commission identified four main types of infiltration by organised crime:
   (i) infiltration of companies and industry sectors: where businesses in financial difficulty acquired sources of financing from criminal organisations, which eventually took over the company for their own purposes (including money laundering);
   (ii) control of territories: where criminal organisations controlled a sector or territory by using intimidation and violence;
   (iii) intimidation services: where organised crime groups assisted businesses in their schemes by intimidating other firms or businesses in the market; and
   (iv) access to trade union investment capital: where individuals linked to the Hells Angels and the Mafia sought to infiltrate the industry by obtaining

access to the capital investments of a construction union.

Causes of corruption and collusion identified by the Charbonneau Commission[28]

The Charbonneau Commission identified the following as salient causes of corruption and collusion in Quebec's construction industry:

1. the vulnerability of the public procurement of construction contracts to corruption due to the large amounts involved;
2. the lack of expertise of the public bodies involved in procurement, and the use of certain processes that facilitate collusion (eg, non-negotiable tariff contracts);
3. the foreseeability of criteria for awarding public contracts, which fosters collusion and the creation of cartels;
4. unreasonably short deadlines for tenders set by corrupt public authorities, which reduces competition and benefits a bidder with privileged or inside information;
5. the lack of regulation of selection committees, which allows for conflicts of interest and undue interference in the decision-making process; and
6. the disclosure of certain information by public authorities, which increases vulnerability to illegal schemes (eg, the release, upon request, of the list of contractors who obtained specifications or tendering documents which facilitates collusion among groups of firms).

Select recommendations of the Charbonneau Commission in relation to key issues

As aforementioned, the Charbonneau Commission made 60 recommendations to the Quebec government.[29] The following is a brief overview of certain recommendations on key issues:

1. create an independent public procurement authority to oversee public contracts:[30]

Increase sanctions for construction companies that break the law, up to and including cancelling their licence issued under Quebec's building authority

the authority would be a 'centre of expertise' that would analyse and verify procurement processes, and support and oversee all public bodies that award contracts; the Charbonneau Commission further recommended that the various public authorities be allowed to consolidate their internal expertise in construction matters;

2. standardise laws and regulations so as to allow public contracting authorities to decide, in cooperation with the public procurement authority and under its supervision, the appropriate weighting of price and quality criteria in the public procurement process for a construction contract;[31]

The new Champlain Bridge under construction in Montreal. Credit: meunierd / Shutterstock

3. reduce payment delays in the construction industry because payment delays create a breeding ground for corruption and collusion; specifically, the Charbonneau Commission found that payment delays:[32]
    - confer significant power on site supervisors, who can speed up or slow down approval of payments to intimidate or favour contractors (leading to private corruption schemes);
    - restrict contractors' ability to take on new projects and thereby contribute to restricting competition and facilitate the creation and continuation of collusive agreements; and
    - lead to 'alternative' sources of financing – as the Charbonneau Commission noted, payment delays favour 'infiltration of the construction industry by organized crime. A [contractor] faced with financial difficulties arising from excessive accounts receivable may be tempted to resort to sources of non-traditional financing. In fact, that is exactly what happens. Non-traditional financing is used by a significant proportion of construction firms as a result of payment delays';[33]
4. increase sanctions for construction companies that break the law, up to and including cancelling their licence issued under Quebec's building authority;[34]
5. increase penalties for those who make use of so-called straw man schemes;[35]
6. implement rules in relation to the share ownership of construction companies;[36]
    - lower the share ownership threshold from 20 per cent to ten per cent in order for any shareholder to be considered an officer of a corporation, and attract scrutiny as to the company's integrity; and
    - empower Quebec's building authority to assess the integrity of officers who hold shares indirectly in any contracting firm;
7. engineers and consulting engineers firms;[37]
    - amend the Professional Code so that firms operating in the construction industry are subject to regulatory power and sanctions, and increase the role and powers of the regulatory body for engineers in Quebec; and

    - implement mandatory ethics training and measures to increase compliance;

