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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INTERNATIONAL BAR ASSOCIATION
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EU Corporate Sustainability Due Diligence Directive: what it means for the construction sector

Unforeseen circumstances and contract rebalancing

Exploring interim relief powers of emergency arbitrators and dispute adjudication boards

International Bar Association Events 2025

Conferences

IBA Annual Litigation Forum: The future of litigation
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IBA/ABA 25th Annual US and Europe Tax Practice Trends Conference
9 – 11 April Hotel Okura, Amsterdam, Netherlands

34th Annual IBA Communications and Competition Law Conference
28 – 29 April Paris, France

Global insurance trends for 2025 – Transactions, Regulation and Disputes
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40th Annual IBA/IFA Joint Conference
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40th IBA International Financial Law Conference
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Building the Law Firm of The Future
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18 – 20 May The St. Regis Florence, Florence, Italy

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2nd IBA African Competition Law Conference
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IBA/ABA 17th Annual US and Latin America Tax Practice Trends Conference
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11th Annual IBA World Life Sciences Conference
11 – 13 June Boston, Massachusetts, Boston, USA

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IBA Law Firm Management Committee Academy for Leaders
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Law Firm Management Committee Latin America Conference - Building the law firm of the future
8 – 9 September São Paulo, São Paulo, Brazil

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5th Asia-based International Financial Law Conference
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12 – 13 September The St Regis Florence, Florence, Italy

Biennial IBA African Regional Forum Conference - The leading-edge lawyer: Integrating technology, deciphering trends, and embracing ESG-driven transformative learning
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2–7 NOVEMBER
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Rule of Law Symposium 2025
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Building the Law Firm of the Future
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10th Annual Corporate Governance Conference
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How lawyers can use AI in daily work: a practical introduction on large language models and legal prompt engineering – session two
28 April 1300 - 1400 BST

Healthy minds, successful futures: wellbeing in legal education
28 April 1400 - 1500 BST

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Full and further information on upcoming IBA events can be found at:

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REGULARS

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Eco-friendly building with vertical garden in modern city. Credit: Gatot/Adobe Stock

FROM THE CO-CHAIRS

Dear ICP Committee Members,

Another quarter has passed, and we're pleased to report that the IBA International Construction Projects Committee (ICP) remains as strong and vibrant as ever. Our commitment to advancing international construction law continues with full force.

The past few months have been particularly active for the ICP. From 27 to 29 March 2025, we hosted the 9th Biennial Conference on Construction Projects from Conception to Completion at the Excelsior Hotel Gallia in Milan, Italy.

The event was a resounding success, drawing more than 200 attendees. Feedback was overwhelmingly positive. The panels were thoughtfully structured and well-executed, and we had the pleasure of reconnecting in person during a memorable dinner at the iconic Palazzo Parigi. We were also pleased to welcome many newcomers to the ICP community and look forward to their continued integration into the group.

We also held our traditional Working Weekend, focused on welcoming new ICP members and strengthening our sense of community. This event, limited to 60 participants, took place this year in one of the world's most beautiful cities: Rio de Janeiro. In addition to four panels organised by our subcommittees, we enjoyed two receptions, a seafood barbecue dinner, and a sightseeing tour that included visits to Corcovado, Christ the Redeemer and Sugarloaf Mountain. We encourage everyone to apply for the 2026 edition – details to be announced soon.

Looking ahead, we're excited to confirm that preparations are well underway for our substantive sessions and social events at the IBA Annual Conference, which will be held from 2 to 7 November 2025 at the Metro Toronto Convention Centre in Toronto, Canada. Moderators and speakers will be confirmed by July, and we're working closely with our subcommittees to deliver another outstanding programme. A call for expressions of interest to speak at the Toronto sessions will be circulated to all ICP members shortly.

Our agenda for Toronto is as follows:

Monday 3 November
1430–1545: Financing mega construction projects
1615–1730: How cultural backgrounds impact the effectiveness of alliancing, partnering & collaborative contracts – and the disputes that arise

Wednesday 5 November
0930–1045: Contracting for projects relying on innovative technologies: do's and don'ts
1430–1545: Risk allocation and force majeure revisited in the context of climate change and extreme weather
2000–2230: ICP Dinner

Thursday 6 November
1430–1545: Decarbonisation, climate resilience and regulatory change: designing, building and operating infrastructure under new realities
1615–1730: ICP Business Meeting

Friday 7 November
0830–1400: ICP Excursion

As always, we look forward to reconnecting at the traditional ICP Dinner. In addition to the great food and camaraderie, this year's dinner will feature the return of the in-person Hard Hat Ceremony, during which we'll formally welcome incoming Co-Chairs Doug Oles and Aarta Alkarimi, along with our newly appointed officers and subcommittee chairs. And of course, the Friday excursion returns – stay tuned for details coming soon.

