

# CONSTRUCTION LAW INTERNATIONAL

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

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**Post-earthquake developments in Turkish construction law**

**Procurement disputes between Uganda and other jurisdictions**

**Interoperation of setoffs and liability caps in construction disputes**



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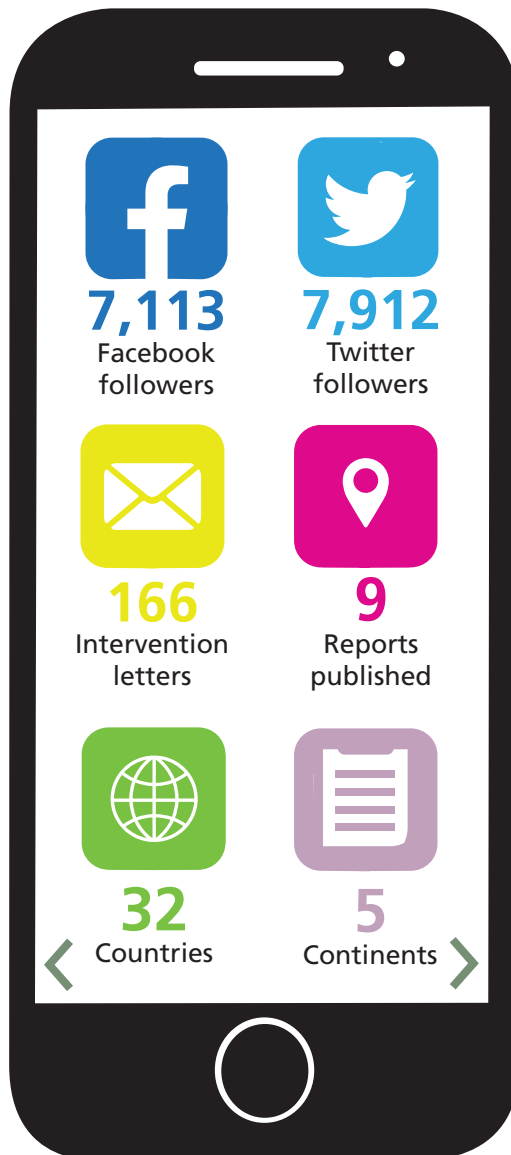
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INTERNATIONAL

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# FROM THE CO-CHAIRS

**D**ear International Construction Projects Committee members,  
All good things come to an end.

When you are reading this December issue of *Construction Law International*, our term as Co-Chairs of the IBA International Construction Projects Committee (ICP) is coming to an end. The past two years seem to have gone by in the blink of an eye. Looking back, we were fortunate to co-chair the ICP at a time when the Covid-19 restrictions had been lifted and we were able to travel again. This allowed us to continue with the 2022 Vevey Working Weekend, originally scheduled to take place in May 2020. This Working Weekend was our first in-person ICP gathering since the outbreak of the pandemic.

The Working Weekend was followed by a successful SEERIL Biennial Conference in Milan, and the Annual IBA Conference in Miami, in 2022. It was nice to meet so many old friends and make new friendships during these events. We all felt relieved that travel bans had been lifted and we were able to meet again.

2023 was an exciting year for the ICP too. We kicked off with our ICP Biennial Conference in Berlin, also known as the 'young lawyers' conference. With a record attendance of more than 170 delegates, this conference illustrated how keen we all are to meet with colleagues and to share our knowledge and friendship.

The 2023 Working Weekend in May 2023 brought us to Mendoza, Argentina. Besides interesting sessions on construction and infrastructure-related topics, prepared by the ICP's subcommittees, the weekend provided an excellent opportunity to taste the famous Malbec wines during the excursion to a winery on the Saturday evening. As the Working Weekend has enjoyed increased popularity, we decided to expand the Working Weekend's attendance to roughly 60 ICP members. This still provides for an intimate atmosphere where all delegates have enough opportunity to meet and to share their views, without becoming a kind of separate conference on its own. We intend to have a similar number of attendees at the 2024 Working Weekend.

In November, we concluded our term with the IBA Annual Conference in Paris. During this conference ICP again hosted five well attended sessions. Once again, we would like to thank the moderators and panellists of these sessions for all their work in preparing for the conference. As is tradition, we had our ICP dinner on Wednesday, during which this year's 'hard hat ceremony' took place, where we handed over our ICP hard hats to the incoming Vice Chairs.

As for our beloved magazine CLInt, it is great to see so many of you contributing to this publication. This allows the ICP to continue its tradition of being the only committee within the IBA having its own publication. During the open business meeting at the Annual Conference in Paris, we discussed the possibilities of having a printed version of CLInt again. We will discuss with the IBA the possibilities of making our magazine as accessible as possible. For now, we would like to note that issues of CLInt are also accessible on your smartphone or tablet via the IBA Members app.

Although this time of year is a great opportunity to reflect on the past year, we would also like to look ahead at what 2024 will bring. From 17–19 April the SEERIL Biennial Conference will take place in Bogota, Columbia, during which the ICP, again, will be responsible for organising a session. The SEERIL Biennial will be followed by the 2024 ICP Working Weekend, taking place from 26–28 April 2024 in Oxford, UK. We thank Roberta Downey and Tony Diamond for hosting this Working Weekend. Registration for this Working Weekend is now closed, but should you be interested in attending if a place becomes vacant, please let us know.

Next year, the IBA Annual Conference will take place earlier than usual. The conference will be held from 15–20 September 2024 in Mexico City, Mexico. We have already started our preparations for this conference by submitting the topics for our five ICP sessions. Once all sessions are set, the ICP will circulate an email with the topics, inviting all ICP members to express their interest in speaking at next year's Annual Conference. If you are interested, keep an eye on your mailbox.

Looking back at our tenure as Co-Chairs, the slogan of a famous watch brand comes to mind. To paraphrase this slogan, you never actually chair the ICP; you merely look after it for the next generation. That is how we perceive the last two years. It has indeed been a great honour and pleasure to look after this wonderful group of ICP members. We would like to thank all the officers who joined us on this journey for their commitment and dedication to the ICP. As we now hand over our hard hats, we wish our new Co-Chairs Virginie Colaiuta and Júlio Bueno and all ICP officers who started their tenure on 1 January 2024, good luck and success. Take care of this wonderful ICP family!

Finally, we would like to thank all ICP members for participating in all ICP events, whether it is CLInt or during a conference. Without you, there would be no ICP. We wish you all happy holidays and a prosperous and healthy new year, and look forward to meeting you again in 2024.

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# FROM THE EDITORS

Dear readers,

We are pleased to introduce the January issue of *Construction Law International* (CLInt).

In this issue, we continue our FIDIC around the world series with a contribution from Kuwait. Our country updates span the globe, looking at recent developments in India, Poland, Korea, Uganda and Turkey. Our feature articles consider the interoperation of setoffs and liability caps in construction disputes, the way in which the Chilean Technical Concessions Panel has addressed the impact of the Covid-19 pandemic in its recommendations, and the assessment of disruption claims under German law and English law. We are also pleased to include in this issue reviews of recent books concerning FIDIC Contracts and the UNIDROIT Principles of International Commercial Contracts.

We thank our contributors for their efforts and hope this edition provides enjoyable and informative reading.

We note that China Irwin's term as Committee Editor will come to an end at the end of the month, as will Thomas Denehy's term as Chair of the Editorial Board. We'd like to thank Thomas for his time and dedication to CLInt over the past years, first as a member of the Editorial Board, then as Deputy Committee Editor and later Committee Editor, and most recently as Chair of the Editorial Board over the last term. CLInt would not be the thriving publication it is today without his extensive efforts in his various roles and his invaluable guidance to the CLInt team. We look forward to introducing the new CLInt editorial team in the March 2024 issue.

Lastly, we take the opportunity to extend our best wishes for the new year.

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## KUWAIT

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### 1. What is your jurisdiction?

The state of Kuwait.

### 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?

Yes, FIDIC forms are often utilised in the State of Kuwait for construction projects, including the largest governmental projects such as the Al Zor Refinery Project. The FIDIC Red Book is the most common form used; however, certain provisions are often included, removed or amended to ensure compliance with Kuwaiti laws and regulations, such as the use of subcontractors and agents to carry out work on a particular project. Other forms used include the Conditions of Contract for Plant and Design-Build (Yellow Book) and the Conditions of Contract for EPC/Turnkey Projects (Silver Book).

As for other megaprojects and public-private partnership (PPP) works, a list of standard contract conditions is published on the Central Agency for Public Tenders (CAPT) website. This shows conditions that must be included in build-and-operate contracts, consultancy agreements, bids and tenders, subcontractors' agreements and design contracts.

It is critical to note that, while standard contracts are commonly used, Kuwaiti law may differ in the interpretation and enforcement of

standard contractual provisions as compared with Western jurisdictions such as the United Kingdom or the United States.

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

While FIDIC does produce forms in Arabic, English language versions are more commonly used in Kuwait. That being said, Arabic is the ultimate binding language between the parties where disputes are heard before the State of Kuwait judiciary.

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

Certain provisions in standard FIDIC forms may be deemed unenforceable, such as time bar provisions for bringing forth claims against an opposing party. Other provisions may be interpreted and applied differently as compared with other jurisdictions depending on the nature of the case.

Further, contracts governed by the laws of the State of Kuwait inherently include rights and obligations that may not be etched in writing, such as obligations to perform a contract honourably and in good faith. The Kuwaiti Civil Code, Law No 67 of 1980, includes an entire section of provisions dedicated specifically for contracts for works which may conflict or override provisions otherwise standard in FIDIC form contracts, such as the right to claim compensation for variations, the amount of liquidated damages a party may be entitled to, or the limitation on a project owner's right to terminate works. Certain provisions of the Civil Code may be contracted out of, while others, such as the obligation to perform a contract in good faith, may not.

### 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?

In Kuwait, FIDIC-based contracts are usually crafted in a way that is more favourable to the project owner, such as entitling the project owner to terminate for convenience, limiting indemnification provisions, and providing the project owner with substantial flexibility to initiate changes.

Common provisions that are often amended in particular are provisions concerning the dispute resolution method, reasons for and effects of termination, the appointment or use of subcontractors or agents, offset obligations on the contractor and tax withholdings.

### 6. Does your jurisdiction treat Sub-Clause 20.2.1 of the 2017 suite of FIDIC contracts as a condition precedent to Employer and Contractor claims?

While this ultimately depends on facts and the court's interpretation, Kuwait appears to take the approach of denying requests to enforce provisions that bar a claim on the basis of a failure to satisfy notice requirements. The Kuwait judiciary has taken the position that contractual provisions that contradict express provisions of Kuwaiti law on the time to initiate a claim cannot be waived before such right arises, ie at the time of entering into the contract.

### 7. 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 have been seen in Kuwaiti construction contracts but are not favoured given the expense and non-binding nature. Where they do exist, while parties are bound to follow the dispute resolution process agreed to in their contract, the resulting recommendation is usually non-binding.

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

Arbitration is heavily used in construction contracts. While this was also the case for government projects, today most Kuwaiti government projects stipulate the Kuwait judiciary as a final means of resolving disputes. Prior to its abolishment, parties often utilised DIFC-LCIA arbitration; however, ICC and LCIA appear to be the most popular types of arbitration. Seats are almost always in a neutral jurisdiction such as the United Arab Emirates, London, New York, or elsewhere.

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

There is no system of precedent in Kuwait and thus prior decisions are generally non-binding. However, one interesting case that could be applied to provisions of a FIDIC contract is that of *Commercial Bank of Kuwait v Kharafi Business Machine WLL (Commercial Bank of Kuwait)*. In *Commercial Bank of Kuwait*, the Court of Cassation ruled that a contractual provision that barred contractual claims after a period of two years was unenforceable, stating:

‘Article (118) of the Commercial Law demonstrates that legislature has determined, for vendors’ liabilities to each other arising from their relevant commercial transactions, a limitation time limit of ten years commencing from the maturity date. In addition, according to clause (22) of the Agreement, the contracting parties agreed on waiver of the right to institute proceedings claiming for an entitlement under the applicable Agreement after lapse of two years from the cause

of action; nevertheless, this time limit is fixed in violation of law, particularly, Article (118) of the Commercial law, applicable to the claimed for entitlement subject hereof, stipulating that the time limit for an entitlement arising from a commercial transaction shall be ten years. Thus, the parties’ agreement on waiver of the right to institute proceedings within a time limit different from the time limit prescribed by the said Article is invalid on the grounds of violation of Article (453.1) of the Civil Code.’ (unofficial English translation).

The Court explained that:

‘No waiver of right to raise a plea of limitation may be made before having the right to such plea is established, but a waiver may be made afterwards. Furthermore, no other time limit may be agreed on in violation of the one fixed by law, because, in any event, determination of such time limit is a matter closely related to the public policy and may not be left to the discretion of individuals.’ (unofficial English translation).

**10. 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 FIDIC forms are widely used, it is important to understand the likely interpretation and application of such forms in the relevant construction project. It is recommended to always seek advice from local counsel on a construction contract governed by or carried out in the State of Kuwait to ensure that the contract is legally and practically written, and can be carried out in the manner intended and understood by the parties.

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## INDIA

### **The need for climate-resilient infrastructure in disaster-prone India**

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*Climate change is undermining hard-earned development gains, trapping the poorest and most vulnerable in poverty, increasing malnutrition and exacerbating inequality.<sup>1</sup> The Covid-19 pandemic and economic crisis have been devastating, and as we support countries to respond to the ongoing crisis and build back, there is an urgent need to integrate climate and development strategies to deliver green, resilient, and inclusive development.<sup>2</sup>*

In September 2023, India hosted 19 countries and the European Union for the G20 Summit, held in the national capital of Delhi. In light of its increasing environmental conscience, the country has taken various initiatives and set priorities for supporting globally inclusive development like the inclusion of ‘green growth’ as one of the seven priorities in the Union Budget 2023-24, which further sought to focus on a number of goals including ‘green buildings’ and ‘green equipment’. To further these priorities during India’s presidency of the G20, which began in December 2022, the country has also been chairing the various working groups – including that of infrastructure investments – and has even established a new working group on disaster risk reduction (DRR), which will be carried forward

by Brazil during its presidency from December 2023 onwards.

The establishment of the DRR group is a critical step in terms of managing the risky situation in which India has found itself when it comes to natural and man-made calamities. With the recent flash floods that caused an unfortunate loss to life and property, this working group may prove to be essential for the functioning of every nation as well as for sustainable development.

The DRR working group, to promote its various motives, has also set a few principles, one of which is the development of climate-resilient infrastructure (CRI). This term, while lacking a proper definition, refers to the construction of structures which are not only designed to withstand different disasters, but can also anticipate and adapt to them. In line with this development, the DRR working group stressed the importance of investing in disaster mitigation and strengthening public-private partnerships (PPP) to support the blending of infrastructure development with CRI.

## The need for adaptation

Construction and infrastructure have repeatedly been held to be the backbone of every economy; it occupies a critical role for developing nations. It is thus vital for the industry to adapt to climatic conditions and simultaneously pursue active measures for disaster mitigation in order to facilitate a fast-paced growth with less (or ideally no) revenue loss.

India is among the world's most disaster-prone countries, with a number of calamities striking 27 out of the 29 states at regular intervals.<sup>3</sup> Recently, the northern part of the country was witness to enormously high rainfall, which led to a series of flash floods that caused devastation and loss in many states, including the national capital of Delhi – where massive destruction to life and property in the city was caused when heavy rain caused the river Yamuna to overflow in May 2023.

This destruction is still ongoing: the entire state of Himachal Pradesh, situated in the Himalayan region, has been declared to be a Natural Calamity Affected Area. With a total revenue loss of approximately INR 100bn in these two states alone, the need for the adaptation of CRI in the Indian construction sector has only deepened.