8. require public contracting authorities to report acts of intimidation or violence to the Charbonneau *Commission de la construction du Québec*, and amend the Act respecting labour relations, vocational training and workforce management in the construction industry to help to combat intimidation in the construction industry;[38] the Charbonneau Commission found that acts of intimidation and violence had caused certain construction companies to avoid certain regions or certain types of construction contracts, which reduced competition and facilitated collusion, corruption and infiltration by organised crime; and
9. provide better protection for whistleblowers so as to encourage reporting;[39]
    - the Charbonneau Commission found that reporting by individuals with direct knowledge of and involvement in corruption schemes was fundamental to fighting corruption: investigations are much less likely to be initiated without initial reporting of malfeasance and much less likely to succeed without the collaboration of participants in the scheme; and
    - accordingly, the Charbonneau Commission recommended that a general whistleblower protection system be implemented so as to ensure anonymity for all whistleblowers, regardless of the agency to which they report and provide greater assistance to whistleblowers, particularly financial support when required.

Legislation enacted pursuant to the Charbonneau Commission's recommendations

It was estimated at the time of the report's release in 2015 that 80 per cent of the 60 recommendations would require legislative or regulatory amendments.[40] On 8 December 2017, the Quebec government announced that more than 80 per cent of the Charbonneau Commission's recommendations had been realised or were in the process of being implemented.[41] To date, the Quebec legislature has passed nine pieces of legislation aimed at giving effect to the Charbonneau Commission's recommendations:[42]

1. Bill 26, an Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts, was enacted in April 2015, that is, prior to the delivery of the Charbonneau Commission's report, but in response to concerns raised by the Charbonneau Commission. The Act provides measures for the recovery of amounts paid due to fraud in connection with all public contracts, not only those within the construction industry. It created a voluntary reimbursement programme (VRP), pursuant to which an individual or corporation could repay amounts improperly received during the course of a public project and obtain a release from the affected public body. The VRP came into effect on 2 November 2015 and closed on 15 December 2017. A failure to voluntarily report fraud may result in civil litigation for the recovery of the defrauded amount(s). The Act establishes a presumption that any entity that has participated in fraud in the procurement process is presumed to have caused injury to the public body concerned.[43]
2. Bill 83, an Act to amend various municipal-related legislative provisions concerning such matters as political financing, introduces tighter audit rules applicable to municipalities with more than 100,000 residents.[44]
3. Bill 87, an Act to facilitate the disclosure of wrongdoings within public bodies, aims to facilitate employee disclosure of wrongdoings within public bodies.[45]
4. Bill 98, an Act to amend various legislation mainly with respect to admission to professions and the governance of the professional system, is aimed at strengthening governance, ethics and reporting of wrongdoing in professional orders.[46]
5. Bill 101, an Act to give effect to the Charbonneau Commission's recommendations on political financing, broadens the scope of investigations of illegal political financing.[47]
6. Bill 107, an Act to increase the jurisdiction and independence of the Anti-Corruption Commissioner and the *Bureau des enquêtes indépendantes* and expand the power of the Director of Criminal and Penal Prosecutions to grant certain benefits to cooperating witnesses, broadens the mandate of Quebec's anti-corruption unit and increases its powers.[48]

Montreal skyline. Credit: Richard Cavalleri / Shutterstock.com

7. Bill 108, an Act to facilitate oversight of public bodies' contracts and to establish the *Autorité des marchés publics* (AMP), is a direct response to the Charbonneau Commission's recommendation that Quebec enact a public procurement authority to ensure the integrity of public procurement in Quebec and proposes the establishment of the AMP as a central authority overseeing public contracts. This authority would take over the role of the *Autorité des marchés financiers* (the securities regulator in Quebec, which has the power to license businesses wishing to enter into public contracts in the province) in respect of public contracts and would oversee all other contracting processes determined by the government.[49]
8. Bill 152, an Act to amend various labour-related legislative provisions mainly to give effect to certain Charbonneau Commission's recommendations, responds to the recommendations around decreasing violence and intimidation in Quebec's construction industry.[50]
9. Bill 162, an Act to amend the Building Act and other legislative provisions mainly to give effect to certain Charbonneau Commission recommendations, is aimed at increasing the power of Quebec's building authority around the issuing of licences for contractors under the Building Act.[51]