Finally, we extend our heartfelt thanks to all ICP officers for their dedication and efforts. We look forward to seeing you all in Toronto.

Warm regards,

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Co-Chairs
IBA International Construction Projects Committee

FROM THE EDITORS

Dear readers,

We are delighted to introduce the April issue of Construction Law International (CLInt), after the highly successful 9th Biennial Conference on Construction Projects from Conception to Completion in Milan last month.

We have country updates from Chile and India. We also have feature articles on:

1. the European Union's recent Corporate Sustainability Due Diligence Directive (CS3D);
2. unforeseen circumstances and contractual relationships, which was first presented at the International Bar Association Annual Conference in Paris in 2022 and is now being published in CLInt in two parts;
3. interim relief powers of arbitrators and dispute adjudication boards, which looks at the potential of such relief being complimentary and the risk of a clash;
4. recent English judgments that have reaffirmed the need for certainty in contractual interpretation; and
5. the United Nations Commission on International Trade Law's (UNCITRAL's) new adjudication clause and its impact on dispute board proceedings.

Finally, we were delighted to review a collection of essays on the law of net zero and nature positive, which have been edited and compiled in a book. We are also delighted to include a review of the new edition of Julian Bailey's book on construction law, which has already become the main reference text on the topic.

We thank our contributors for sharing their experience and insights. As always, we encourage all International Construction Projects Committee members to contribute to CLInt by submitting articles to Thayananthan Baskaran at thaya@baskaranlaw.com.

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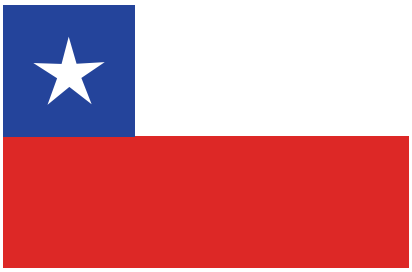

COUNTRY UPDATE: CHILE

Chilean Supreme Court accepts that a lump sum is not an obstacle to the payment of additional works

Elina Mereminskaya
Independent Arbitrator, Santiago

In the judgment of 15 October 2024, 'Ingeniería Eléctrica Eramus Limitada con Fundación Integra' Docket No 102.906-2023, the Chilean Supreme Court ruled on the cassation appeals filed by both parties in the case.

The project in question was a kindergarten, whose construction was assumed by Ingeniería Eléctrica Eramus Limitada ('Eramus'). A single, global and fixed lump sum price was agreed, determined in accordance with the estimate submitted by the contractor, based on the unit prices for various items. The parties were required to enter into special agreements in the event of any alterations and/or modifications to the works entrusted. Under such an agreement, any extension or modification of the contracted works had to be carried out with the order or consent of the principal, and a special price for such works had to be established on the basis of the unit prices of the contractor's original estimate.

The trial court ordered the owner to pay the construction company for increased costs for over-excavation and increased costs for the construction of an orchard. However, it rejected the claim for consequential and moral damages resulting from Eramus's recourse to the financial system to improve its weakened financial situation, caused by Integra Foundation's ('Integra's') alleged breaches. It also rejected the reimbursement of the delay liquidated damages collected by Integra due to the two-month delay in completion. The judgment was upheld on appeal.

Integra challenged the second instance ruling before the Supreme Court by way of cassation on the merits.

First, it pointed out that the orchard did not constitute additional work, contrary to the decision of the first instance. It argued that the claim for an additional payment for the work described in the contract went against the claimant's own acts because it consented to a lump sum contract, which expressly provided for a single price for the total construction, without being able to allege increases or decreases at a later date.

Second, it claimed that the challenged judgment partially accepted the claim without interpreting the contract with the true intention of the contracting parties, in accordance with Article 1560[1] of the Civil Code. Indeed, the contract was agreed under the lump sum modality in order to not incur additional expenses. Therefore, it argued that the judgment violated the law of the contract, provided in Article 1545 of the Civil Code.[2]

Third, it claimed that the contested judgment contravened Articles 1708[3] and 1709[4] of the Civil Code, by ordering the payment of sums for increased costs for over-excavation and the construction of an orchard; obligations that were deemed to be accredited only with the witnesses' testimony, that is, the stipulations of a lump sum contract were modified, despite the existence of an express rule that prohibited it.