## A study of certain reports on CRI

In 2018, the Organisation for Economic Cooperation and Development (OECD) published a policy paper dealing with the importance of CRI. The paper discussed how CRI possessed the potential of improving the reliability of service provisions, increasing asset life and protecting asset returns. It was also specified that the costs associated with this approach can be reduced by way of using flexible and adaptive approaches such as PPP. In the paper, OECD called for adaptation of stringent measures within the framework of various nations, wherein the tools for mainstreaming adaptation included spatial planning to redirect development away from high-risk areas, infrastructural policy appraisals, and regulatory and economic standards.<sup>4</sup>

Other than the aforementioned paper, various international organisations have been adamant on their intention to promote CRI as a key concept to preserve the environment, while simultaneously aiding national development. Owing to the vulnerability of the country, many national organisations have also initiated work on understanding the ways in which CRI can be used by the construction industry of the nation.

## Mapping India's vulnerability – a report by CEEW

The Council on Energy, Environment and Water (CEEW), in collaboration with the Indian National Disaster Management Authority (NDMA)

published a report on the mapping of India's vulnerability to disasters, including various district-level case studies, to understand the need for a climate resilient infrastructure.

As per the Report, 40 per cent of the Indian districts were found to have a swapping trend with three out of every four districts found to be extreme event hotspots.<sup>5</sup> On the basis of a detailed analysis, the CEEW recommended a series of five measures, including the integration of climate risk profiling within infrastructure planning (recommended to be undertaken at an urgent pace) to enable India to lessen the devastation that is likely to be caused with an increase in the Earth's temperature of 1.5 degrees Celsius.

By way of its recommendations, the CEEW has ultimately advocated for a substantial investment to be made in the development of climate risk-informed infrastructure, which has been further held to be a much-needed factor for the achievement of the US\$5tn economy goal by the year 2025,<sup>6</sup> which was set by the government of India in its recent initiatives.

## The Flood Affected Area Atlas

With the most recent disaster to strike India being a series of flash floods, the Flood Affected Area Atlas, published by the NDMA in association with the Indian Space Research Organisation in March 2023, has attained additional importance. Through this atlas, the aforementioned organisations conducted a detailed satellite study of the 15,750,723 flood-affected areas of the nation in light of data collected between 1988 and 2022.

While the data in question focused on different types of floods, including flash floods, it specified that, owing to the great vulnerability exhibited by the nation in experiencing flood-like conditions, the report could be fruitful in understanding the

pattern of floods before constructing structures – thus, reducing the substantial revenue loss caused by the increasing severity of disasters. A notable feature of this report was its ability to predict future floods in various regions, including in Delhi.

### The role of disaster risk financing and PPPs

In its final meeting in the coastal Indian state of Chennai, the DRR working group emphasised the need to strengthen PPPs and blended finance mechanisms for supporting CRI. The working group understood that, by strengthening the synergy between disaster risk financing (DRF) and CRI, countries will be able to prioritise national and global disaster preparedness, recovery, rehabilitation, and reconstruction mechanisms.<sup>7</sup>

There is no doubt that PPPs have emerged to be a successful model for the governments of developing nations to support infrastructure development, allowing private companies to undertake the construction for perks and reducing the financial burden on the country. Thus, the observation of the DRR working group, on holding this model to have an integral part in supporting CRI adaptation may be considered to be accurate.

On the other hand, DRF has been, time and again, held to be a crucial method for providing support to mitigate the loss caused through calamities. Many organisations provide DRF, including the World Bank and the Asian Infrastructure Development Bank.

Combining PPP with DRF may be an efficient way of increasing the pace at which countries like India attain infrastructure growth, while simultaneously supporting their individual goals of sustainability and climate mitigation.

### Conclusion

As mentioned earlier, the G20 Summit took place in the national capital of

Delhi in the month of September 2023. Only two months prior, many major parts of this state were victims of waterlogging and floods. At the time of writing, various parts of the country are still experiencing flash floods and extremely heavy rainfall, causing considerable loss of life and property.

While the Indian government has been working to control the situation and provide funds and relief to the states, it has also been struck with the realisation that there is a dire need to undertake measures which will aid in the mitigation of future losses caused by disasters. This realisation is also borne out by the establishment of the DRR working group under the Indian presidency of the G20.

While there are many possibilities for adaptation in which CRI values and concepts can be inculcated within the existing construction industry, the costs associated with such adaptation may be considered to be lessened in the aforementioned method of forming a nexus between PPP projects and DRFs. Such a nexus is, however, dependent on efficient adaptation, which is further subject to an adequate implementation of the initiatives being taken by the government.

### Notes

- 1 *Climate Leadership in Action* (World Bank Group, 2014), see [www.worldbank.org/content/dam/Worldbank/document/Climate/climate2014-resilience-brief091214.pdf](http://www.worldbank.org/content/dam/Worldbank/document/Climate/climate2014-resilience-brief091214.pdf), accessed 23 October 2023.
- 2 *Climate Change Action Plan I* (World Bank Group, 2021), see <https://openknowledge.worldbank.org/server/api/core/bitstreams/19f8b285-7c5b-5312-8acd-d9628bac9e8e/content>.
- 3 'Disaster risk reduction' (UNICEF), see [www.unicef.org/india/what-we-do/disaster-risk-reduction#:~:text=India%20is%20among%20the%20world's,%2C%20landslides%2C%20floods%20and%20droughts](http://www.unicef.org/india/what-we-do/disaster-risk-reduction#:~:text=India%20is%20among%20the%20world's,%2C%20landslides%2C%20floods%20and%20droughts), accessed 23 October 2023.
- 4 *Climate Resilient Infrastructure* (OECD, 2018), [www.oecd.org/environment/cc/policy-perspectives-climate-resilient-infrastructure.pdf](http://www.oecd.org/environment/cc/policy-perspectives-climate-resilient-infrastructure.pdf), accessed 23 October 2023.

5 Abinash Mohanty & Shreya Wadhwan, *Mapping India's Climate Vulnerability*, (CEEW, 2021), [www.ceew.in/sites/default/files/ceew-study-on-climate-change-vulnerability-index-and-district-level-risk-assessment.pdf](http://www.ceew.in/sites/default/files/ceew-study-on-climate-change-vulnerability-index-and-district-level-risk-assessment.pdf).

6 Ministry of Commerce & Industry, *Vision of a 5 Trillion Indian Economy*, PIB (October 12, 2023, 2:29 P.M. IST), see <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1549454>.

7 'Third and Final G20 Disaster Risk Reduction Working Group (DRRWG) meeting concludes in Chennai' (G20), see [www.g20.org/en/media-resources/press-releases/july-2023/drrwg/](http://www.g20.org/en/media-resources/press-releases/july-2023/drrwg/), accessed 23 October 2023.

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### POLAND

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#### Guarantee of payment for construction works

On 16 October 2023, an amendment to the Polish Civil Code<sup>1</sup> entered into force to exclude the application of the provisions on the guarantee of payment for construction works when the investor is the State Treasury.

The Act has retroactive effect, also applying to ‘construction contracts concluded before the date of entry into force of this act, with respect to which the contractor did not request the submission of a guarantee of payment for construction works before that date’.

Since 2010, Polish law has provided for the right of a construction contractor to request that an investor provide a ‘guarantee of payment for construction works’ in the form of a bank or insurance guarantee, bank letter of credit or bank surety, ‘to secure the timely payment of the agreed remuneration for the performance of construction works’ (Article 649(1), section 1 et seq. of the Civil Code).<sup>2</sup> Until now, these provisions have applied to all investors and contractors, according to the following rules:

- the contractor may, at any time, demand from the investor a payment guarantee up to the amount of any claim for the contractual remuneration and additional works or works that are necessary for the performance of

the contract, accepted in writing by the investor (Article 649(3), section 1 of the Civil Code);

- the investor and the contractor bear the costs of establishing the guarantee in equal parts (Article 649(1), section 3 of the Civil Code);
- if the contractor fails to obtain the requested payment guarantee within the time limit it has set, which is not less than 45 days, the contractor is entitled to withdraw from the contract due to the investor’s fault (Article 649(4), section 1 of the Civil Code); and
- the contractor’s right to demand a payment guarantee cannot be excluded in the contract (Article 649(2), section 1 of the Civil Code).

The Act excludes the application of these provisions when the investor is the State Treasury. According to the explanatory memorandum for the Draft Act, the following arguments are meant to support the amendment.

Firstly, Article 649(1) of the Civil Code was introduced into the Civil Code in 2010 to ‘prevent negative phenomena in the economy, in particular the failure of investors to pay for works performed by construction contractors’. In the case of the State Treasury, there is no such risk, as the Treasury is a ‘credible investor providing a guarantee of solvency’.

Secondly, the issuance of the guarantee entails significant costs for the Treasury. Although Article 649(1), section 3 of the Civil Code guarantees that the parties bear them in equal parts, ‘[i]n practice, such costs are borne by the public finance unit, which then seeks reimbursement of half of the costs from the contractor, which does not always happen quickly and sometimes means waiting for years for the conclusion of litigation’. In this context, the State Treasury’s exemption from the obligation to provide a payment guarantee is ‘beneficial for the state budget’.

Thirdly, the amendment of Article 649(1) of the Civil Code is allegedly consistent with similar

instruments providing protection for the State Treasury (eg, Article 749 of the Civil Procedure Code, which stipulates that it is inadmissible to secure monetary claims against the State Treasury).

Fourthly, the amendment is intended to counteract the abuse of the payment guarantee institution for contractors to withdraw from their construction contracts. In this context, it was pointed out that:

‘There are cases where the contractor uses payment guarantees contrary to their intended purpose. The contractor, seeing the risk that the investor will withdraw from the contract due to its fault (for example because of a delay in implementation) and charge the associated liquidated damages, using the payment guarantee instrument, can not only avoid the risk of potential liquidated damages, but completely reverse the situation. Instead of paying damages, the contractor itself can raise financial claims against the investor.’

The above arguments call for certain polemical remarks.

#### Guarantee of solvency does not mean guarantee of payment

While it is difficult to argue with the axiom that the State Treasury is a ‘credible investor which provides a guarantee of solvency’, one could question whether it is proper in the context of said institution. Experience has shown that ‘guarantee of solvency’ does not always mean ‘guarantee of payment’, especially ‘timely payment’. In practice, the question of ‘when’ the payment will be made proves to be no less important for construction companies than ‘whether’ it will take place at all.

Continuity and liquidity of financing (cashflow) is crucial to the operation of construction companies. Construction production is capital-intensive. An investment requires an

ongoing supply of capital from the investor itself. Therefore, the guarantee of payment for construction works was originally meant to secure not only the payment of the agreed remuneration for the construction works itself, but also its ‘timeliness’. This follows *verbis legis* from Article 649(1), section 1 of the Civil Code, according to which the payment guarantee is intended to protect ‘the timely payment of the agreed remuneration for the performance of construction works.’

Excluding the possibility of demanding a payment guarantee from the State Treasury as an investor may therefore worsen the situation of contractors, regardless of the axiom of the State Treasury’s solvency. If the State Treasury, as the investor, refuses to make payment for any reason – for example, invoking a set-off of the contractor’s remuneration against contractual penalties or counterclaims (which may be disputable) – the contractor may lose hope of receiving its payment other than at the end of a lawsuit lasting many years. For all that time, the cost of the completed and unpaid works will be borne by the contractor. Although in the event of a successful lawsuit the contractor can count on interest for delay, it often does not compensate for the various negative consequences of the disruption of the cash flow. Payment congestion can lead to ‘chain reactions’ and even trigger waves of business bankruptcies.

### **The thesis of the need to combat the abuse of payment guarantee through changes in the law is questionable**

It follows from the explanatory memorandum for the Draft Act that the amendment is intended to counteract the phenomenon of contractors ‘abusing’ Article 649(1) of the Civil Code – ie, using the demand for a payment guarantee as a ‘weapon’ in a dispute with the investor,

including using the failure to provide the required guarantee as grounds for withdrawal from the contract.

The claim about the phenomenon of abuse of the law and the need to combat it through legislative intervention does not seem valid. Firstly, it has not been supported by any empirical data, studies or court decisions. Secondly, the provision of a payment guarantee under Article 649(1) section 1 of the Civil Code is not free of charge for the contractor. The relatively high cost of establishing a guarantee is one of the reasons why many contractors refrain from requesting this instrument.

Thirdly, the mere request of the contractor to the investor for a payment guarantee does not give grounds for withdrawal from the contract. Such grounds arise only when the investor fails to provide the contractor with a guarantee within a time limit (not less than 45 days), or when the provided guarantee does not meet the statutory requirements. In other words, it essentially depends on the investor whether the failure to respond properly to the demand for a payment guarantee will give the contractor grounds for withdrawal.

Fourthly, it is difficult to treat as an ‘abuse’ the contractor’s exercise of a right that arises *ex lege* in the event of the investor’s failure to perform a statutory obligation. In such situations where the contractor’s behaviour contradicts the principle of ‘clean hands’, takes the form of abuse or other conduct where demand for a payment guarantee detracts from the purpose of this institution, the investor – the State Treasury – can successfully seek protection through the courts, using existing institutions such as Article 5 of the Civil Code.

### **The principle of equal treatment under civil law**

The explanatory memorandum of the Draft Act declares that the proposed amendment ‘does not violate equality before the law’. However, it does not dispel

doubts about the compatibility of the proposed solution with the principle of equal treatment under civil law.

The provisions of the Civil Code on the construction contract do not differentiate *de lege lata* the rights and obligations of the parties on the basis of entity-related criteria. The contractor can demand payment guarantees – *lege non distinguente* – from both private and public investors. Accordingly, the obligation to submit a payment guarantee at the request of the contractor is equally incumbent on all investors. The amendment will change this by putting the State Treasury in a better position than all other investors – both public and private.

The rationale behind the amendment is to protect the fiscal interests of the Treasury and to protect the Treasury against the risk of contractor withdrawal.

However, a question arises as to why the beneficiaries of these benefits should not be – in addition to the State Treasury – local government units or other entities that share with the State Treasury the attribute of legally guaranteed solvency?

Finally, according to Article 649(5) of the Civil Code, Articles 649(1)–649(4) of the Civil Code apply to contracts concluded between a contractor and further contractors (subcontractors). The Act does not explicitly answer the question of how the State Treasury’s preferential treatment will affect the legal relationships between the general contractor and subcontractors. Will the contractor – deprived of the possibility to obtain payment guarantee from the State Treasury – continue to be obliged itself to establish analogous guarantees for the benefit of subcontractors? The recitals of the explanatory memorandum lead one to answer the question in the affirmative, but the issue raises doubts that may long await resolution in case law.

### Change to the allocation of risks and contractual balance during contract implementation

Issues related to guarantees of timely payment of remuneration are an important part of the assessment of contractual risks associated with the implementation of investments. The Act therefore raises concerns, among other things, from the perspective of intertemporal norms and retroactive effects. Taking away the contractor's right to demand a payment guarantee – already in the course of contract performance – will lead to interference in the content of the contractual relationship, which was not anticipated by the parties when concluding the contract, and to a violation of the existing consensual contractual balance between the contractor and the investor. In other words, for the contractor, who is deprived of the possibility of obtaining a payment guarantee after the conclusion of the contract, such a change is not neutral.

It is the moment of contract conclusion (and in some cases, the submission of a binding offer or the opening of bids), and not the date of the request for the establishment of a payment guarantee (as provided for in the Act), that should be considered conclusive from the point of view of assessing respect for the principle of non-retroactivity of civil law (reflected in Article 3 of the Civil Code). Deprived of the payment guarantee, a contractor could either not submit a bid at all or submit it with a different bid price.

### Final comments

The assessment of contractual risk translates into the valuation of bids submitted by potential contractors. Risk 'drives up' the price. By aggravating the situation of contractors, the amendment may limit their 'appetite' to bid for such contracts, lead to higher bid prices, and induce them to

seek opportunities to bid for other investors' contracts. Consequently, both the legal and economic sense of the amendment – putting the State Treasury in a different position than all other investors – seems questionable.