Montreal skyline. Credit: Richard Cavalleri / Shutterstock.com

Analysis and conclusion

Many of the recommendations of the Charbonneau Commission align with the principles formulated in 2009 by the OECD in respect of achieving integrity in public procurement and the Charbonneau Commission's recommendations as a whole reflect the OECD's view that governments must develop tools to prevent corruption throughout the entire procurement cycle, and not merely the contract formation stage.[52] Indeed, the Charbonneau Commission's recommendations are formulated around five goals that reflect an attempt to take as comprehensive and broad an approach to the issue of corruption in the construction industry as possible. These are: (1) review the framework for the awarding and management of public contracts; (2) improve prevention and detection activities and strengthen sanctions; (3) protect political party financing from influence; (4) promote citizen participation; and (5) renew confidence in elected officials and public servants.

Critics have expressed the view that the various bills enacted by the Quebec government are not getting to the root of the problem or that some aspects of the bills aforementioned undermine their stated purpose.[53] For instance, the whistleblower legislation established a Public Protector to whom information may be disclosed confidentially. However, in order to disclose that information publicly and attract the protection against reprisals provided under the legislation, the whistleblower must have 'reasonable grounds to believe that a wrongdoing committed or about to be committed poses a serious risk to a person's health or safety or to the environment'.[54] However, other bills have been well received, including Bill 108, which creates a central authority for public procurement in Quebec. This legislation is expected to reinforce the oversight of public contracts and increase the level of transparency in the tendering and awarding processes for public contracts.[55]

Although it has yet to be seen whether the above legislative enactments will have the intended effect on the Quebec construction industry, it seems fair to say that the Quebec government has expended significant effort to follow through with the Charbonneau Commission's recommendations, and it will be interesting to see the extent to which corruption risk is lessened as a result.

Legislation is expected to reinforce the oversight of public contracts and increase the level of transparency in the tendering and awarding processes for public contracts.

Notes

1 Transparency International (a non-profit, non-governmental organisation dedicated to fighting corruption) contains a wealth of information on corruption around the world, including country-specific reports outlining recent developments in respect of legislative enactments and enforcement actions www.transparency.org accessed 2 June 2018.
2 See www.transparency.org/news/feature/corruption_perceptions_index_2017 accessed 2 June 2018.
3 OECD, *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials* (OECD Publishing, 2014) www.oecd.org/corruption/oecd-foreign-bribery-report-9789264226616-en.htm accessed 2 June 2018.
4 *Ibid*, 10.
5 The Charbonneau Commission is officially called the Charbonneau Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry.
6 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (17 December 1997) entered into force 15 February 1999 www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm accessed 24 June 2019.
7 SC 1998, c 34 http://laws-lois.justice.gc.ca/eng/acts/c-45.2/FullText.html accessed 2 June 2018.
8 CFPOA n 8 above at s 2 (Definitions), s 3 (the offence of bribing a foreign public official) and s 4 (the accounting offences). The CFPOA uses the Canada's Criminal Code definition of 'person', thus providing for corporate liability under the act.
9 Both the bribery offences and accounting offences carry a maximum penalty of 14 years' imprisonment, and there is no upper limit on the fines that can be imposed in relation to offences under the CFPOA.
10 RSC 1985, c C-46 http://laws-lois.justice.gc.ca/eng/acts/C-46/FullText.html accessed 2 June 2018.
11 See n 11 above at s 119(1).
12 See n 11 above at s 119(1).
13 See n 11 above at ss 121(1)(a), (b), (c) and (e).
14 See n 11 above at s 123.
15 See n 11 above at ss 121(1)(d) and (e).
16 See n 11 above at s 426.
17 See n 11 above at ss 121(1)(f) and 121(2).
18 The sentencing principles are found in s 798 of the Code, see n 11 above. In *R v Serre* (2013 ONSC 1732), for instance, Justice Aitken stated (at paras 28–29): '[i]t is well established that, in cases… involving breach of trust by a public official, the most important objectives are general deterrence and denunciation… It has been held in numerous cases that breach of trust by a public official generally calls for a custodial sentence, even where there are significant mitigating factors.'
19 Public Services and Procurement Canada (PSPC) is the federal ministry responsible for procuring goods