The Supreme Court considered that Integra was seeking to alter the facts established in the judgment, while insisting that the claim should have been rejected based on factual circumstances that were not established in the trial.

Because the cassation appeal before the Supreme Court did not allow altering the facts established by the lower courts, the cassation appeal filed by the respondent was rejected.

In turn, Eramus challenged the judgment of the second instance because, in its opinion, it violated Article 1545 of the Civil Code, which establishes the binding force of contracts for the parties.

It claimed that the delay in the delivery of the works was due, first, to the fact that the respondent deliberately failed to sign the contractual addendum, whereby the extension of time in the execution of the work was to be acknowledged as a consequence of the performance of additional work; despite the fact that such work had been previously authorised by the respondent and, likewise, approved once it had been completed. Second, the claimant argued that the delay was due to the fact that the respondent did not comply with its duty to obtain essential and vital permits for the proper progress of the work, which slowed down the completion of the overall work for a period of at least two months. Consequently, the delay was not attributable to the claimant and the application of the delay liquidated damages was unjustified.

Likewise, it alleged that Article 1546[5] of the Civil Code, which establishes the obligation to fulfil contracts in good faith, had been violated. It stated that the collection of liquidated damages for delay was contrary to good faith, the delay not being attributable to the contractor.

Finally, it stated that the judgment was wrong in rejecting the claim for consequential and moral damages. It stated that the judges erroneously interpreted the rule in question, when the judgment concluded that there was no causal relationship between the breach of contract by the respondent, and the claimed consequential and moral damages because these were due to the claimant's decision making. However, in the claimant's opinion, the theory of the necessary and adequate cause of the damages suffered by it should have been applied, as it was the non-payment of large sums to a small company that would inevitably force it to cover the deficit caused by resorting to the banking financial system, with all the costs that this implied.

The Supreme Court ruled as follows: 'From the foregoing, it is clear that the claimant's allegations seek to establish new factual assumptions not established by the judges, such as the cause or reason for the delay in the delivery of the works by the claimant, which would enable it to request the refund of the fine and compensation for consequential and moral damages arising from the breach of contract; allegations that are based primarily on a fact not established in the case.'

The Supreme Court pointed out that only the judges of the merits are empowered to establish the facts of the case, and once this task has been carried out correctly, in view of the merits of the evidence provided, they are immutable, and cannot be reviewed by means of the cassation, unless the violation of the laws regulating the evidence has been denounced in an effective manner, which was not the case here.

For these considerations, the cassation appeal on the merits was rejected. The positive effect of this decision is to recognise that the lump sum agreement is not a blank cheque to cover any additional or extraordinary work. The lump sum does not constitute an approval of such work, which must be compensated separately. As obvious as this conclusion may seem to construction professionals, its confirmation by the Supreme Court is valuable for the Chilean construction industry.

Notes

1 'The intention of the contracting parties being clearly known, it must be followed rather than the literal words.'
2 'Every contract legally entered into is a law for the contracting parties, and cannot be invalidated except by their mutual consent or for legal causes.'
3 'Witness evidence shall not be admissible in respect of an obligation that should have been recorded in writing.'
4 'Acts or contracts containing the delivery or promise of a thing worth more than two tax units must be recorded in writing.'
5 'Contracts must be executed in good faith, and therefore bind not only to what is expressed in them, but to all things that arise precisely from the nature of the obligation, or that by law or custom belong to it.'

Elina Mereminskaya is an independent arbitrator in Santiago and can be contacted at **em@emereminskaya-arb.com**.

COUNTRY UPDATE: INDIA

Achieving disaster risk reduction in the construction sector in India

Gagan Anand
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In July 2024, the coastal region of India faced unprecedented rainfall, which led to severe landslides, resulting in a great loss of people and property. The district of Wayanad in Kerala was set to receive its annual rainfall, when an increase of approximately ten per cent of downpour brought about catastrophic results where, in addition to the gross devastation of infrastructure due to the practical submerging of the entire city, two complete villages washed away.[1] Three months later, November 2024, proved to be a landmark as a high-level delegation led by the Principal Secretary to the Prime Minister of India represented the interests of the nation in the meeting of the G20 Disaster Risk Reduction Working Group (DRRWG) held in Belém, Brazil, in furtherance to which, a ministerial declaration on Disaster Risk Reduction was finalised. This meeting was strategically important to India's commitment towards disaster risk mitigation owing to the fact that the foundation of the DRRWG was laid during India's G20 presidency in 2023.