- 1 The act was published in the Polish Official Journal on 15 September 2023 (Dz.U. 2023 poz. 1890); available online at: Ustawa z dnia 13 lipca 2023 r. o zmianie ustawy o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko oraz niektórych innych ustaw (sejm.gov.pl); Polish title: *Ustawa z dnia 13 lipca 2023 r. o zmianie ustawy o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko oraz niektórych innych ustaw*. The act was adopted on the basis of a draft act amending the Act on Disclosure of Information about the Environment and its Protection, Participation of the Public in Environmental Protection and on Environmental Impact Assessments and certain other legislation, Paper No 3304, 3304-A of 23 May 2023 (hereinafter: the 'Draft Act' and the 'Act', respectively).
- 2 According to Article 649, section 1 of the Civil Code: '[g]uarantee of payment for construction works, hereinafter referred to as 'payment guarantee', is granted by the investor to the contractor (general contractor) in order to secure timely payment of the agreed remuneration for the performance of construction works.'

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## SOUTH KOREA

### Initial decisions on the Serious Accidents Punishment Act

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### Enforcement of the Serious Accidents Punishment Act

The increased pressure for businesses to adopt environmental, social and governance (ESG) practices is taking various forms across different countries.

In Korea, a notable response to heightened social responsibility expectations is the enactment of the Serious Accidents Punishment Act (중대재해처벌법) (SAPA), effective since 27 January 2022. The SAPA is significant as it addresses the aftermath of serious accidents, and their links to companies' safety and health management systems.

Under this act, individuals determined as Responsible Managing Officers (경영책임자) such as CEOs, chief safety officers (CSOs), representative directors and presidents bear accountability for serious accidents in their businesses or workplaces. If a company's safety system is inadequate and a serious accident occurs, criminal penalties – including imprisonment and fines of up to KRW 1bn – can be imposed on these officers.

The construction industry, prone to such accidents, has witnessed a pioneering court ruling involving the SAPA after a fatal incident on a

construction site. Given that these rulings are the first instances of SAPA enforcement, they have drawn significant attention, particularly due to the imprisonment of a company's representative director for a SAPA violation.

### Initial court decisions

The first decision<sup>1</sup> involves a construction company that subcontracted a portion of its construction work to a subcontractor. Tragically, an employee of the subcontractor fell from an 18-metre height on the fifth floor into an opening and died. The employee was not wearing a safety harness. The court sentenced the representative director of the construction company to 18 months in prison suspended with a three-year probation for SAPA violations. A criminal fine of KRW 30m was imposed on the construction company for both SAPA and the Occupational Safety and Health Act (OSHA) violations. The site managers of both the construction company and the subcontractor were sentenced to eight months in prison suspended with a two-year probation for death by occupational negligence<sup>2</sup> and OSHA violations. A criminal fine of KRW 10m was imposed on the subcontractor for OSHA violations.

The court's decision hinged on the Responsible Managing Officers' responsibility to establish and implement safety and health measures for the employees of a third party when their company or institution subcontracts to the third party in the business or workplace that it *substantially* controls.<sup>3</sup>

The court found that the representative director (as Responsible Managing Officer) of the construction company failed to comply with the obligations under the SAPA, including (1) establishing work procedures to identify and improve hazards and risks,<sup>4</sup> (2) setting criteria for evaluating safety and health managers,<sup>5</sup> and (3) preparing a manual for emergency response.<sup>6</sup>

These lapses led to the failures to provide safety harnesses to employees and to cease the lifting work without wearing a safety harness, despite the removal of a safety guardrail for the lifting work.

The second decision<sup>7</sup> pertains to a steel manufacturing company that engaged a contractor for facility repairs. During the repair work, a malfunctioning textile belt caused a 1,220kg heat sink to fall from a crane; the heat sink struck and killed an employee of the contractor in the steel manufacturing company's plant. Similarly to the first decision, the court found that the representative director of the steel manufacturing company failed to establish and implement adequate safety and health measures for the contractor's employees who were working in the business or workplace that the steel manufacturing company substantially controls, violating SAPA and OSHA obligations. The court sentenced the steel manufacturing company's representative director to one year in prison without suspension, setting a precedent for Responsible Managing Officers being actually detained and imprisoned under the SAPA. The representative director appealed the decision, but the second-instance court dismissed the appeal.<sup>8</sup>

### Prospects of future development

With the courts imposing prison sentences on the Responsible Managing Officers of the defendant companies in both cases, the pressure on construction companies to establish and implement effective safety and health measures in compliance with SAPA requirements is expected to heighten.

The imposition of an *actual* prison sentence without suspension in the second decision, considering the representative director's prior criminal history related to violating occupational safety duties and being held accountable for a deadly accident, is likely to

underscore the importance of taking measures to prevent similar accidents from recurring.

Meanwhile, in a pending SAPA case, in which a defendant has applied for a constitutionality review of the SAPA for ambiguity of obligations, severity of penalties and disparities compared to other crimes,<sup>9</sup> the court recently dismissed the application.<sup>10</sup> However, as the defendant is contemplating an appeal to the Constitutional Court,<sup>11</sup> it will also be worth monitoring the controversies over the constitutionality of the SAPA.

### Notes

- 1 Goyang Branch of Uijeongbu District Court (의정부지방법원 고양지원) Decision 2022GoDan3254, 6 April 2023.
- 2 Art 268, Korean Criminal Code, see [https://elaw.klri.re.kr/kor\\_service/lawView.do?hseq=60888&lang=ENG](https://elaw.klri.re.kr/kor_service/lawView.do?hseq=60888&lang=ENG), accessed 23 October 2023: 'Death and Injury by Occupational or Gross Negligence. A person who causes the death or injury of another by occupational or gross negligence, shall be punished by imprisonment for not more than five years or by a fine not exceeding 20 million won.'
- 3 Enforcement Decree of the SAPA (as of Oct 2021) art 4.9.
- 4 *Ibid*, art 4.3.
- 5 *Ibid*, art 4.5.
- 6 *Ibid*, art 4.8.
- 7 Masan Branch of Changwon District Court (창원지방법원 마산지원) Decision 2022GoHap95, 26 April 2023.
- 8 Busan High Court (부산고등법원) Decision 2023 No167, 23 August 2023.
- 9 Hankyoreh, 20 July 2023, [https://www.hani.co.kr/arti/society/society\\_general/1100943.html](https://www.hani.co.kr/arti/society/society_general/1100943.html), accessed 23 October 2023.
- 10 Changwon District Court (창원지방법원) Decision 2022ChoGi1795, 3 November 2023.
- 11 Labor Today, 14 November 2023, <https://www.labortoday.co.kr/news/articleView.html?idxno=218253>, accessed 15 November 2023.

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View of Kampala City, seen from Gaddafi National Mosque in Uganda. Credit: martin/Adobe Stock

# Comparative approaches for resolving procurement disputes related to public infrastructure projects between Uganda and other jurisdictions

The procurement process is an essential part of the construction project cycle; however oftentimes it is bogged down by disputes which have a substantial negative impact on the future of the affected project – both in terms of cost and time.

This article highlights the mechanisms to resolve procurement disputes in Uganda and the efficacy of such mechanisms.

The article further explores the mechanisms from other jurisdictions dealing with similar procurement disputes, and how best they can be adopted in Uganda to efficiently deal with the said disputes.

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## The nature of disputes and the administrative review process

The typical procurement disputes that arise during the procurement process concern change of criteria, non-compliant or non-responsive bids, breach of the provisions of the law and regulations, and, in some instances, bribery and corruption. For instance, the High Court in *Salini SpA v Attorney General & Anor*<sup>1</sup> ordered that the procuring entity re-evaluate the technical bids of all prequalified bidders. It also directed the procurement authority to take an active role in the appointment of independent, impartial and fair-minded persons to re-evaluate technical bids, as the earlier process had been marred by corruption and impropriety.

The Public Procurement and Disposal of Assets Act provides an aggrieved bidder or tenderer recourse by way of administrative review,<sup>2</sup> first by the Accounting Officer (who primarily represents the employer's entity) who determines the complaint by the bidder. If dissatisfied with the decision, or if no decision is made within the statutory period of 10 days, the complainant can lodge an appeal with the Public Procurement and Disposal of Public Assets Appeals Tribunal (the PPDA Appeals Tribunal) which is mandated to issue its decision within 15 days.

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*The administrative review mechanism therefore presents aggrieved bidders with an opportunity to resolve the procurement disputes in a timely manner to avert time and cost overruns that would impact public projects*

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The decision of the PPDA Appeals Tribunal can be subjected to a further appeal, which is restricted to questions of law, to the High Court within 30 days from the decision of the PPDA Appeals Tribunal. Any decision rendered by the High Court is final.

The current legal regime is a break from the more convoluted process which would require the bidder to express dissatisfaction with the decision of the Accounting Officer before proceeding to the PPDA Appeals Tribunal.

The administrative review mechanism therefore presents aggrieved bidders with an opportunity to resolve the procurement disputes in a timely manner to avert time

and cost overruns that would impact public projects, especially where such projects are financed by multilateral development banks with strict project completion timelines. For instance, in 2021–2022, the PPDA Appeals Tribunal resolved disputes worth US\$160m, of which the disputes related to infrastructure projects accounted for more than 50 per cent of the value.<sup>3</sup>

The major downside of the administrative review mechanism is that, due to the strict statutory timelines, most of the disputes are dismissed on technical grounds – for instance, late filing<sup>4</sup> of the complaint or appeal, expiry of the bid security, etc, which locks out potentially meritorious disputes.

Secondly, the law provides for timelines for each tier of the mechanism except for the appeal process in the High Court, where no timeframe is provided for when the decision can be issued. This creates a loophole to be abused, as the appeal could take years to be concluded due to preexisting case backlogs in the court system. This could affect the aggrieved bidder in the proceedings before the Tribunal, as the hitherto suspended procurement process is lifted during the appeal process to the High Court.

Additionally, in the course of determining the appeal, the High Court has powers which include setting aside the decision of the PPDA Appeals Tribunal. This in particular would make it practically impossible to implement where the procurement process would be complete by the time the decision of the High Court is delivered; the only plausible remedy available to the aggrieved bidder is an award in damages for either loss of profit or loss of opportunity, which is still at the discretion of the court.

## Dispute resolution mechanisms from other jurisdictions

The Technology and Construction Court<sup>5</sup> (TCC Court) in the UK offers a mixed approach of both thorough pre-action processes that encourage the use of alternative dispute resolution (ADR) and expedited trial processes with the underlying requirement of the parties' cooperation in all instances, which ensures that the public procurement disputes are dealt with in a timely manner.

In several jurisdictions<sup>6</sup> such as Spain and Peru, arbitration has been used to resolve the public procurement disputes due to its

inherent advantages of flexibility, expedition and finality. This is notwithstanding that public procurement disputes traditionally fall within the public law domain whereas arbitration is often used in private disputes. The overarching goal is that, if arbitration is well used, it would protect public interest.

Similarly, Poland<sup>7</sup> has a two-tier process, which involves the aggrieved bidder submitting their written protest with the procuring entity. If dissatisfied with the decision or if the decision is not rendered within the statutory limits, then an appeal can be lodged with the Office of Public Procurement (PPO) where an arbitral tribunal is constituted to determine the appeal within 14 days from the date of filing.

In the Netherlands,<sup>8</sup> arbitration for public procurement disputes are restricted to public works, which is accelerated in nature to accord the parties a quick and final decision.

Mediation<sup>9</sup> has equally been fronted as an alternative mechanism to resolve such disputes since it accords the parties confidentiality, is cost friendly and, more importantly, maintains the parties' existing or future relationships when compared to litigation.

## Conclusion

The public procurement process plays a critical role in the success of infrastructure projects and therefore it follows that the mechanisms in place to resolve the disputes that arise during the procurement process should be effective, efficient and reflect value for money as these projects are intended for the public good.

While the current mechanism of administrative review in Uganda is efficient, it could work better if augmented with other alternative dispute mechanisms such as arbitration or mediation. These would go a long way to promote the basic procurement principles, including transparency, accountability, fairness and competition. This would have the invariable effect of instilling public confidence in the procurement system as a whole.

## Notes

- 1 High Court Civil Application No 121 of 2012.
- 2 S 89 and S 91, PPDA Act.
- 3 PPDA Appeals Tribunal Report 2021–22.
- 4 PPDA Appeals Tribunal Report 2021–22.
- 5 TCC Guidance Note on Procedures for Public Procurement Cases.
- 6 Alexandra Molina Dimitrijevič, 'Arbitration as A Dispute-Solving Mechanism in Public Procurement: A Comparative View Between Peruvian and Spanish Systems' (IPPA), see [www.ippa.org/IPPC4/Proceedings/01ComparativeProcurement/Paper1-18.pdf](http://www.ippa.org/IPPC4/Proceedings/01ComparativeProcurement/Paper1-18.pdf), accessed 23 October 2023.
- 7 OECD Public Procurement Review Procedures, SIGMA Papers No 30, 30, see [www.oecd-ilibrary.org/governance/public-procurement-review-procedures\\_5km160w0qbvf-en](http://www.oecd-ilibrary.org/governance/public-procurement-review-procedures_5km160w0qbvf-en), accessed 23 October 2023.
- 8 *Ibid.*
- 9 Elizabeth Repper and Simon Taylor, 'The use of mediation to resolve public procurement disputes' (Thomson Reuters Practical Law Construction Blog, 23 October 2013), see <http://constructionblog.practicallaw.com/the-use-of-mediation-to-resolve-public-procurement-disputes-draft/>.

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Turkey earthquake of 2023. Credit: EmirCem/Adobe Stock

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## Post-earthquake developments in Turkish construction law

**D**ue to its geopolitical location, Turkey is one of the world's most earthquake-prone countries.

On 6 February 2023, a magnitude 7.8 earthquake struck Kahramanmaraş in south-central Turkey. It was the most powerful earthquake recorded in Turkey since 1939,

and affected many cities across the country. This earthquake was followed by a second one of magnitude 7.5. Excluding undocumented immigrants, 15.7 million people were directly affected. Beyond the tragic loss of life, the earthquake had major economic effects as it caused serious changes

in the landscape: tens of thousands of buildings were destroyed. The consequences of this seismic catastrophe, both in terms of loss of life and property, currently constitute a crucial issue in Turkey.

This matter encompasses many perspectives of law. In response, the Turkish government has undertaken a series of initiatives aimed at expediting and enhancing the efficiency of the post-earthquake recovery process. In this respect, Law No 7452 on the Adoption of the Presidential Decree on Settlement and Construction within the Scope of the State of Emergency (Law No 7452), which came into force on 5 April 2023, introduced specific measures related to construction activities in areas affected by the earthquake. With the incorporation of Additional Article-1 into the aforementioned legislation on 15 July 2023, further provisions were introduced to facilitate the reconstruction of buildings damaged due to the earthquake.

These provisions, analysed herein, are designed to expedite the regeneration process to a greater extent than described in Law No 6306 on the Regeneration of Areas Under Disaster Risk (Law No 6306) which came into force on 16 May 2012. This article will provide an overview of Law No 6306 and analyse Law No 7452.

In 2012, the Turkish government reacted to the Condominium Law, which required a unanimous vote of unit owners to make material changes to buildings, by enacting Law No 6306. This is considered to be one of the most important regulations in the Turkish real estate law history.

Law No 6306 introduced a number of changes including the role and the authority of the Ministry of Environment, Urbanisation and Climate Change (the Ministry) and other administrative bodies in the regeneration process; the classification of risky buildings and risky areas; and the designation, registration and transfer of risky buildings. However, there is no doubt that the most important changes brought in by Law No 6306 was the agreement among owners, and the exemptions and other incentives offered.

Additional Article-1 has envisaged even faster processes. When considering Additional Article-1 of Law No 7452, the primary changes to the construction law are reviewed in terms of pre-implementation of regeneration projects, measures for the owners who are not part of the regeneration projects, the statutory

right to terminate construction contracts under certain conditions, financial support, and steps for the post-implementation of regeneration projects.