and services on behalf of departments and agencies of the Government of Canada www.tpsgc-pwgsc.gc.ca/apropos-about/prps-bt-eng.html accessed 11 June 2018. PSPC is also responsible for implementing the federal government's debarment policies. Under PSPC's current 'Integrity Regime', the debarment period can be up to ten years www.tpsgc-pwgsc.gc.ca/ci-if/apropos-about-eng.html accessed 11 June 2018.

20 Eg, see Martin Patriquin, 'Quebec: the most corrupt province', *Maclean's* (Toronto, 24 September 2010) www.macleans.ca/news/Canada/the-most-corrupt-province accessed 4 June 2018.

21 See n 21 above.

22 Quebec, *Rapport final de la Commission d'enquête sur l'octroi et la gestion des contrats publics dans l'industrie de la construction* (Montreal: CEIC, November 2015), vol 1, pt 1, c 2, 'Le mandat, les pouvoirs, et les obligations de la Commission' at 12. www.ceic.gouv.qc.ca/fileadmin/Fichiers_client/fichiers/Rapport_final/Rapport_final_CEIC_Integral_c.pdf accessed 2 June 2018. The official report is currently only available in French, but an English translation of vol III, which contains the Charbonneau Commission's findings and recommendations, was produced by the International Centre for Criminal Law Reform and Criminal Justice Policy at the University of British Columbia Peter A Allard School of Law https://icclr.law.ubc.ca/publication/charbonneau-commission-report-volume-iii-english-translation accessed 2 June 2018.

23 See n 23 above vol 1, pt 2, 'Mot de la présidente' (PDF at 16).

24 See n 23 above vol 1, pt 2, c 6 at 165–167.

25 See n 23 above vol 3, pt 4, c 1 at 4–10.

26 See n 23 above vol 3, pt 4, c 1 at 10–13.

27 See n 23 above vol 3, pt 4, c 1 at 14–17.

28 See n 23 above vol 3, pt 4, c 2 at 20–72.

29 See n 23 above vol 3, pt 5, c 2 at 91–193.

30 Recommendation no 1, see n 23 above vol 3 pt 5, c 2 at 91–97.

31 Recommendation no 2, see n 23 above vol 3 pt 5, c 2 at 97–99.

32 Recommendation no 15, see n 23 above vol 3 pt 5, c 2 at 121–122.

33 See above n 33.

34 Recommendations nos 10 and 11, see n 23 above vol 3, pt 5, c 2 at 114–117.

35 Recommendation no 13, see n 23 above vol 3, pt 5, c 2 at 118–119.

36 Recommendation no 12, see n 23 above vol 3, pt 5, c 2 at 117–118. Quebec's building authority, the Régie du bâtiment du Québec, enacts construction, safety and professional qualification standards and oversees enforcement through investigations and inspections.

37 Recommendations no 28, 29 and 30, see n 23 above vol 3, pt 5, c 2 at 138–141.

38 Recommendations no 16, 17 and 18, see n 23 above vol 3, pt 5, c 2 at 138–141.

39 Recommendation no 8, see n 23 above vol 3, pt 5, c 2 at 109–111.

40 Parti libéral du Québec, Annonce Gouvernementale, 'Creating the base for a new Quebec' (8 December 2017) https://plq.org/en/press-release/creating-the-base-for-a-new-quebec accessed 4 June 2018.

41 See n 33 above.

42 Of the nine bills, seven have already come into force, two were assented to 31 May 2018 and the coming into force date is not available as of the writing of this article.