The meeting acted as a wake-up call to countries across the world to invest in areas of disaster risk reduction in order to provide a better and sturdier infrastructural future to their citizens. For developing countries, like the founding member India, which continue to rely heavily on the growth of the construction sector and are prone to disasters due to their unique positioning, the declaration offered a further push to dedicate a portion of their revenue or financing towards the inclusion of disaster resilient methods in the construction sector. Through such a push, hope would be offered to the countries towards the prevention of severe inadvertent financial losses, which would result from any future man-induced or natural calamity, like the one in Kerala.

India and its disaster-prone areas

The United Nations International Strategy for Disaster Reduction Secretariat (UNISDR) highlighted a dramatic increase of 151 per cent in direct economic losses from climate-related disasters from 1998 to 2017. India ranks fourth, with economic losses worth over $79.5bn.[2] In the Global Climate Risk Index, India is ranked as the seventh most disaster-prone country, with Mozambique being the most affected country on the list.[3] As per the estimates provided by the National Disaster Management Authority of India, the country, due to its unique geo-climatic and socio-economic conditions, is vulnerable in varying degrees to floods, droughts, cyclones, tsunamis, earthquakes, urban flooding, landslides, avalanches and forest fires.[4]

In consideration of the devastating disaster in Kerala, along with those that occur in other prone states, like Assam and Gujarat, the aforementioned statistics have additional importance in calling on the need for the country to invest heavily in climate-resilient infrastructure (CRI). Such investment may prove to be necessary for facilitating the smooth development of the country, with little to no loss of gross domestic product (GDP). That said, it may be relevant to mention that, while the road continues, India has had adequate realisation of this need and has been taking various calculated steps to mitigate the risks.

Even though India has gone a long way towards the development of a strong disaster response system, with a number of technological advancements, the complete inculcation of the methods in the most important sector of the economy, that is, the construction sector, still remains to be achieved.

Climate-resilient infrastructure and smart city integration

Resilient infrastructure is not just about the safe transfer of goods and services across roads, bridges or railways, it is about the people, households and communities that depend on these systems as a lifeline to better health, education and secure livelihoods.[5]

The importance of CRI cannot be understated in a country as disaster prone as India. Considering the fact that the 2024 landslides of Wayanad were not the first rain-related incident to have occurred in the state and that many other regions in India continue to be prone to a varying number of disasters, the criticality of the adaptation of CRI is ubiquitous in terms of protecting the infrastructural growth of the country at large.

In terms of the adoption of CRI measures, India may be able to take a hint from within by adopting the example of Kolkata, which is on the path to developing the country's first climate smart city as part of the Climate Smart Cities Program (CSCP) of the UN. With the objective of delivering an

'evidence-based plan for rapid deployment of energy-efficient technologies, and investment in climate-resilient infrastructure at the local level',[6] the city of Kolkata shall be working towards the mitigation of climate risks associated with the state's climatic positioning, while simultaneously reducing energy costs by $430m by 2050.[7]

An adoption of the aforementioned distinctive plan at the national level may aid India in bringing about transformational change and making considerable progress towards disaster risk reduction. An efficient way to achieve this objective may also be through a strategic coupling of a portion of either the 'National Adaptation Fund for Climate Change' or the 'Climate Change Action Program' with the 'Smart Cities Mission' of India. The combined objectives of all such policies may facilitate the optimum utilisation of funds and resources towards the attainment of the Sendai framework goals, thereby bringing about a realisation of the Ministerial Declaration finalised by the DRRWG.

Working towards a common goal

It is an undisputed fact that the various states and union territories of India have been collectively working towards disaster risk reduction for a long time. Responses towards disaster-stricken infrastructure have also been evident in the 'Rebuild Kerala Development Plan', which was established by the state government after the rain-induced floods of 2018 washed away the roads and bridges of low-lying areas of the state. As the plan paved the way for the inclusion of the values of sustainable CRI during the redevelopment of the state, Kerala offered a roadmap to other parts of India for institutionalising the concept of climate resilience and establishing an Ecosystem-Based Disaster Risk Reduction Policy (Eco-DRR).