According to Law No 6306, owners who possess at least two-thirds of the land shares are allowed to conduct transactions as to the land-related law, including plot division, partial abandonment of a plot for public use, reconstruction, and land purchase (which ordinarily require the approval of all owners under the Condominium Law). According to Law No 7452, owners having the simple majority of land shares will be authorised to make those transactions.

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*The Turkish government has undertaken a series of initiatives aimed at expediting and enhancing the efficiency of the post-earthquake recovery process*

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Under Law No 6306, in the risky and reserve areas, the shares of owners who oppose urban regeneration decisions are auctioned off to other owners and outside parties. If an owner does not consent to the regeneration decision, the corresponding land shares for dangerous regions and reserve areas will be registered in the name of the Treasury. If there is no buyer, the corresponding land shares for dangerous regions and reserve areas will be registered in the name of the Treasury.

According to Addendum Article-1 of the Law No 7452, there will be no auction for the land shares of owners not choosing to take urban regeneration initiatives or inaccessible owners, and those shares will be temporarily registered in the name of the Treasury until the completion of reconstruction. Furthermore, it is important to note that, owners will be notified of those issues via the e-Government portal during all procedures; those notifications will be announced for fifteen days in the relevant neighbourhood by the official neighbourhood representative. Thus, owners should frequently check their personal e-Government accounts because they will not receive official notices from the authorities: the abovementioned notifications will be considered as having been made in accordance with the provisions of the Notification Law.

Similar to the changes regarding the pre-implementation process, under Law No 7452, owners holding the simple majority of land shares are allowed to terminate previously signed construction contracts.

Also, despite obtaining a building licence within the scope of the Law No 7452, if the construction work of the new building has not started within one year, or the construction work has been stopped and the construction activity has not been continued with the team and equipment at a level that requires the completion of the project within at least six months due to reasons arising from the contractor, a decision can be taken by the simple majority of the owners for the termination of the contracts. Law No 6306 requires the approval of the owners holding at least two-thirds of the majority of land shares to terminate a construction contract.

Similar to Law No 6306, owners, upon request, will be granted construction credit. Within this scope, grants are given to the owners for one residential building and one workplace. However, grants and credits will not be given to those who are benefiting from the financial rights under Law No 7269 on Measures to be Taken and Assistance to be Provided Due to Disasters Affecting Public Life.

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*Law No 7452 aims to expedite the completion of regeneration projects in the earthquake-affected areas to ensure the housing needs of earthquake victims in Turkey*

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Real property purchase and sale, mortgage establishment and other land registry and cadastral transactions, contracts, licences, and other transactions to be carried out within the scope of the new law will be exempt from all kinds of taxes, duties and fees. Moreover, in line with Law No 6306, owners will be exempt from all kinds of fees and charges collected by municipalities during the construction process as well as inheritance and transfer tax. Also, loans extended to owners within the scope of Law No 7452 will be exempt from bank and insurance transaction tax. The details regarding loans and grants will be determined by a Presidential Decree which is expected to be published shortly.

The owners of apartments taking part in regeneration projects will receive independent

sections after the completion of building projects. The owners whose land shares are registered in the name of the Treasury, since they are not participating in the implementation, will be notified to take delivery of the independent section associated with their shares.

There are different provisions depending on whether the owner takes delivery. If the owner takes delivery, the owner will pay the remaining amount to the Treasury with a maturity of 84 months after the grant amount is deducted from the construction cost. If the owner does not take delivery, the owner's claim to the immovable property will expire. While the rights and annotations in the immovable land registration will remain over the amount of the sum contributed on behalf of the owner, in such a scenario, the Treasury will deposit an amount equal to the sum of the immovable's pre-earthquake valuation, and grant the amount into a time deposit account formed in the owner's name.

In conclusion, Law No 7452 aims to expedite the completion of regeneration projects in the earthquake-affected areas to ensure the housing needs of earthquake victims in Turkey as soon as possible by changing the legal requirements of some of the essential construction law transactions under Law No 6306.

However, while new legal provisions are advantageous for reviving the reconstruction efforts, some legal issues may arise due to the material differences of those transactions between Law No 6303 and Law No 7452. Thus, owners should carefully evaluate their new rights and obligations under Law No 7452 in their regeneration efforts.

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City of London skyline 2023. Credit: charles/Adobe Stock

# Capping the setoff, or setting off the cap: considering the interoperation of setoffs and liability caps in construction disputes

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Limitations of liability clauses and setoff provisions are ubiquitous in construction contracts, yet few cases have considered how these critical clauses should properly be applied together once liability for claims and counterclaims are finally decided. Should a liability cap be applied first, before parties' claims are set off, or should parties' claims be set off before limits on liability are considered? The difference is not just academic, but can yield starkly different damage awards. Yet the issue has attracted little attention in Canadian jurisprudence. This article argues that, in cases with competing successful claims, liability caps should be

applied first – before setoff – in accordance with the parties' bargained-for rights.

Recently, the United Kingdom's Technology and Construction Court had an opportunity to consider the interaction of these common provisions. In *Topalsson GmbH v Rolls-Royce Motor Cars Limited*,<sup>1</sup> Justice O'Farrell considered whether setoff to establish the net sum due should be carried out before or after the application of the cap on liability.

The parties' contract contained the following limitation of liability: 'the total liability of either Party to the other under this Agreement shall be limited in aggregate for all claims no matter how arising to the

amount of €5m (five million euros).’ Before applying the limit or setoff, the judge found that Rolls Royce had proved damages of €7,962,323 and the damages due to Topalsson amounted to €794,759. Since Rolls Royce’s damages exceeded the cap, the judge had to decide whether to apply the cap or setoff first.

Justice O’Farrell found that the wording of the contract required the application of setoff first, prior to considering the liability cap:<sup>2</sup>

‘In contrast, under the Agreement, the cap on liability is applicable to the total liability of either party to the other in aggregate for all claims no matter how arising. The total liability of either party to the other requires the application of the above provisions to ascertain the balance of sums due or payable. On a proper construction of the express terms agreed between the parties, under the Agreement the accounting exercise to determine the net sum due to or from each party must be carried out before the cap is applied.’

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*The effect of applying the setoff first was to limit Taylor Morrison’s ability to recover under the contract, while providing Terracon an un-bargained-for benefit*

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While the judge’s decision turned on the very specific language of the contract, the decision sets an uncomfortable precedent for the application of setoff before the limitation of liability. The balance of this article will survey American, Australian and Canadian jurisprudence on this issue, and propose a reasoned path forward.

**United States: Taylor Morrison of Colorado v Terracon Consultants, Inc<sup>3</sup>**

In *Taylor Morrison of Colorado v Terracon Consultants, Inc*, the Colorado Court of Appeal overturned a trial decision that applied a \$550,000 liability cap before applying \$592,500 setoff against a \$9,586,056 jury award.

The claim was brought by a subdivision developer against a geotechnical engineer for construction defects based on homeowners’ complaints about drywall cracks in their new homes. At trial, the jury awarded the developer \$9,586,056 in damages, but also found that the engineer’s liability was limited to \$550,000. Having

applied the cap, the jury deducted the \$592,500 settlement from other liable contractors against the \$550,000 damages to arrive at zero dollars. The developer appealed. According to the court:

‘This case requires us to address for the first time how a trial court should adjust a jury verdict awarding damages for breach of contract when there is both a setoff for the amount recovered from other liable parties and a contractual limitation on a defendant’s liability. We conclude the correct approach is to first apply the setoff against the jury verdict and then apply the contractual limitation against this reduced amount.’ (Paragraph 1)

The appeals court found that the result of applying the cap first, and then setting off ‘effectively rendered the jury’s damages finding meaningless.’<sup>4</sup> The appeal court held that:

‘Had the trial court first applied the setoff against the jury verdict and then applied the contractual limitation, the court would have applied the \$592,500 setoff against the \$9,586,056 jury damages verdict, resulting in new total of \$8,993,556. The trial court then would have capped Terracon’s liability according to the Limitation, and reached a final judgment of \$550,000 for Taylor.

‘This approach prevents double recovery because Taylor’s recovery from Terracon and the other parties did not exceed the loss actually sustained (some nine and one half million dollars). This approach also preserves Terracon’s rights to enforce the terms of the contract because Terracon would not have paid more than the Limitation agreed upon in the contract.’ (Paragraphs 31–32)

The *Taylor Morrison* case is not exactly analogous to the UK decision in *Rolls Royce*, since the setoff made was for monies received by the claimant from other defendants, not Terracon. Terracon’s liability to Taylor Morrison was capped subject to their contract, but the effect of applying the setoff first was to limit Taylor Morrison’s ability to recover under the contract, while providing Terracon an un-bargained-for benefit. In effect, Terracon received a windfall due to the payments made by other defendants. Reversing that decision and requiring setoff to be applied first did not expose Terracon to more than the limitation it had contracted for.

**Australia: *Global Constructions Australia Pty Ltd (in liq) v AIG Australia Limited***<sup>5</sup>

In *Global Constructions Australia Pty Ltd (in liq) v AIG Australia Limited*, the Federal Court of Australia was required to determine an insurer's liability to pay coverage for 'crime protection', including for employee fraud or dishonesty, and theft or fraudulent acts. Coverage was subject to a limitation of liability and the court had to determine whether to set off from an insured's direct financial loss before or after the application of a liability cap.<sup>6</sup>

'The insured says one finds the Direct Financial Loss from the acts, deducts the loan account and the value of the shares, and, if that sum (being A minus B) is greater than the limit of liability, the limit of liability caps the obligation of the insurer under the policy, also taking into account the retention. See Derrington D and Ashton RS, *The Law of Liability Insurance* (3rd ed, LexisNexis Butterworths, 2013) at 1395–1396 [8–469]. The insurer, on the other hand, says that the deduction of the loan account and the value of the shares of the malfeasor is taken off, or reduced from, the insurer's liability having already taken into account the limit of liability. Thus here, where one has a sum of Direct Financial Loss of significantly over a million dollars, and a limit of liability of \$500,000, the point at which one deducts the loan account becomes important.'

The insurer's view that the liability is zero is because it says the loan account is \$800,000 and that is to be taken off last, as it were. After one recognises that the Direct Financial Loss is more than \$500,000, the liability is reduced to the limit of liability and then and thereafter the loan account is deducted.'

In the result, the Federal Court in Australia came to a similar conclusion as the Colorado Court of Appeals in *Taylor Morrison*:<sup>7</sup>

'If a shareholder effectively stole \$20 million from the company, and had a loan account of \$15 million, or a loan account of \$600,000, in both cases, there would be a zero value of the liability of the insurer on the insurer's construction. I do not think that that result would flow naturally from the structure of the policy as it appears. As I said, I read the insurer's liability for Direct Financial Loss on the fourth line of cl 6 as referable to its liability as identified in

that clause, being the Direct Financial Loss resulting from Theft or Fraudulent Acts. The contrary would see it as the insurer's liability, including any limit of liability elsewhere provided for, and I do not think, structurally or textually, that conclusion is appropriate.

'It follows that the insurer's argument regarding the operation of the limit of liability is rejected. Mr Herbert's loan account is to be set-off against the Direct Financial Loss resulting from Theft or Fraudulent Acts, prior to the application of the limit of liability and retention. It follows that the applicant is entitled to an order that leads to a judgment in at least a sum that the parties are agreed upon, using figures of the insurer with any more, if there be any more, to be ordered by reference to the findings or later agreement in the quantification debate.'

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*The court had to determine whether to set off from an insured's direct financial loss before or after the application of a liability cap*

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Again, the circumstances of the case are not strictly analogous to those in *Rolls Royce* because the payor – here the insurer – was seeking to benefit from payments or setoff from third parties (in this case, the fraudulent shareholder), to avoid its bargained-for liability to pay on the occurrence of a stipulated risk. Setoff in this case does not expose the insurer to any greater sum than its bargained-for liability cap, though the insured is able to recover more of its total losses from elsewhere.

Thus, while similar, both the American and Australian examples, above, are distinguishable from the typical construction dispute context in so far as the setoff amounts were from third parties, not the result of offsetting mutual debts between the parties. Next, we will turn to a Canadian case that is squarely on point, and was decided similarly to *Rolls Royce*.

**Canada: *KBR Industrial Canada Co v Air Liquide Global E&C***<sup>8</sup>

The case of *KBR Industrial Canada Co v Air Liquide Global E&C* was an application under the Alberta Arbitration Act, for leave to appeal an arbitral award in which the tribunal, in a

split decision, applied setoff of two claims before applying the liability cap to the final damages award. The key issue on appeal was the interoperation of the contractual overall limitation of liability clause and a contractual right of setoff.

Briefly, the facts were these: Air Liquide was building a hydrogenation plant and subcontracted with KBR to fabricate 77 modules to be installed in the plant. KBR struggled to comply with the delivery schedule, and Air Liquide de-scoped 20 modules from KBR and assigned them to another supplier, JV Driver Industrial Inc. KBR started an arbitration, claiming for unpaid invoices, and damages arising from the de-scoped work, change orders and disruption. Air Liquide counterclaimed for the cost it incurred for de-scoping the work and having JV Driver finish it. Air Liquide also claimed setoff of its damages against any amounts found to be owing to KBR.

The tribunal's award found damages were owed to both parties: KBR was owed unpaid invoices of \$18m, and Air Liquide was entitled to \$22m. Under the subcontract, KBR's liability to Air Liquide was capped at 20 per cent of the contract price, or about \$8m. Two of the three panellists found that the damage awards had to be set off first, before applying the cap. After setoff, KBR was ordered to pay Air Liquide \$5.2m, and the cap was found not to apply because it was greater than the amount owed.

Dissenting only on the issue of the liability cap and setoff, one arbitrator first applied the liability cap to Air Liquide's claims, reducing KBR's liability to the \$8m cap, and then set off that amount against the unpaid invoices, directing payment by Air Liquide to KBR of \$9.7m. Thus, notwithstanding their agreement on the damages initially incurred, the net difference in the arbitrator's final award was \$15m!

The Alberta Court hearing the application declined to interfere with the tribunal's majority decision, holding that:

'KBR has not cited any authorities in support of the proposition that this is the correct legal approach. Further, there does not appear to be anything explicit in the contract which imposes this requirement on the application of the set-off clause.' (Paragraph 38)

'Instead, it seems that the Panel did its best to interpret and apply the contractual clause establishing the right of set-off. Even

assuming that the majority of the Panel erred in their interpretation, that again is again at most a mixed question of law and fact. There is no extricable error in law on this ground.' (Paragraph 40)

The *Air Liquide* case highlights the significant swing in outcomes that can occur when the order of application of setoffs and liability caps are interchanged: in this case, parties swap from payor to payee. The larger the case, the more significant this swing can grow. Since the Alberta court declined to intervene and clarify the issue, and the tribunal's decision holds little or no precedential weight, the issue is still very much at large in Canada.

For the reasons set out below, the author considers the majority decision in *Air Liquide*, like the judge's decision in *Rolls Royce*, to have been in error, undermining the parties' bargained-for limitations of liability.

### What is a limitation of liability?

Limitations of liability provisions are a form of exclusion clause that are commonly found in commercial contracts, particularly in construction contracts. Such provisions may exclude *types* of liability (eg, many construction contracts exclude consequential damages, lost profits or lost business opportunity), or cap the amount of damages for which one party is liable to the other.

Typically, liability caps will be stipulated as a fixed amount, or may be expressed as a percentage of the overall contract price, subject to adjustments for changes or variations. Liability caps are also often subject to exclusions, including for liability due to fraud, gross negligence or wilful misconduct, and sometimes exclude amounts that are recovered through insurance proceeds or by way of third-party claims.

A limitation of liability clause can be found in most standard form construction contracts. For example, CCDC 2 Stipulate Price Contract includes the following general condition [emphasis added]:

'13.1.2 *The obligation of either party to indemnify as set forth in paragraph 13.1.1 shall be limited as follows:*

.1 In respect to losses suffered by the Owner and the Contractor for which insurance is to be provided by either party pursuant to GC 11.1 – INSURANCE, the minimum liability insurance limit for one occurrence, of the applicable insurance policy, as referred to in CCDC 41 in effect at the time of bid closing.