43 SQ 2015, c 6. under s 47, the Minister of Justice must report to the Quebec government on the programme's implementation within six months of the programme's end. The report must include the names of the companies and individuals who participated in the programme, the names of the public bodies involved and the total amount reimbursed.

44 SQ 2016, c 17.

45 SQ 2016, c 34.

46 SQ 2017, c 11.

47 SQ 2016, c 18.

48 SQ 2018, c 1.

49 SQ 2017, c 27.

50 SQ 2018, c 12.

51 SQ 2018, c 13.

52 Sarah Chaster, 'Public Procurement and the Charbonneau Commission: Challenges in Preventing and Controlling Corruption' (2018) 23 Appeal 121 at 142–147.

53 Andy Riga, 'Charbonneau Report: One Year Later, Has Anything Changed in Quebec?' *Montreal Gazette* (Montreal, 23 November 2016) http://montrealgazette.com/news/local-news/charbonneau-commission-report-one-year-later-has-anything-changed-in-quebec accessed 11 June 2018.

54 See n 46 above at s 7.

55 See n 52 above at 141.

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FEATURE ARTICLE

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Building diversity: the value of inclusivity in the construction industry

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Research across all industries has demonstrated that inclusive workplaces and diverse management lead to better performance in organisations. In construction, where challenges include attracting and retaining talent and replacing an aging workforce,[1] diversity and inclusivity are becoming increasingly important areas of focus for organisations. The 'Top 10 Canadian Construction Trends to Watch in 2019' predicted that inclusive workplaces would be on the rise in 2019.[2]

The construction industry is beginning to recognise that competitive advantages may go to companies whose workforces look more like the communities they serve. However, the industry, like many others, is slow to embrace change. Adherence to tradition has kept many companies from benefiting from the skills and expertise of people from different backgrounds and deterred younger generations from pursuing careers in construction. While construction workplaces have evolved in recent years, there remains a gap in the infrastructure of many companies with respect to the promotion of equality and development of talent from high-performing, diverse groups.

Diversity and inclusion statistics

Inclusion is not a direct by-product of diversity; an organisation can have a diverse team of talent but fail to give employees with marginalised identities opportunities to grow and succeed.

Globally, the construction industry does not have a reputation for being composed of a vastly diverse or inclusive workforce. According to the Bureau of Labor Statistics' 2015 data, the construction workforce in the United States was 28.5 per cent Hispanic/Latino, 9.3 per cent female, 6.0 per cent black and 1.8 per cent Asian.[3] As of 2018, women still only made up a total of nine per cent of the construction workforce, showing little to no statistical change since 2015.[4] In 2017, women held just seven per cent of construction management jobs.[5]

A diverse workforce will make a company not only more attractive to potential employees, but also more attractive to potential customers

The *Good Employer Guide 2016: Diversity Challenge in the UK* highlighted that women and ethnic minorities made up only ten per cent of the United Kingdom building industry's total employees. Women represented seven per cent of the workforce and ethnic minorities accounted for just 3.2 per cent, with little evidence of significant change or improvement since 2009;[6] however, the number of women in construction management jobs was nearly twice that of the US, or 14 per cent of the workforce.[7]

Willis Towers Watson, a global adviser, predicted that limited workforce diversity will be a top 20 risk for construction firms through 2027.[8]

The value of diversity and inclusivity

Diversity and inclusivity can have a significant impact on company culture and success. Research shows that diverse workplaces can provide a company with a competitive business edge.

The National Centre for Diversity in the UK evaluated diversity in the construction industry to determine how essential it is for organisations and individuals to embrace equality, diversity and inclusion in the industry and to encourage industry professionals and corporations to make a conscious shift towards diversifying the workplace. The study found that diversity was a driver of innovation, allowing individuals to share their experiences, background and knowledge. The statistics showed that gender-diverse companies are 14 per cent more likely to perform better than non-diverse companies, and ethnically diverse companies are 35 per cent more likely to perform better than their less diverse counterparts.[9]

The study also found that the pool of consumers is increasingly diverse, according to the Department for Business, Innovation and Skills' report *UK Construction: An Economic Analysis of the Sector*. Today any organisation that does not promote equality, diversity and inclusion is neglecting valuable markets, missing out on sales and ultimately losing profits.

There is a direct link between diversity and inclusion, and financial performance. In McKinsey's Delivering through Diversity study, more than 1,000 companies over 12 countries were studied in relation to profitability and long-term value creation, through exploring diversity at different levels of each organisation, considering a broader understanding of diversity and providing insight into best practices.[10] While the study was not focused on construction, the lessons learned are relevant and applicable:

- In 2014, companies in the top quartile for gender diversity on executive teams were 15 per cent more likely to experience above-average profitability than companies in lower quartiles. In 2017, this number rose to 21 per cent, showing a positive correlation between gender diversity on executive teams and higher financial performance and profitability worldwide.[11]
- In terms of ethnic and cultural diversity, the 2014 finding for companies showed that companies with the most ethnically diverse executive teams were more likely to outperform their peers on profitability. The statistics show that companies that were in the top quartile had a 35 per cent likelihood of outperformance than those in the lower quartile, and the 2017 finding was a 33 per cent likelihood of outperformance of companies in lower quartiles.[12]

All of these numbers support the business case for diversity in the construction industry. A diverse workforce will make a company not only more attractive to potential employees, but also more attractive to potential customers due to the fact that diversity brings along broader problem-solving perspectives and innovative ideas. Industry professionals should not ignore these statistics when developing or updating their business and employment models. Active discussions should take place within companies to implement strategies and best practices that promote diversity and inclusion to create a better workplace and to achieve greater business success.

A focus on women

Gender diversity has been directly linked to both profitability and value creation. In particular, gender diversity on executive teams showed the strongest correlation to higher profitability across the geographies studied.[13]

With gender diversity being at the forefront of many workplace discussions in the construction industry, it is important to recognise the statistics and implement strategies to create more opportunity for women to get involved at all levels of the industry. For example, in often male-dominated work environments of architectural and engineering firms, women have struggled to break the glass ceiling on executive teams. The last major industry survey found that women account for half of graduates from architecture programmes in the US, but only make up about 20 per cent of licensed architects and 17 per cent of partners or principals of architecture firms.[14] The firm receiving the most high-profile architectural commissions in the world has just two female principals.[15] This statistic is, unfortunately, not surprising.

Similarly, the Society of Women Engineers has observed that only 13 per cent of engineers in the workforce are women.

From a wage perspective, women also continue to lag behind their male counterparts in the construction industry. For example, female engineers make 90 cents for every dollar earned by a male engineer, with little change in these statistics since the early 2000s.[16]

Although equal pay has been a legal requirement for years in many countries, including Canada, the UK and the US, the gender pay gap still remains an ongoing issue for women in the workplace.

In 2018, Equal Pay Day was marked on 10 April in the US; that is, on average, a woman must work up to 10 April into the new year to reach the same pay that a man earned in the previous year.[17] In the economy at large, white women earn $0.87 for every dollar earned by their white male counterparts. Asian women earn $0.87 for every dollar, black women earned $0.63 for every dollar, Native American women earned $0.57 and Latina women earned $0.54.[18] This data illustrates not only issues in the gender pay gap as a whole, but issues within the gender pay gap for other distinguishable groups. It is notable that women in the construction industry earn an average of 95.7 per cent of what men in the industry make. This is 18 per cent higher than the average 81.1 per cent gap found in other industries.[19] This data suggests that women in the industry are beginning to get opportunities to succeed to the level of their male counterparts, but that other marginalised groups of women still face challenges and setbacks in this area.

In the UK, as of April 2018, all companies with 250 employees or more were required to collect gender pay gap data and disclose it for publication by the Government Equalities Office.[20] This was a major step working towards closing the gap, to evaluate the data and recognise trends and areas for improvement. According to the data, several organisations in the industry had gender pay gaps of 40 per cent or more, and overall trends showed that many firms in the engineering and construction industries were falling behind the national gender pay gap of 18.4 per cent.[21]

It is important for the industry to heed this data and create more opportunities for women to move towards more diverse and inclusive workplaces and close the pay gap across the board for all women.