.2 In respect to losses suffered by the Owner and the Contractor for which insurance is not required to be provided by either party in accordance with GC 11.1 – INSURANCE, *the greater of the Contract Price as recorded in Article A-4 – CONTRACT PRICE or \$2,000,000, but in no event shall the sum be greater than \$20,000,000.*

.3 In respect to indemnification by a party against the other with respect to losses suffered by them, such obligation shall be restricted to direct loss and damage, and neither party shall have any liability to the other for indirect, consequential, punitive or exemplary damages.

.4 In respect to indemnification respecting claims by third parties, the obligation to indemnify is without limit.’

A similar provision can be found in the 2017 FIDIC Yellow Book [emphasis added]:

‘1.15 Limitation of Liability

Neither Party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other Party in connection with the Contract, other than under:

- (a) Sub-Clause 8.8 [Delay Damages];
- (b) sub-paragraph (c) of Sub-Clause 13.3.1 [Variation by Instruction];
- (c) Sub-Clause 15.7 [Payment after Termination for Employer’s Convenience];
- (d) Sub-Clause 16.4 [Payment after Termination by Contractor];
- (e) Sub-Clause 17.3 [Intellectual and Industrial Property Rights];
- (f) the first paragraph of Sub-Clause 17.4 [Indemnities by Contractor]; and
- (g) Sub-Clause 17.5 [Indemnities by Employer].

The *total liability of the Contractor to the Employer under or in connection with the Contract*, other than:

- (i) under Sub-Clause 2.6 [Employer-Supplied Materials and Employer’s Equipment];
- (ii) under Sub-Clause 4.19 [Temporary Utilities];
- (iii) under Sub-Clause 17.3 [Intellectual and Industrial Property Rights]; and
- (iv) under the first paragraph of Sub-Clause 17.4 [Indemnities by Contractor], *shall not exceed the sum stated in the Contract Data or (if a sum is not so stated) the Accepted Contract Amount.*

This Sub-Clause shall not limit liability in any case of fraud, gross negligence,

deliberate default or reckless misconduct by the defaulting Party.’

Subject to the typical exceptions for fraud, gross negligence, or wilful or reckless misconduct, these clauses represent the maximum amount one party may owe the other in respect of any claims under the construction contract. Put another way, they set the maximum amount one party may be indebted to the other party for claims under the contract.

**What is setoff?**

Setoff may reasonably be thought of as a mutual cancellation of debts. In Canada, setoff is divided into legal setoff and equitable setoff. Each has three required elements.

For legal setoff, the following elements are required:<sup>9</sup>

1. *Liquidated debts*: the claims between two parties must be for debts which are liquidated. Accordingly, non-liquidated claims (such as damages) and non-money claims (such as property claims or claims for specific performance) are not available.
2. *Mutuality*: the cross-claims must be between the same parties, and in the same right.
3. *Connection or no connection*: the cross-claims need not, aside from the requirement of mutuality, have any connection between them.

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*Most construction contracts have express setoff provisions giving parties the right to set off their mutual debts*

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Equitable setoff is similar, but more relaxed. Debts are not required to be liquidated, so claims for damages come into play, and the mutuality requirement is relaxed. The requirements are:<sup>10</sup>

1. *Liquidated or unliquidated claims*: including claims for damages, but not non-money claims (for example, specific performance).
2. *Mutuality*: this requirement is similar to the legal requirement, but arguably relaxed.
3. *Connection*: cross-claims must be connected in some manner.

Most construction contracts have express setoff provisions giving parties the right to set off their mutual debts: instead of parties making separate payments, the party with the larger debt may simply pay the difference between the two amounts.

## Setoff and liability caps

Parties can only set off amounts that they *owe* to each other. They may not set off against notional amounts that they do not owe. Even in the context of equitable setoff of damages claims, such setoff can only be effected once the amounts are determined by a court or arbitrator.

Now consider the following example:

'A contractor enters into a FIDIC Yellow Book agreement with an owner to deliver a new power plant, with an agreed to liability cap of \$10 million. Issues arise on the project, including significant delay, which both parties accuse the other of causing. Ultimately, the contractor is terminated and brings a claim for delay damages, termination damages, and unpaid invoices. The owner counterclaims for delay damages, including lost profit.

The tribunal finds the contractor liable to the owner for delay damages of \$17m, including \$1m in lost profit, but as profits are excluded, total damages are reduced to \$16m. On the other side, the owner is found to be liable for unpaid invoices in the amount of \$5m.'

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### *Setting off damages amounts before the application of a liability cap creates the real risk that parties will be liable for more than the maximum amount of their potential indebtedness*

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Now the question arises which to apply first: the setoff or the liability cap. Applying setoff first, the owner is owed \$11m, and the cap brings it down to \$10m. If, however, the cap is applied first, the owner's \$16m award is reduced to \$10m, and after setoff the owner would be owed \$5m. It is submitted that only the latter approach is fair and consistent with the parties' bargain.

There is little question that the \$1m in profit is not owed to the owner because of the contractual exclusion: its deduction, in the first instance, is not particularly controversial. Most observers would agree that it would be unfair for an owner to prove \$1m in lost profit and use that to set off against a debt to the contractor, where lost profit is expressly excluded. If the contractor could never be liable to the owner for lost profit, it would be wrong to reduce the contractor's award by any amount of profit.

Why then should losses in excess of an express cap be treated differently? The parties agreed that the contractor's liability to the owner would not (or could not) exceed \$10m.

Whether or not damages are proved at some greater amount is immaterial since the contractor is *not liable* for damages above the cap. In other words, the excess is not part of the contractor's debt to the owner, just as the owner's damages resulting from lost profit are not the contractor's liability.

When setoff is applied first, the benefit of the bargained for cap on liability is undermined. Consider a different example. The contractor's liability is capped at \$10m. A contractor proves damages for unpaid invoices of \$20m, and the owner proves delay damages of \$15m. Two scenarios are possible: if setoff is applied first, the contractor will be awarded \$5m. In other words, the contractor will have forgone \$15m to the owner, when it had bargained for a maximum liability to the owner of \$10m. That the money was not 'paid' is irrelevant; the lost revenue is just as real to the contractor, and is just as valuable as cash.

Moreover, in the above example, the owner *benefits* from withholding payment of the invoices. Had it paid the contractor as it should have, at the end of the same arbitration, the contractor would have been owed zero, and the owner's \$15m award would have been reduced to \$10m. Instead, because it had accrued a debt to the contractor by failing to pay invoices worth \$20m, it has improved its position by \$5m. This outcome perverts incentives and is contrary to the parties' bargain. Setting off damages amounts before the application of a liability cap creates the real risk that parties will be liable for more than the maximum amount of their potential indebtedness.

That the outcome would have been different if the damage awards were mutually paid instead of setoff should be sufficient to prove the necessity of applying a liability cap before setoff. In the previous example, had the parties exchanged two cheques, there could be no dispute that the contractor's net outcome would be plus \$10m. There is no legal or equitable reason for that outcome to be different – ie, \$5m less – because the parties elect to set off their mutual debts rather than make separate cash payments.

## Conclusion

Setoff and liability caps are a common feature of construction contracts, yet their interoperability in the claim context is not well considered. Given the lack of clarity

coming from courts, parties should consider clear, express language in their contracts to establish exactly when liability caps should be applied in circumstances of mutual debts under the contract. As argued above, allowing setoff of damages before caps are applied risks unfairly exposing one party (or both) to an amount of liability that is in excess of their contractual limits, even if actual payment of monies may not exceed the capped figure.

- 1 [2023] EWHC 1765 (TCC).
- 2 *Ibid*, para 332.
- 3 410 P.3d 767 (2017).
- 4 Para 30.
- 5 [2018] FCA 98.
- 6 *Ibid*, paras 14–15.
- 7 *Ibid*, paras 33–34.
- 8 2018 ABQB 257.
- 9 Kelly Ross Palmer, *The Law of Set-off in Canada* (Canada Law Book, 1993), 4–5.
- 10 *Ibid*, 5.

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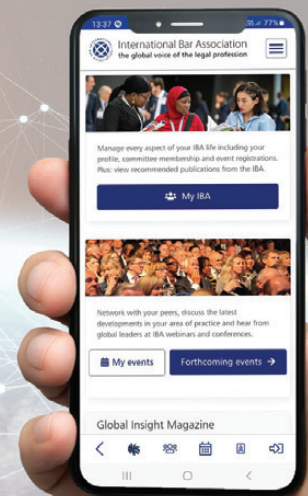


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Aerial view of empty streets during Covid-19 quarantine in Santiago de Chile. Credit: progat/Adobe Stock

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# The Covid-19 pandemic in the recommendations of the Chilean Technical Concessions Panel

Is Covid-19 a *force majeure* event? Does it give rise to a compensation of the construction costs? Has the economic regime of the concession contracts been altered by the pandemic? Should the state compensate the concessionaires for the costs caused by additional sanitary requirements imposed due to Covid-19? The authors analyse how these questions have been addressed by the Chilean Technical Concessions Panel.

## Introduction

Two and a half years have elapsed since the Covid-19 pandemic first began to impact the Chilean territory. Since then, its effects have

become noticeable in many construction and public works concession projects. In this regard, the Technical Concessions Panel for Public Works (hTCP) has issued six

Recommendations concerning the effects of Covid-19. This article analyses how the TCP has characterised this phenomenon and what consequences it has attributed to it when issuing its recommendations.

In accordance with the provisions of the Public Works Concessions Law (Concessions Law), any discrepancies arising between a concessionaire company and the Ministry of Public Works (MPW) during the execution of the public works concession contract may be submitted for consideration by the TCP<sup>1</sup> prior to resorting to arbitration. However, the same law establishes that:

‘The technical or economic aspects of a dispute may be brought to the attention of the Arbitration Commission or the Court of Appeals only when they have been previously submitted for consideration and recommendation by the Technical Concessions Panel.’<sup>2</sup>

As a result of this provision, due to the technical or economic nature of all the disputes, the submission of the discrepancy to the TCP becomes mandatory.

The TCP was established and has been operating since 18 March 2011.<sup>3</sup> Its first Recommendation was issued in 2015.<sup>4</sup> Currently, it has jurisdiction over more than 30 public works concession projects. The TCP is a permanent body composed of five professionals (two lawyers, two engineers and one economist) with jurisdiction over all public works concession projects awarded from the entry into force of Law No 20.410 on 20 January 2010. While the TCP performs certain functions that make it resemble a dispute board, it should not be equated with one. It is rather a standing body with all of its members appointed by public authorities.

The TCP does not exercise jurisdiction in the way a court or tribunal does. Instead it has to issue a well-reasoned technical and economic Recommendation.<sup>5</sup> The Recommendation is not binding on the parties; each of them can either comply with it or submit a claim to an arbitration commission (an ad hoc arbitral tribunal) or to the Court of Appeals of Santiago to resolve their dispute.<sup>6</sup> The Recommendation may be taken into account by the arbitration commission or the Court of Appeals of Santiago as a precedent for rendering the judgment.

To conduct this analysis, the following steps are followed:

1. The discrepancies submitted for consideration by the TCP are summarised.

2. The criterion applied by the TCP regarding Covid-19 and its effects is analysed.
3. Concluding remarks close the analysis.

### The summary of the discrepancies

Four out of the six Recommendations pertain to airport concessions – a type of project that was particularly affected by measures taken against the spread of the pandemic – involving the reduction of air traffic. In turn, two Recommendations concern increased costs for the concessionaire due to sanitary measures instructed by the authority to address Covid-19 in concessioned hospitals.

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*The Recommendation is not binding on the parties; each of them can either comply with it or submit a claim to an arbitration commission (an ad hoc arbitral tribunal) or to the Court of Appeals of Santiago to resolve their dispute*

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As we will see below, the characterisation of Covid-19 carried out by the TCP is not limited to airport activities or measures taken to address the pandemic’s effects in hospitals. Instead, the TCP analyses the phenomenon in a generic manner, without delving into its specific effects on each activity. This general approach might become helpful in the overall assessment of the legal consequences of Covid-19 with regard to various kinds of projects.

### Alteration of the economic equilibrium of the contract

#### DISCREPANCY D02-2021-16: DISCREPANCY DUE TO ALTERATION OF ECONOMIC EQUILIBRIUM DERIVED FROM THE PANDEMIC

The discrepancy was submitted by the concessionaire company Nuevo Pudahuel SA regarding the New Pudahuel Airport project, Chile’s main airport located in the city of Santiago. The concessionaire company requested from the TCP firstly to recognise the Covid-19 pandemic as a supervening event, whose effects on air traffic substantially and enduringly altered the economic equilibrium of the concession contract, and secondly for said economic equilibrium to be restored. The solicitor submitted two proposals: the main proposal related to a contract revision based on observed values, and an alternative proposal

related to a contract revision based on projected values. The TCP stated that:

‘[T]he pandemic caused by Covid-19 falls outside the natural, rational, and foreseeable risks of the business for which the responsibility of the Concessionaire Company extends, and therefore this aleatory event cannot not be borne solely by it.’

Subsequently, the TCP indicated that:

‘[T]he pandemic is a supervening event of nature, an extraordinary and unforeseen situation, completely beyond the control of the parties, and it has caused effects not only in various spheres and activities globally and within the country (...) [recognised] by the Ministry of Public Works itself through Official Letter No 394 of 20/03/20.’

At the same time, it maintained that:

‘[T]he Covid-19 pandemic is a supervening event, but its specific effects in this case must be evaluated considering the terms of the contract and, in any case, adopting a time horizon of several years.’

The TCP rejected both proposals put forth by the concessionaire company, merely stating that:

‘[T]he contractual framework empowers the MPW to engage in negotiations, with the purpose of jointly with the counterparty to review or to make more flexible the concession contract, due to a justified supervening cause.’

Given the non-binding nature of the Recommendation and its somewhat ambiguous wording, the concessionaire company and the MPW engaged in a controversy regarding its scope, with each party declaring itself the victor in the said discrepancy.<sup>7</sup> Additionally, the concessionaire company initiated proceedings before the International Centre for Settlement of Investment Disputes (ICSID) against the state of Chile.<sup>8</sup>

#### **DISCREPANCY D01-2021-11: DISCREPANCY REGARDING COMPENSATIONS ARISING FROM HEALTH MEASURES INSTRUCTED BY THE AUTHORITY**

This discrepancy was submitted by the concessionaire company Aeropuerto del Sur SA regarding the El Tepual Airport project, located in the city of Puerto Montt in southern Chile. The concessionaire company requested the recognition of the MPW’s obligation to compensate it due to the decrease in embarked passengers resulting from regulations due to Covid-19. As an alternative to the above, and

because the TCP cannot terminate the contract, the concessionaire company requested the TCP to establish criteria for the early termination of the concession contract by mutual agreement.

The TCP concluded that the contractual termination requirement, namely, ‘significant alteration of the economic regime of the contract,’ was not fulfilled, as the economic imbalance was caused by the pandemic as a primary cause, and not by the authorities’ actions or regulations. The acts of the authorities were not ‘sovereign acts’ per se but a consequence of the pandemic.

In addition, in its view, a *force majeure* event took place. However, since *force majeure* operates as an exoneration of liability, it is not applicable in this case as neither party had breached the contract.

Notwithstanding the above, the TCP recommended the parties renegotiate the contract to extend the concession period and suggested each of the parties to bear 50 per cent of the cost thereof.

#### **Compensation for health measures decreed by the authorities**

#### **DISCREPANCY D07-2022-9: DISCREPANCY DUE TO COST OVERRUNS RESULTING FROM THE ADOPTION OF MEASURES INSTRUCTED BY THE AUTHORITIES DURING THE PANDEMIC**

The discrepancy was submitted by the concessionaire company Salud Siglo XXI SA regarding the Antofagasta Hospital, located in the city of Antofagasta in northern Chile. The concessionaire company requested compensation for cost overruns due to measures instructed by the authorities in the context of the Covid-19 pandemic. These measures included additional requirements and an increase in the technical standard of services: new procedures and protocols that affected the services provided by the concessionaire during the operational stage. The TCP concluded in its Recommendation that:

‘The orders issued in the context of the pandemic for extraordinary measures to be implemented by the Concessionaire Company, constitute an increase in the service levels within the terms of Article 19, paragraph 3, of the Concessions Law.’