Legal profession and expert witnesses

Mirroring the industry that it serves, the construction bar globally has faced diversity and equality challenges and is taking steps to change the status quo. It has been said that lawyers lead the push for equality, but have forgotten to focus on their own profession. According to statistics, law is one of the least racially diverse professions in North America. Many believe that women and minorities have made advances in recent years and that any remaining issues of inequality arise out of lack of capability, commitment and life choices. While there is more diversity in the profession than decades ago, studies show that gains have been minimal.

For example, the National Association for Law Placement (NALP) in the US has been compiling information on diversity for 26 years. In its 2018 report,[22] the NALP noted that law firms were making very slow, incremental progress in increasing the presence of women and minorities, particularly in the partner ranks. Minorities accounted for 9.13 per cent of partners in the nation's major firms and women accounted for 23.36 per cent of the partners in these firms. At just 3.19 per cent, minority women continued to be the most underrepresented group at the partnership level across all firm sizes and most jurisdictions.

In the UK, the Bar Standards Board has summarised available diversity data in its *Report on Diversity at the Bar*.[23] The data reflects the disparity of women and black, Asian and minority ethnicities in higher ranks of the bar. Women account for 50.4 per cent of pupils, 39.6 per cent of non-Queen's Counsel (QC) practitioners and 15.8 per cent of QCs. Black, Asian and minority lawyers account for 16.3 per cent of pupils, 13.5 per cent of non-QC practitioners and 7.8 per cent of QCs.

In Sandra Somers's 'Where Are the Expert Women?', an article just published in this journal, it was noted that, as an estimate, only one in every ten experts is a woman. In addition, the ratio of women to men that go through the Academy of Experts is roughly only one in eight. The expert field is primarily male dominated, with many associating the term 'expert' with being male. Throughout the industry, the performance of female experts has been praised, with one senior barrister interviewed for the article stating that, in his experience, women are 'clearer in their reports and in the witness box, and tend to have done more work themselves'. Although the feedback on how these women perform in their roles is positive, there is still a lack of representation from women in expert positions. It is difficult for women to prove that they are the best candidate for the job when they are constantly faced with unconscious male bias in the expert field.

Implementing diversity and inclusion initiatives

In recent years, the global construction community has started to implement initiatives designed to foster diversity and inclusion. Certain governments and major industry groups are actively promoting equality, diversity and inclusion (EDI) and companies are developing EDI action plans to attract and retain a diverse workforce.

In the US, the National Forum for Diversity in Construction strives to maximise strategies for promoting growth and opportunity among the construction industry through 'think tank' discussions held quarterly. At these meetings, industry professionals evaluate data and trends to formulate strategies to promote best practices in using diversity in construction as an economic tool.[24] Companies are engaging more with organisations such as the National Association of Women in Construction (NAWIC) and the Construction Employers Association to hold learning and training sessions and encourage mentoring between larger, established contractors and small minority and female-owned construction firms.

In the UK, the Construction Industry Council (CIC) has worked to raise awareness regarding issues of diversity and inclusion in the workplace.[25] The CIC has also developed a panel to create a forum to allow all industry professionals to participate in the discussion to promote diversity and to share insights and brainstorm potential initiatives that may be effective in accomplishing this goal.

In Canada, Bill C-25 received royal assent in 2018, and all publicly traded companies are required to disclose their policies on diversity and the diversity of boards and senior management. Further, a new federal Apprenticeship Incentive Grant for Women provides funding to registered apprentices who have successfully completed their first or second year or level of an apprenticeship programme in eligible Red Seal trades, a partnership programme between the federal government, provinces and territories that sets common standards to assess the skills of tradespeople across Canada. At a provincial level, the Ontario government has set a target for composition of boards to be 40 per cent women by December 2019 and is working with the private sector to achieve this goal. In particular, the Ministry of Finance is working with the Ontario Securities Commission to ensure that progress among Toronto Stock Exchange-listed issuers continues to be tracked and published. The construction industry has also worked to better integrate First Nations peoples on job sites.[26] The Canadian Construction Association has developed an Indigenous Engagement Guide to assist construction companies in developing successful working relationships with indigenous groups.[27] Companies that see the most success in these relationships are those that develop an understanding of indigenous history and communications and understand the cultural and social values of these communities.