The aforementioned provision establishes that, when an increase in service levels is instructed, the MPW shall provide economic compensation to the concessionaire, for the

additional costs incurred by the concessionaire due to such circumstances.

**DISCREPANCY D03-2021-14: DISCREPANCY DUE TO REQUEST FOR COMPENSATION FOR SERVICES, REQUIREMENTS, AND CHANGES IMPOSED BY THE AUTHORITY**

The discrepancy was submitted by the concessionaire company Metropolitana de Salud SA regarding the Félix Bulnes Hospital located in Santiago. The concessionaire company requested additional costs due to requirements, increased demands, and changes imposed by the authorities as a consequence of Covid-19, which were not included in the contract or exceeded its scope. The TCP concluded that the modifications to the approved definitive project of the hospital by the MPW related to health and safety measures were additional works. However, the TCP did not find it possible to determine the value of each additional work claimed by the concessionaire.

**DISCREPANCY D04-2022-21: DISCREPANCY DUE TO DECREASE IN REVENUE DERIVED FROM THE EFFECTS OF THE PANDEMIC**

The discrepancy was submitted by the concessionaire company Aeropuerto Carriel Sur SA regarding the Carriel Sur Airport located in the city of Concepción in southern Chile. The concessionaire company claimed a decrease in revenue caused by Covid-19 and associated sanitary measures.

The TCP followed the same line of arguments as in Discrepancy D02-2021-16. In particular, it confirmed that Covid-19 was an extraordinary supervening event that led to a decrease in passenger demand and, consequently, in other commercial activities. However, these circumstances were not ‘sovereign acts’. The TCP reiterated its characterisation of the pandemic as a phenomenon that ‘falls outside the natural, rational and foreseeable risks of the business’.

Nonetheless, it maintained that the specific effects of the pandemic should be evaluated under the terms of the contract and, in any case, over a time horizon spanning over several years. It asserted that, with nine years of concession remaining, it was premature to speak of a loss of economic equilibrium. Furthermore, attempting to obtain compensation for a specific impact, as the concessionaire attempted, did not

necessarily imply the existence of a potential economic imbalance of the contract.

Ultimately, the TCP rejected the concessionaire’s proposal but recommended it to request a review of its economic aspects, which the parties were authorised to do under the contract.

*Compensation for construction costs*

**DISCREPANCY D05-2021-16: DISCREPANCY DUE TO EXTENSION COSTS AND HIGHER CONSTRUCTION COSTS**

The discrepancy was submitted once again by the concessionaire company Nuevo Pudahuel SA, regarding the New Pudahuel Airport project. The concessionaire company requested compensation from the MPW for the cost and time impact caused by the Covid-19 pandemic and the measures taken by the authorities to address it during the construction period. The concessionaire company asserted that, due to these factors, the agreed-upon costs and timeline of the project had been altered. The TCP concluded that:

‘(1) The Covid-19 pandemic and its consequences affected the duration and/or costs of the construction process under the Concession Contract; (2) In accordance with the applicable regulations of the present Concession Contract, the costs incurred by the Concessionaire Company due to the Covid-19 pandemic during the construction phase are to be borne by the Concessionaire Company.’

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*The TCP reiterated its characterisation of the pandemic as a phenomenon that ‘falls outside the natural, rational and foreseeable risks of the business’*

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Thus, the concessionaire company had to bear the construction risks and costs, while the MPW had to bear the risks and costs of delays in project completion.

It is worth mentioning that the Chair of the TCP issued a dissenting opinion stating that the concept of *force majeure* was not applicable as neither of the parties had breached the contract. Indeed, the MPW instructed the non-stoppage of the works in the public interest. However, in this case, it did so at the request of the concessionaire company, making it not a ‘unilateral act of the authority’.

### Characterisation of Covid-19 and its effects on concessions

The TCP leaned towards compensating hospital concessionaire companies, relying on the provision of the Concessions Law mentioned above, which states that measures taken by the authorities that require an increase in service levels should be compensated to the concessionaires. In these cases, the TCP disregarded the pandemic as the cause of the increase in service levels ordered by the public authorities. Indeed, the Concessions Law does not specify for what reasons the authorities may have instructed the increase in service levels. Thus, it did not matter that the increase in service levels was caused by a phenomenon that fell ‘outside the natural, rational and foreseeable risks of the business’ as was Covid-19. According to the TCP’s recommendation, the mere order to increase the service levels gave rise to compensation.

Their stance was different in the case of airports.

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*This is explicitly stated in each of the six Recommendations, referring to the Covid-19 pandemic as an event that was unforeseen at the time of the award of the contract, with effects that could not be foreseen, and are completely beyond the control of the parties, and impossible to resist.*

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As a starting point, the TCP characterised Covid-19 as a *force majeure* event or an act of God. This is explicitly stated in each of the six Recommendations, referring to the Covid-19 pandemic as an event that was unforeseen at the time of the award of the contract, with effects that could not be foreseen, and are completely beyond the control of the parties, and impossible to resist.

The TCP relied on the guidance provided by the Contraloría General de la República, the entity responsible for overseeing the legality of actions taken by the state administration, that in its Ruling No 3610/2020 dated 17 March 2020, indicated that the Covid-19 pandemic is an unforeseen and extraordinary event.

In turn, *force majeure* is regulated in Chile under Article 45 of the Civil Code. Under this provision, *force majeure* acts as an exemption from liability, suspending the obligation of the affected party to perform the obligation during the occurrence of the

*force majeure* event. The occurrence of a *force majeure* event, by itself and in the absence of different contractual agreements, does not entitle the affected party to compensation for damages.<sup>9</sup> Thus, the notion of *force majeure* does not support the concessionaire company’s claim for compensation.

To reach the conclusion regarding compensation or the lack thereof, the TCP relied on Article 22, letter b) of the Concessions Law for Public Works, namely:

‘Article 22. The legal regime of the concession during the construction phase of the work shall be as follows:

2. The works shall be carried out at the entire risk of the concessionaire, who shall be responsible for all necessary expenditures until their complete completion, whether arising from unforeseen events, *force majeure*, or any other cause. The State shall not be liable for the consequences arising from contracts entered into by the concessionaire with contractors or suppliers. However, the State shall contribute to the payment of damages resulting from unforeseen events or *force majeure* if provided for in the tender conditions.’

This broad provision was used by the TCP to reject the claims of the concessionaire companies. In other words, the characterisation of Covid-19 as a *force majeure* event or an act of God leads the TCP to the conclusion that the concessionaire companies are not entitled to compensation and, therefore, must bear the costs caused by the pandemic.

In particular, the TCP deemed that the MPW was not the author of a breach that could have caused the damages suffered by the concessionaire companies. The concessionaire companies had not incurred breaches either. Thus, they could not invoke cost compensation under the *force majeure* doctrine in their favour. As the economic harm was caused by a *force majeure* event such as Covid-19, the concessionaire companies were not entitled to demand compensation from the MPW and were required to bear the associated costs themselves, in accordance with Article 22.2 of the Concession Law.

Notwithstanding the above, Article 19 of the Concessions Law also stipulates that the concessionaire may request compensation in the event of a supervening act of a public authority.<sup>10</sup> But, because the TCP classified the Covid-19 pandemic as a nature-born *force majeure* event, since it was not an act of authority or a ‘sovereign act’, the

concessionaire company was not entitled to compensation under Article 19.

However, the TCP itself recognises that an event might have a dual nature, being both an act of God and a public authority decision at the same time. Therefore, the TCP could have adopted a stance more consistent with its overall approach to the pandemic and could have recognised that, despite the pandemic being a *force majeure* event, compensation for the governmental measures was still due to the concessionary companies.

### Final reflections

The economic equilibrium of the contract, altered by the pandemic, requires restoration for the purpose of allowing the impacted concessionary companies' investments to regain their unaffected status, by providing compensation for the damages caused directly by Covid-19 or by the instructions given by the authority as a result.

These types of contracts are administrative or public contracts. The state administration has the unilateral power to modify the contract's content to adequately satisfy public needs: a power that is acknowledged by the Concessions Law. As the power of modification constitutes an act of authority or 'sovereign act', the Concessionary Company should have the right to compensation to the extent that the requirements established in Article 19 of the Concessions Law are met. However, this was not the course of action taken by the TCP.

As we have seen, the Recommendations of the TCP have had mainly a negative outcome for the concessionary companies. Their requests for compensation were primarily based on restoring the economic equilibrium of the contract. However, the TCP has characterised the Covid-19 pandemic as an event of *force majeure*. On this basis, it has rejected the compensation requests submitted by the concessionary companies, in accordance with the risk allocation rule provided in Article 22.2 of the Concession Law.

Now, it is worth asking whether the arbitral tribunals to which these concessionary companies have resorted or will resort, will uphold or not what was decided by the TCP.

Given the limited possibilities for maintaining the economic and financial equilibrium of the concession contract in situations like Covid-19, the only alternative for improving the position of the

concessionary companies in the future is for the administration to include renegotiation clauses in the tender documents. Indeed, if another extraordinary or *force majeure* event occurs that alters the economic equilibrium of the contract, the renegotiation clauses will allow a more balanced solution in the interest of the concession system in Chile. The question is whether this alternative is in the interest of the state and whether, if such a possibility is granted, the agreements would be feasible.

### Notes

- 1 Public Works Concessions Act 1991, Art 36. The text has been consolidated, coordinated and systematised by Decree No 900 of 1996 of the Ministry of Public Works.
- 2 *Ibid* Art 36 *bis*, para 1.
- 3 *Annual Report* (Technical Concessions Panel, 2022), 7.
- 4 *Ibid*, 26.
- 5 MPW Decree No 956 (1997).
- 6 Public Works Concessions Act, Art 36, para 3.
- 7 'MOP rechaza nuevamente peticiones Nuevo Pudahuel' (La Agencia de Viajes, 8 April 2021), see <https://chile.ladevi.info/mop/mop-rechaza-nuevamente-peticiones-nuevo-pudahuel-n29805>.
- 8 *ADP International SA and Vinci Airports SAS v Republic of Chile* (ICSID Case No ARB/21/40).
- 9 Elina Mereminskaya & Álvaro Jara Burotto, 'Should the law foresee the unforeseeable? The unforeseeable trends in Chile in view of the Covid-19 pandemic' (2020) 15 (3), *Construction Law International*, 47.
- 10 Public Works Concessions Act, Art 19: 'The concessionaire may request compensation in the event of a supervening act by an authority with public powers, that it must justify, only when, cumulatively, the following requirements are met: the act occurs after the award of the concession tender; it could not have been foreseen at the time of its award; it does not constitute a legal or administrative norm issued with general effects, exceeding the scope of the industry of the concession in question, and significantly altering the economic regime of the contract.'

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Snowy, abandoned, empty construction site. Credit: maykal/Adobe Stock

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# An interdisciplinary commentary to the approach of the assessment of disruption claims from a German and an English perspective

Disruption claims in construction projects can be difficult to detect, measure and prove, and not only for a single reason. In this article, the authors review the assessment of disruption claims from a legal (German civil law) and quantum expert (English common law) perspective.

## **What is a construction contract from a legal perspective?**

At the outset of the subsequent discussion of empirical models for the assessment of disrupted construction progress, it might be helpful to recall the very nature of a construction contract or '*locatio conductio operis*'.<sup>1</sup> A construction contract is a bilateral, synallagmatic and

commutative contract which may incorporate obligatory elements (creating obligations) and dispositive elements (transferring property of materials from the contractor to the employer).<sup>2</sup> Under such a contract, civil law and common law legal systems usually regard the agreed reciprocal performance and counter performance as equal and/or equivalent (in terms of value).

Under the German Civil Code, if the parties omit to determine price as counter performance, the law deems the parties to have agreed on the usual and habitual price for the works at the place (see Section 632 (2) German Civil Code).<sup>3</sup> In South Africa, the court concludes that the contractor was entitled to ‘reasonable remuneration’.<sup>4</sup> Under English law, the English court observes that, if a contractor undertakes specific work that is not priced in the contract, the contractor is entitled to be paid a reasonable sum for the work.<sup>5</sup> The comparative approach in Article 5.1.7 of the Unidroit Principles refers a reasonable price as the default rule.

When the parties execute their contract, they decide to put their future behaviour (for instance, ‘risk events’) under the constraints and restrictions of their reciprocal contract, no matter what happens. In other words, by means of their contract the parties find a temporary community of fate (a temporary structure; in German, *Gefüge*) which aims to complete a piece of work (the target), regardless of any changes it may undergo.<sup>6</sup>

The community ends upon completion of the works (for instance confirmed by a taking-over certificate or similar) which states the date on when this community transforms into a relationship which is less intense (aimed at merely protecting the employer against defects). In summary, the law basically divides contracts *inter alia* into:

- unilateral contracts;
- bilateral (common law) and synallagmatic contracts (civil law); and
- commutative and aleatory (contingent) contracts.<sup>7</sup>

### What is disruption?

Project disruption commonly has multiple causes which can be hard to disentangle, resulting in a ripple effect that magnifies the impact on productivity. The greater the number of causes, the harder it is to keep comprehensive records and quantify losses with precision. Although a contractor may have a duty to mitigate its loss, it may not detect a disruption or realise its full impact until after the event has occurred or when the project is completed. When defining disruption, the main difference between English and German law relates to the way to assess it.

### England

The Society of Construction Law Protocol (SCL Protocol) refers to disruption as ‘a disturbance, hindrance or interruption to a Contractor’s normal working methods, resulting in lower efficiency. Disruption claims relate to loss of productivity in the execution of particular work activities’.<sup>8</sup>

In large and complex construction projects, some level of disruption to the contractor’s original plan is likely to be unavoidable. This could be due to variations to the works, late instructions, a change in site condition, or third-party actions which result in work area congestion, intermittent working, out-of-sequence work or extended working hours. When an activity is carried out less efficiently than it could have been without disruption, the contractor may have to increase the use of labour and plant resources to complete the work and stay on schedule.

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*In large and complex construction projects, some level of disruption to the contractor’s original plan is likely to be unavoidable*

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Although most standard forms of contract address some of the specific events that could lead to disruption, they do not expressly address recovery for disruption under the contract.<sup>9</sup> A contractor which makes a disruption claim is required to demonstrate that a disruptive event, which is attributable to the employer, has caused it to incur identifiable additional cost due to down time, uneconomic working, or loss of productivity.<sup>10</sup>

### Germany

The German Civil Code classifies disruption as a cause of action. However, Section 642 outlines that:

- (1) If, during the execution of the works, an act by the customer is necessary, then the contractor may demand reasonable compensation if the customer, by failing to perform the act, is in default of acceptance.
- (2) Compensation is assessed based on the duration of the default and the agreed remuneration, in addition to the contractor’s expenses or what it could earn from other utilisation of its labour.

## How to establish a disruption claim

Common law and civil law jurisdictions have different ways of establishing a disruption claim, but the results are more or less the same.

### England

In *Walter Lilly v Mackay*,<sup>11</sup> Akenhead J summarised the principles in proving a disruption claim at paragraph 486:

‘Ultimately, claims by Contractors for delay or disruption related loss and expense must be proved as a matter of fact. Thus, the Contractor has to demonstrate on a balance of probabilities that, first, events occurred which entitle it to loss and expense, secondly, that those events caused delay and/or disruption and thirdly that such delay or disruption caused it to incur loss and/or expense (or loss and damage as the case may be).’

To justify a disruption claim, one must demonstrate that:

1. an event has actually occurred;
2. the event is entitled to recovery of loss and expense;
3. notification has been given according to the contract provision; and
4. the event has caused disruption and loss of productivity.

If all four of these criteria are met, then loss can be quantified.