As an example on a corporate level, a recent survey shows that 81 per cent of the UK staff of Mott MacDonald, a global consulting firm, now feel that EDI is being taken seriously and that EDI initiatives have been effectively implemented.[28] These include initiatives such as preparing an EDI Action Plan, employing an EDI manager, unconscious bias training and opening dialogue around more inclusive language and behaviour. At Dialog, a North American multi-disciplinary design firm, efforts are being made to continually examine issues such as pay equity; develop programmes to support women, employees who speak English as a second language and younger employees; and provide younger members with opportunities to develop ideas through internal scholarships for personal research projects. EllisDon, a Canada-based contractor, has an in-house mentoring programme and helps employees newly arrived to Canada with language and other challenges by pairing them with established employees from a similar background. Bechtel, a global engineering, construction and project management company, collaborates with external organisations focused on the development of underrepresented groups in science, technology, engineering and mathematics fields, including the National Action Council for Minorities in Engineering.

Within the legal profession, recognising that lawyers play a key role in shifting behaviours towards colleagues, clients and the public, many associations and governing bodies are now internally examining their make-up, identifying issues and implementing diversity and inclusion programmes. In 2018, the American Bar Association passed Resolution 105 to promote and expand diversity in alternative dispute resolution (ADR). Resolution 105 provides an action plan, including initiating diversity discussions within law firms, asking prospective neutral panels about their policies and practices and selecting diverse neutrals to act as arbitrators. JAMS, an American-based organisation of ADR services, took steps to assess its own members and employees, and released statistics showing that of its workforce, 27 per cent of senior management and 45 per cent of employees reflect diverse backgrounds and 46 per cent of senior management and 72 per cent of employees are women. JAMS has created a sample clause that can be inserted into contracts to promote diversity in the selection of an arbitrator or a panel:

> 'The parties agree that, wherever practicable, they will seek to appoint a fair representation of diverse arbitrators (considering gender, ethnicity and sexual orientation), and will request administering institutions to include a fair representation of diverse candidates on their rosters and list of potential arbitrator appointees.'

In 2018, the American Bar Association passed Resolution 105 to promote and expand diversity in alternative dispute resolution.

The Canadian Bar Association, the largest professional association for lawyers in Canada, has established an equality committee dedicated to achieving equality in the legal profession and overseeing the implementation of equality-related resolutions adopted by the association's council. The Society of Construction Law, UK, has instituted an Equality and Diversity Policy and requires all members to agree to adhere to the policy, which includes creating an environment free from bullying, harassment, victimisation and unlawful discrimination and which promotes dignity and respect for all. The society hosts regular seminars and panel discussions focused on issues of diversity and inclusion for the construction bar.

Clients also play a role in advancing diversity in the legal profession. Companies such as HP are issuing diversity mandates to the law firms they retain. HP has established a 'diversity holdback' policy that permits withholding up to ten per cent of all amounts invoiced by firms that do not meet or exceed HP's minimal diverse staffing requirements. These initiatives by governments, associations and companies reflect an understanding around the world that diversity and inclusion are invaluable to the success and health of the construction industry.

Conclusion

While the benefits of improved workplace diversity and inclusion are recognised, changes in the construction industry will not happen passively. Companies, large and small, will need to continue developing and implementing initiatives to attract and retain a diverse workforce or fall behind in economic growth. Initiatives such as diversifying management, working with external organisations committed to fostering diversity, mentoring and addressing pay gap issues will enable the industry to progress. The result will be a more productive and innovative environment where all employees feel welcomed and are supported to work to their full potential.

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