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*Common law and civil law jurisdictions have different ways of establishing a disruption claim, but the results are more or less the same.*

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However, when there are many or a constant flow of disruptive events, finding the causal link between the event and the loss suffered can be difficult. It is not uncommon for contractors’ site records to be patchy and full of contradictions. Without good quality contemporaneous records, it is hard to prove the extent of productivity and its impact. Also, the greater the number of causes of disruption, the harder it is to pin down when and exactly how they happened from the site records. When there are several causes of disruption, there will likely be unmeasurable effects in other areas. These losses may not be easily recognised by the contractor as part of their assessment.

### Germany

The German Federal Supreme Court requires the submission of a coherent construction progress-related presentation that outlines the actual effects of the respective disruptive events on the specific progress.<sup>12</sup> A detailed overview of when and how individual activities were supposed to be carried out must be provided, supported by details on the specific use of labour and machinery. This should then be compared with actual progress to be substantiated. In practice, expert statements will be produced and submitted. The legal approach has become an art, practised by construction business administrators.

### The causality test

To prove a claim for loss or productivity under both civil and common law, the claimant must demonstrate a causal link between an act of hindrance by the employer and the loss of productivity and additional expenditure. The claimant must prove that the loss of productivity and additional expenditure was a direct consequence of the disruptive events.

In most legal systems, evaluation and determination of quantum is contingent upon the confirmation of a cause-and-effect nexus (ie, the causality test). However, this test is aimed at confining liability to attributable reasons and should not be applied too narrowly. The causality test as a mere ‘but for’ test (meaning causation in fact) is frequently easy, while the discussion of remoteness or similar may be difficult.

To allocate liability, there are four legal constraints on the causality test which must be met. The disruptive event must be:

- bearable;
- foreseeable;
- adequate; and
- calculable.

Accordingly, the legal specification of causality (which is typically aimed at allocating liability and avoiding injustice), and their inherent limitative elements make it difficult to demonstrate a sufficiently strong factual basis for causation. While English law provides the foreseeability test,<sup>13</sup> German law proposes the adequacy test.<sup>14</sup>

*Adequate causation* is established if the act of the wrongdoer created a high risk of

generating the kind of losses incurred, or if the risk of the occurrence of such a loss has been substantially increased.<sup>15</sup>

*Foreseeable damages* arise naturally, ie: ‘according to the usual course of things, from the breach of contract itself’ and are ‘supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it’.<sup>16</sup>

### Methods in measuring disruption

The construction industry has developed various methods for measuring loss of productivity due to disruption events depending on the types and quality of records available. In England, the SCL protocol sets out a range of disruption analysis methodologies that can broadly be divided into ‘productivity-based’ and ‘cost-based’. Two of the most widely used project-based methods are the ‘measured mile analysis’ and the ‘earned value analysis’, both of which have their own advantages and disadvantages.

In Germany, the ‘Schottke pattern’ provides conclusive guidance on the assessment of disruption of progress claims, focusing on the contractual intentions of the parties subject to general legal limitations and restrictions.

This article provides a comparative commentary focusing on these three methodologies.

#### *Measured mile analysis*

The measured mile analysis is a widely accepted method for analysing disruption. The SCL Protocol defines it as a method that ‘compares the level of productivity achieved in areas or periods of the works impacted by identified disruption events with productivity achieved on identical or like activities in areas or periods of the works not impacted by those identified disruption events’.<sup>17</sup>

As measured mile analysis compares actual cost data, the productivities over the two different periods must be of the same type of work which is performed under the same physical conditions in the same project.

When limited site records have been maintained by the contractor, establishing a baseline of productivity might be extremely difficult, if not impossible. If the work is

severely disrupted throughout the project, it may be impossible to find a period that was not impacted, or no similar activities exist to allow for a like-for-like reliable measured mile for an accurate calculation. This method assumes that the data is error-free, yet incorrect data could distort the results of the analysis.

For a project that has been severely disrupted, it is rare to be able to identify an unimpacted period that is long enough to be used as comparable baseline productivity. Instead, a modified approach – a ‘baseline measured mile’ – is often deployed. When adopting this method, a less impacted section or period of the project will be chosen, and disruptive events or any other anomalies that are not an employer’s culpability will be excluded.

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*The construction industry has developed various methods for measuring loss of productivity due to disruption events depending on the types and quality of records available.*

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#### *Earned value analysis*

Earned value analysis identifies the number of man-hours reasonably included in a tender for completing certain work activities and compares this with the actual man-hours in completing the same tasks.<sup>18</sup> If all goes to plan, as the work activity progresses, the tender allowance is ‘expended’, and the man-hours allocated are ‘earned’.

For example, a contractor originally planned to take 20 hours to lay ten metres of pipework. Because of a disruptive event, the contractor took 35 hours. This means that the contractor spent 35 hours to earn 20 hours allowed in their tender, and the additional 15 hours ‘expended’ is because of productivity loss.

Earned value analysis is based on an estimated baseline productivity; it is usually derived from the contractor’s planned productivity rate in its tender. It is important that the tender allowance is accurate and achievable. A contractor may often overestimate their efficiency and productivity and not allow sufficient risks for unforeseeable work to keep its price competitive in winning a tender. To avoid any challenges to the baseline productivity, the Contractor must properly verify its tender allowance, as it was emphasised

in the judgement of *Walter Lilly v Mackay* that a contractor ‘will need to demonstrate that its accepted tender was sufficiently well priced that it would have made some net return’.<sup>19</sup>

Proving whether the estimated productivity is realistically achievable is crucial. In *Amey v Cumbria*,<sup>20</sup> Amey quantified its disruption by comparing planned output from its tender allowance with productivity actually achieved. Although the court accepted Amey’s disruption measurement method, Amey did not provide convincing evidence that its tender planned output was realistically achievable. Judge Stephen Davies commented that ‘if this approach was to be taken it ought to have been verified by being able to demonstrate that the planned outputs had actually been achieved in some cases where the disrupting events did not occur’.

The court continued that, by reference to the contemporaneous records which were produced, the contractor could have conducted a cross-check on a suitable sample basis.<sup>21</sup>

Regardless of the method chosen for measuring disruption, the underlying data must be credible.

### The Schottke pattern

Due to the 2018 change in German construction contract law, Professor Ralf Schottke, an engineer, business administrator and experienced German delay and disruption expert, developed a tool to assess disruption of progress claims. This method takes into account the contractual intentions of the parties subject to general legal limitations and restrictions.

The Schottke pattern aims to overcome a too-legalistic view on ‘cause and effect’ discussions without neglecting the existence of such legal requirements, based on the observation that construction contracts are embedded in a characteristic commercial logic known as commutative justice. The tool is fact-based and universally applicable, with five key stages.<sup>22</sup>

#### STAGE 1: DETERMINATION OF IMPEDED PART OF THE WORKS

Stage 1 of the Schottke Pattern involves an analysis of what is or was actually impeded or disrupted, and the related tender assumptions (planned expenditure) with regard to the related activity. This stage identifies:

- Planned performance of each activity based on a resource-loaded programme.
- Tender assumptions regarding the use of resources by asking the questions:
  1. What material shall be used?
  2. What is the intended or necessary working method?
  3. What equipment shall be used?
  4. What class of labour is involved?
  5. How much labour is used?

At this stage, the affected activity (in a detailed construction programme) must be identified, for instance ‘steel bending’ (regarding a floor level), by taking in account the working conditions (eg, complexity, weather, etc), working method, the equipment, labour and material (eg, dimensions, quality, workability factors, etc).

For example, a project involves significant steel bending activities, which include labour and steel, being price based on kg at €18/h. A variation impacted 1,000kg of steel bending out of an estimated 2,000kg. It emerges from the calculation that the Contractor assumed in the Contract a productivity rate equal to 0.8 hour per kilogram. This equals to a calculated tender cost at €14.4/kg.

Stage 1	Unit	Qty
Planned labour performance on the impeded activity	hour/kg	0.8

This identified figure applies to 1,000kg steel bending (the identified disrupted activity).

#### STAGE 2: DETERMINATION OF HYPOTHETICAL ‘ACTUAL COST/EXPENDITURE’ BUT FOR THE IMPEDING EVENT [CORRECTION OF ERRORS]<sup>23</sup>

With an intention to substitute the ‘measured mile’ approach, Stage 2 of the Schottke pattern analyses the details of the impeded activity. For example, the steel bending activity may be broken down into different steel bar diameters. At a subsequent step it is possible to rely on referenced resource expenditure values as recorded in manuals.

Stage 2	Unit	Qty
Corrected (hypothetical resources)		
1. Undisrupted		
Productivity	hour/kg	1
Rate (based on tender rate)		18

Stage 2 is the most important phase of this method as it corrects basic assumptions (also requested by the SCL)<sup>24</sup> with regards to hypothetical working conditions. This is because the occurrence of the disruptive event means that the contractor will not carry out the work as planned and thus, actual expenditure but for the disruptive event can usually not be identified and/or measured.

However, if exceptionally measurable, the measured data will be used.<sup>25</sup> If no value can be determined by measurement, it must be derived from the baseline contract calculation.<sup>26</sup> In this situation, the values can be estimated by taking into account either empirical or reference values from undisturbed areas.<sup>27</sup> The similarities with the measured mile approach cannot be denied. However, the Schottke pattern avoids deriving the result from actual cost (in respect disturbed and undisturbed miles); it merely uses reference data to correct the calculation assumptions, if necessary.

By comparing as-planned and hypothetical as-built data, it is possible to obtain a correction factor. Hence, this stage aims to understand what the contractor was supposed to expend compared to what it planned to expend (in terms of resources) as per tender.

**STAGE 3: DETERMINATION OF ‘ACTUAL COST’**

This takes into account the impeding event and eliminates extrinsic or irrelevant sources of additional expenditure (such as learning curve of steel bending gang, insufficient equipment, or temporary raw material shortage).

Stage 3	Unit	Qty
Determine as-built productivity rate (disrupted)	hour/kg	1.4

**STAGE 4: EXTRAPOLATION OF TENDER RATES BY USING CORRECTED (HYPOTHETICAL) VALUES FROM STAGE 2**

Stage 4	Unit	Qty
Extrapolation of tender rates based on corrected values $1 + 0.8 \times (1.4 - 1.0) = 1.32$	hour/kg	1.32

**Intermediate result:**

Undisrupted	$0.8 \text{ h/kg} \times 18 \text{ €/h} = 14.4 \text{ €/kg}$	} 0.94 %
Disrupted (actual costs)	$1.4 \text{ h/kg} \times 18 \text{ €/h} = 25.2 \text{ €/kg}$	
Disrupted (corrected)	$1.32 \text{ h/kg} \times 18 \text{ €/h} = 23.76 \text{ €/kg}$	

At this stage, the previously ascertained value applies in order to extrapolate applicable tender rates.

**STAGE 5: EVALUATION**

The German Schottke pattern does not intend to substitute the evidence for cause and effect, but it provides a reasonable and appropriate method to adjust the original price in lieu of introducing a foreign element of compensation on a ‘cost plus’ basis. It allows the users to:

- take into account evidence for cause and effect;
- restore the contractual equilibrium in a sensitive and reliable manner by adapting the price to the changed circumstances based on resource management data;
- rely on corrected tender rates rather than tender assumptions; and
- extrapolate a new price, or, in other words, determine an unknown value outside of a set based on the existing curve.

**Conclusion**

In assessing disruption, it is important to bear in mind that disruption by an employer’s risk event means interference with the contractor’s freedom to manage the works efficiently, and due expedition of the work according to the appropriately planned resources originally included in the contract sum. To restore the contractual equivalence of performance and counter performance, a pragmatic and rational approach in measuring loss of productivity due to a disruptive event is normally adopted, depending on the circumstances surrounding the disrupted works. It is important to clearly explain the reason for the measurement method chosen, and to set out the causation, liability, and the associated losses comprehensively and logically.

Any method of disruption must involve identifying, analysing and costing relevant or consequential resources and should ascertain the actual additional expenditure. High quality, accurate site records are essential.

Regardless of the method, the underlying data must be credible and reliable.

The ‘measured mile’ method identifies the actual productivity rate of an undisrupted progress mile as the baseline, instead of using tender allowance based on assumptions, to compare against an impacted period. By contrast, the earned value method adopts tender allowance instead of actual productivity rates achieved as the baseline.

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*Regardless of the method, the underlying data must be credible and reliable.*

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The Schottke pattern considers tender allowances as unrealistic and not achievable, and new productivity rates should be derived from tender resource allowances to reflect the hypothetical actual resource allowances, subject to the application of correction factors. This is to assume that when the work is severely disrupted, it may be impossible to ascertain the actual allowances of a (hypothetical) planned undisrupted work progress.

As much as we like to emphasise the importance of theories and maxims, in order to move forward and evaluate the contractor’s loss of productivity with accuracy, good record keeping on the use of resources and understanding of the contractor’s calculation of tender allowances is key. A reliable database is imperative in restoring the equivalence of price and expenditure by evaluating the impact on the contract price as a result of the disruptive events. A contractor’s hypothetical, and frequently inaccurate or speculative assumptions in its initial contract price, and its own culpable (coincidental or incidental) losses or gains, should be eliminated.

*This article is based on a presentation given at the DRBF Central and Eastern Europe Conference at Vienna, Austria, on 10 March 2023.*

#### Notes

- 1 Translation from Latin: Letting and hiring of a piece of work.
- 2 Robert Joseph Pothier, *Oeuvres de R.-J. Pothier: contenant les traités du droit français*, (Forgotten Books, 2019), Töme III, 1825, Part 7, s 2 no 397.
- 3 *Ibid*.

- 4 *Compagnie Interfricaine de Travaux v South African Transport Services and Others* (680/89) [1991] ZASCA 16; 1991 (4) SA 217 (AD); (21.3.1991).
- 5 English House of Lords, *Thorn v London Corp.* (1876).
- 6 Larenz, SchuldR, AT, s 2 V.
- 7 Henry Thomas Colebrooke, *Treatise on Obligations and Contracts*, Part I, 1818, 16.
- 8 The Society of Construction Law Protocol, 2nd edition, paragraph 18.1.
- 9 *Ibid*, paragraph 18.4.
- 10 Julian Bailey, *Construction Law*, (Volume II, 3rd edition, London Publishing Partnership, 2020) 11.184.
- 11 *Walter Lilly & Co Ltd v Mackay* [2012] EWHC 1773 (TCC).
- 12 Federal Supreme Court, Judgment dated 24.02.2005, ref. VII ZR 225/03.
- 13 *Hadley & Anor v Baxendale & Ors* [1854] EWHC J70.
- 14 See German Federal Supreme Court NJW 2002, 2232 (2233); German Federal Supreme Court NJW 1972, 195 (197).
- 15 See German Federal Supreme Court NJW 2002, 2232 (2233); German Federal Supreme Court NJW 1972, 195 (197); Tobias Wagner, Limitations of Damages for Breach of Contract in German and Scots Law - A Comparative Law Study in View of a Possible European Unification of Law, [2014] HANSE LAW REVIEW (HanseLR) [Vol 10 No 1], 73, 83.
- 16 *Hadley & Anor v Baxendale & Ors* [1854] EWHC J70.
- 17 The Society of Construction Law Protocol, 2nd edition, paragraph 18.16(a).
- 18 *Ibid*, paragraph 18.16(b).
- 19 *Walter Lilly & Co Ltd v Mackay* [2012] EWHC 1773 (TCC), paragraph 486 (d).
- 20 *Amey LG Ltd v Cumbria County Council* [2016] EWHC 2856 (TCC).
- 21 *Ibid*, paragraph 18.33.
- 22 In order to compare the Schottke pattern with the measured mile analysis it would be necessary to compare:  
Measured unimpacted mile  $\triangleq$  2.0  
Measured disrupted mile  $\triangleq$  3.0
- 23 At this stage the (hypothetical) necessary use of resources for the undisturbed construction activity must be determined. Stage 2 is aimed at determining the actual resource input for the part of the service and remuneration that was not impacted by the impediment, but would have been spent even without the impediment having occurred.
- 24 See SCL Delay and Disruption Protocol, 2nd edition, 2017, at 18.9 and 18.16.
- 25 Schottke, *Praktikable Vereinfachungen der wirtschafts-, rechts-, und baubetriebs wissenschaftlichen Theorie zu den fünf Nachweisschritten und Konsequenzen* bzgl. s 650c BGB, Part III, BauWI 2021, 69, 76.
- 26 *Ibid*, 17, 21.
- 27 Schottke, *Praktikable Vereinfachungen der wirtschafts-, rechts-, und baubetriebs wissenschaftlichen Theorie zu den fünf Nachweisschritten und Konsequenzen* bzgl. s 650c BGB, Part III, BauWI 2021, 69, 76.

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## ***FIDIC Red Book Contract: An International Clause- by-Clause Commentary*** **Edited by Christopher R. Seppälä**

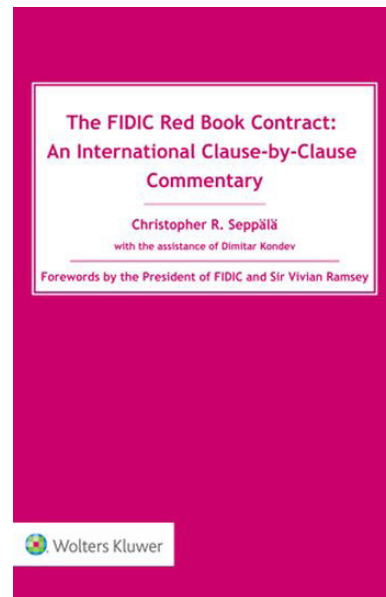
Published by: Wolters Kluwer

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Publication date: May 2023

*Reviewed by Thayananthan Baskaran and  
Shaagita Rajenthiran*



**T**he *FIDIC Red Book Contract: An International Clause-by-Clause Commentary* by Christopher R. Seppälä provides a comprehensive analysis of the FIDIC Red Book contract, the most commonly used FIDIC contract. This book is an essential supplement to practitioners in understanding and navigating its complexities, as it offers a detailed explanation of each clause in the contract, helping readers ascertain the rights and obligations of the contracting parties.

The *Commentary* is well researched and backed by international legal principles and authorities from common law as well as civil law jurisdictions. As the author acknowledges that the earlier editions of the Red Book were modelled closely on an English standard form of contract conditions, the author seeks to cite civil law and international legal material as the FIDIC forms are not intended for use only in common law jurisdictions but universally.<sup>1</sup> The author also offers practical insights and examples to further illustrate the concepts discussed.

The book consists of five chapters. Chapter 1 serves as a general introduction to the book and serves as an excellent starting point for readers: the author's comprehensive introduction provides a solid foundation for the rest of the book, setting the stage for a detailed overview of what to expect in subsequent chapters.

In Chapter 2, the author compares the common and civil law positions in relation to the usual issues that arise under international construction contracts. In the course of making this comparison, the

author delves into the origins of these two systems of law to illustrate the differences in these systems in relation to international construction contracts.<sup>2</sup> Observing that parties to a FIDIC contract may elect to be governed by international legal principles, the author also provides a consideration of the International Institute for the Unification of Private Law (UNIDROIT) Principles and its relevance to a FIDIC contract.<sup>3</sup> The author concludes that the UNIDROIT Principles may be useful as a resource to fill in gaps or to assist in the interpretation of domestic law.<sup>4</sup>

Chapter 3 focuses on the different approaches taken by state courts in civil and common law countries as well as the UNIDROIT Principles in contract interpretation. The author explains that the UNIDROIT Principles may be stated to reflect best practice as far as the law of international commercial contracts is concerned as the UNIDROIT Principles have been prepared by experts from both civil and common law systems.<sup>5</sup>

Chapter 4, which forms most of the book, provides a clause-by-clause commentary. The commentary begins with the main changes from the Red Book 1999 and related provisions, followed by an analysis of each clause, related law relevant to the provision, and finally suggests improvements to certain clauses.

The author explains key clauses such as Clause 18: Exceptional Events. Through detailed analysis and practical examples, the author explores the circumstances in which a

party may be relieved temporarily from performing any obligations under the contract if prevented from doing so by an exceptional event and the further relief to which it may be entitled to. Under Sub-Clause 18.6: Release from Performance under the Law, the author delves into the doctrine of frustration under English law and the doctrine of impracticability under United States law, establishing a common ground between the systems that the rarity of the situations in which the doctrines can be invoked so as to enable a party to be relieved from a contract helps explain the practical importance of Clause 18.<sup>6</sup>

The final chapter of the book is a practical explanation on FIDIC forms relating to the Dispute Avoidance/Adjudication Board, as well as miscellaneous documents included in the Red Book 2017 comprising, amongst others, an advisory note from FIDIC regarding building information modelling systems and forms of securities. In similar

fashion to the preceding chapter, the commentary begins with the main changes from the Red Book 1999 and related clauses followed by an analysis and finally suggested improvements.

Overall, this book is an excellent resource for anyone working with the FIDIC Red Book contract, as the book provides authorities from both civil and common law jurisdictions for a universal application. The thorough and well-researched analysis, coupled with practical insights and examples, makes it an invaluable tool for understanding the intricacies of this FIDIC form.

#### Notes

- 1 *Commentary*, 3–5.
- 2 *Ibid*, 52–54.
- 3 *Ibid*, 138–139.
- 4 *Ibid*, 151.
- 5 *Ibid*, 177–181.
- 6 *Ibid*, 1,088–1,089.

## ***FIDIC Contracts in the Americas***

## ***FIDIC Contracts in Africa and the Middle East***

**Edited by Dr Donald Charrett**

### ***FIDIC Contracts in the Americas***

Published by Informa Law, Routledge  
2023

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370 pages, £150

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### ***FIDIC Contracts in Africa and the Middle East***

Published by Informa Law, Routledge  
2023

ISBN 9781032074399

452 pages, £150

Publication date: 20 September 2023

*Reviewed by Dr Cyril Chern*

**D**r Donald Charrett has once again brought clarity to the operational side of FIDIC contracts in the latest books in the FIDIC Contracts series (of which he is the editor).

In total, the five books in the series cover over 53 jurisdictions, utilising 110+ jurisdictional experts with in-depth knowledge of their particular jurisdictions, all marshalled into the comprehensive texts edited by Dr Charrett. These new titles are *FIDIC Contracts in the Americas* and *FIDIC Contracts in Africa and the Middle East*, which follow on from the great success of his other leading texts in this series: *The International Application of FIDIC Contracts* (2019), *FIDIC Contracts in Asia Pacific* (2021), and *FIDIC Contracts in Europe* (2021).

These new titles continue in the tradition of showing the practical side to the application of the FIDIC contracts in the various jurisdictions. For each region, the intricacies and difficulties of dispute resolution and the use of FIDIC contracts are shown, so that any practitioner can easily see the legal situation

and what obstacles may or may not be encountered in the use of FIDIC contracts in any of the countries covered. Each of the leading countries in the region of these books is covered and each also deals with the current construction conditions, legal conditions, and interaction with FIDIC contract forms.

As an example, in the title dealing with the Americas the various chapters are written by leading lawyers and experts in the various countries in which FIDIC operates, covering issues which are necessary to understand before doing business there. Thus, in the chapter on applying FIDIC contracts in Mexico, one section deals with what special provisions in the Particular Conditions are necessary for consistency with applicable laws in Mexico. This is written by a leading legal practitioner in Mexico and covers all that one would need to know as to the use of FIDIC contracts in that country.

For example, a typical FIDIC notice provision states that notice must be given within 28 days of any event, the result of which is that the date for completion 'is or will be delayed' – what does this mean, what is the notice to look like and what is it to say? This is where the problem starts. If one wanted to know whether this is good law in Chile, this newest book points out that in Chile the law is not clear as to this sort of provision, and it remains to be seen whether this provision will be given effect under Chilean law as it precludes a party from performing actions in defence of its rights. It can be equated to a

statutory limitation provision, and it might not be deemed acceptable to reduce four or five years of the statutory limitation period to 28 days. Such a limitation may be deemed contrary to Chilean public policy, as it would dramatically reduce and shorten access to justice – a very valuable point to be aware of for any practitioner who is not from Chile.

This manner of presentation for each country in the series holds true for both new books. As an example in *FIDIC Contracts in Africa and the Middle East*, the chapter on applying FIDIC contracts in Angola has a section covering which FIDIC General Conditions are incompatible or inconsistent with governing law of the contract in Angola. This is all valuable information for those labouring in the field of construction contracts.

All of this is edited and put together by Dr Charrett, and comprises the essence of his long and exemplary career as barrister, arbitrator, mediator, expert and dispute board member with vast international experience practising in technology, engineering and construction disputes. His ability to synthesise the various countries and their experts into these two new editions makes for outstanding reference books which are a pleasure to read and understand.

These are 'must have' and 'go-to' books for any contractor, solicitor, barrister, engineer and employer who uses FIDIC contracts. In particular, the information contained therein will save time and money for all those who use them – I highly recommend these books.

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

**By Eckart Brödermann**

Published by Wolters Kluwer 2023

ISBN 9789403503370

832 pages, £192

Publication date: 15 May 2023

*Reviewed by Thayananthan Baskaran and Hanisah Rusli*

**V**arious laws may be relevant to an international construction contract. For example, the law of the state in which the site is situated, the law of the contract and the law applicable to dispute resolution proceedings. The law of the state in which the site is situated is dependent on the geographical location of the site and not on the agreement between the parties. The law of the contract and the law applicable to the dispute resolution proceedings are, however, dependent on the agreement between the parties. The parties may find it difficult to agree on the law applicable to the contract as they may be from different legal traditions, for example, the employer may be from a civil law jurisdiction, while the contractor may be from a common law jurisdiction. Even if both parties are from a common law jurisdiction, a party may be uncomfortable agreeing to the law of the other party's state being applicable to the contract, simply because the party is not familiar with such laws.

The UNIDROIT Principles of International Commercial Contracts (the Principles) seek to address these difficulties by offering a codified set of rules that are drawn from various legal traditions. By way of background, UNIDROIT, or the International Institute for the Unification of Private Law, as the organisation is known in full, was founded as an organ of the League of Nations. At present, it is an intergovernmental organisation with 64 member states acting on the basis of the UNIDROIT Statute.<sup>1</sup>

The origins of the Principles can be traced to 1968 when, based on a dialogue initiated by the Secretary-General of UNIDROIT that year, the Governing Council of UNIDROIT included in its working programme for 1971 the goal of 'progressive codification of the law of contractual obligations'.

The goals of the *Commentary* are expressly stated to be:

- to provide an overview in a nutshell for each of the 211 articles;
- to convey trust in a developed, pragmatic and sophisticated contractual regime, conveying personal experience of confidence in the quality of the Principles and the process of their making;
- to provide short and 'compact' comments to key issues; and
- to emphasise practical aspects of using the Principles, including a discussion of the limits of any given rule and the options for practitioners.<sup>2</sup>

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

The Official Comments on the Principles confirm that they are not limited to 'ordinary exchange contracts', but extend to 'complex transactions in particular long-term contracts'.<sup>3</sup> The Principles may therefore be adopted for international construction contracts, which are long-term complex transactions. In this context, two articles of the Principles are of particular interest.

The first is Article 2.1.18, which provides for the modification of the terms of a contract: 'A contract in writing which contains a clause requiring any modification or termination by agreement to be in a particular form may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has reasonably acted in reliance on that conduct.'

Article 2.1.18 strikes a reasonable balance between the commercial need for certainty on one hand, and preventing unconscionable conduct on the other, by providing, generally, that if a contract provides for modification of its terms in a particular form then that form must be complied with if the modification is to be effective. To this general rule there is then the exception that a party may be

stopped from insisting on such requirements of form due to its conduct, if the other party has relied on such conduct.<sup>4</sup> This will apply to international construction contracts, which often provide that any modification of the terms of the contract is to be in writing and signed by the concerned parties.

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

Again, a good balance is struck between a general duty to cooperate, which is then tempered by a limit of reasonableness. The reasonable limit, as the *Commentary* explains,<sup>5</sup> may be viewed from the following aspects: (1) costs; (2) the economic balance agreed upon in the contract; and (3) any possible information asymmetry of the parties.

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

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

‘2.2 Assistance

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

- (a) copies of the Laws of the Country which are relevant to the Contract but are not readily available; and
- (b) any permits, permissions, licenses or approvals required by the Laws of the Country (including information required to be submitted by the Contractor in order to obtain such permits, permissions, licenses or approvals):
  - (i) which the Contractor is required to obtain under sub-clause 1.13 [Compliance with Laws];
  - (ii) for the delivery of Goods, including clearance through customs; and
  - (iii) for the export of Contractor’s Equipment when it is removed from the Site [...]

4.6 Co-operation

The Contractor shall, as stated in the Specification or as instructed by the Engineer,

co-operate with and allow appropriate opportunities for carrying out work by:

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

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

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

If the Contractor suffers delay and/or incurs Cost as a result of an instruction under this Sub-Clause, to the extent (if any) that co-operation, allowance of opportunities and coordination was Unforeseeable having regard to that stated in the Specification, the Contractor shall be entitled subject to sub-clause 20.2 [Claims For Payment and/or EOT] to EOT and/or payment of such Cost Plus Profit.’

In this second edition, the *Commentary* includes an annex to Article 5.1. This annex provides a useful checklist for construction contracts. The annex also suggests how the UNIDROIT principles may be used with the FIDIC contracts.

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

Notes

- 1 *Commentary*, XIII.
- 2 *Ibid*, 20–21, para K2.
- 3 *Ibid*, 25–26, para A1.
- 4 *Ibid*, 134–135, Art 2.1.18, paras A–C.
- 5 *Ibid*, 229–232, Art 5.1.3, paras A–D.

## Construction Law International

### Guidelines for submission of articles and updates from around the world

Articles should be submitted to [dint.submissions@int-bar.org](mailto:dint.submissions@int-bar.org).

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The author's name will appear with title but without post-nominal letters, etc. Please provide a very short description (<20 words), which should include the author's name, firm or organisation, city and email. For example: '[Name] is a [role] at [firm] in [city] and can be contacted at [email].'

As this publication is aimed at busy lawyers, please provide a 50- to 100-word summary, which would serve as the 'standfirst' (or introductory paragraph). This summary could be written in the form of a question or could state a problem that the article then deals with, or could take the form of some bullet points. Article titles should be 5–10 words long.

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

**eyeWitness to Atrocities** begins with a simple vision: a world where the perpetrators of the worst international crimes are held accountable for their actions. As an initiative of the **International Bar Association (IBA)**, with the support from **LexisNexis Legal & Professional**, the eyeWitness to Atrocities app provides a means of documenting human rights atrocities in a secure and verifiable way so that the material can be used as evidence in a court of law.

Every day, around the world, human rights defenders, investigators, journalists and ordinary citizens capture photos and video of atrocities committed by violent and oppressive states and groups. eyeWitness provides these individuals with a tool to increase the impact of the footage they collect by ensuring the images can be authenticated and, therefore, used in investigations or trials.

With the eyeWitness mobile app, users capture photos or videos with embedded metadata that shows where and when the image was taken and confirms that it has not been altered. The images and accompanying verification data are encrypted and stored in a secure gallery within the app. Users then submit this information directly to a storage database maintained by the eyeWitness organisation, creating a trusted chain of custody. Users retain the ability to share and upload copies of their now verifiable footage to social media or other outlets.

eyeWitness becomes an advocate for the relevant footage it receives, ensuring it is used to promote accountability for the atrocities filmed. An expert legal team analyses all footage received and identifies the appropriate authorities, including international, regional or national courts, to investigate further. eyeWitness also works closely with organisations already documenting such crimes to incorporate the app into existing workflows that seek accountability for these same crimes.

By offering a solution to the evidentiary challenges of mobile phone footage, the eyeWitness app empowers those courageous individuals who are capturing footage with the ability to use these the images to bring the perpetrators of serious international atrocity crimes to justice.

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