These policies may proficiently deal with the structural inefficiencies of India's infrastructure, in line with the ecosystems of the various states and union territories, thereby offering a site-specific approach towards the attainment of climate-resilient construction. Such approaches may include the utilisation of different forms of raw materials, specific to the climate, as well as the manner of construction, wherein, in many cases, the financial burden of adopting such approaches may not be as considerable as other technological approaches.

It may, however, be manifest to note that part of the Eco-DRR project is already in place in India, where the government, in association with the UN Environment Programme, has been working towards the rejuvenation of ponds and restoration of wetlands in the areas of Odisha, Bihar, and Gujarat. Considering the vital role played by the construction sector in the Indian economy, along with the severe threat to infrastructure posed by extreme climatic calamities, a specific Eco-DRR policy or project focusing the construction sector may prove to be beneficial.

Even though it may be undeniable that the occurrence of disasters is beyond human control, the active inclusion of policies, plans and a committed effort towards the latter's implementation may bring about the efficient realisation of India's struggle to attain disaster risk reduction and climate resilience at a larger level, thereby reducing the severe toll on human lives and infrastructural damage, as was caused to the coastal region of Kerala.

Notes

1 The Hindu Bureau, 'Wayanad landslides: How two villages vanished overnight', *The Hindu* (Chennai, 16 August 2024) www.thehindu.com/news/national/kerala/wayanad-landslide-how-two-villages-vanished-overnight/article68506601.ece accessed 8 November 2024.

2 UNDRR, 'UN 20-year review: earthquakes and tsunamis kill more people while climate change is driving up economic losses', 10 October 2018 https://undrr.org/news/un-20-year-review-earthquakes-and-tsunamis-kill-more-people-while-climate-change-driving accessed 8 November 2024.

3 David Eckstein, Vera Künzel and Laura Schäfer, Global Climate Risk Index 2021, 44 (German Watch 2021).

4 National Disaster Management Authority, Annual Report 2021–22, 1 (VPX Engineering Impex Pvt Ltd 2022).

5 Oceane Keau and Vijetha Bezzam, 'India's Road to Resiliency: Why climate proofing India's road network is vital to secure sustainable development', World Bank Blogs https://blogs.worldbank.org/en/endpovertyinsouthasia/indias-road-resiliency-why-climate-proofing-indias-road-network-vital-secure accessed 9 November 2024.

6 UN Environment Programme www.unep.org/topics/disasters-and-conflicts/country-presence/india#:~:text=UNEP's%20Eco%2DDRR%20project%20aims,Odisha%2C%20Bihar%2C%20and%20Gujarat accessed 9 November 2024.

7 *Ibid.*

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FEATURE ARTICLE

Credit: Gatot/Adobe Stock

The EU's Corporate Sustainability Due Diligence Directive: what it means for the construction sector

Elise Edson
A&O Shearman, Paris

A turning point in European Union regulation

On 25 July 2024, the EU Corporate Sustainability Due Diligence Directive ('CS3D') entered into force. EU Member States now have two years (until 26 July 2026) to transpose it into their national laws. Compliance deadlines will be staggered, with the first group of companies expected to comply starting in July 2027.

The CS3D imposes a duty of due diligence on in-scope companies, requiring them to identify and address any adverse impacts on human rights and the environment arising from their activities, both inside and outside the EU.

Companies are additionally required to adopt and put into effect a climate transition plan aligned with the Paris Agreement's goal of limiting global warming to 1.5°C and the European Climate Law's objective of achieving climate neutrality by 2050.

In the construction sector, the effects of the CS3D are expected to extend well beyond the larger firms directly subject to its requirements, impacting actors of all shapes and sizes across the construction supply chain. This overview highlights the CS3D's implications for the sector and considers how the new rules could reshape industry practices.

Scope and compliance timelines

Earlier drafts of the CS3D incorporated an approach that designated the construction sector as a 'high impact sector', subjecting it to lower applicability thresholds. However, this approach was ultimately abandoned.

In the final text, the CS3D applies without distinction as to sector to:

- EU companies with 1,000+ employees and a net worldwide turnover of €450m+;
- non-EU companies with a net turnover in the EU of €450m+;
- franchises[1] with a net worldwide turnover of €80m+ and royalties in the EU of €22.5m+; and
- ultimate parent companies of a group of companies that meets these thresholds on a consolidated basis.

EU companies must comply within three to five years from the date of the CS3D's entry into force (25 July 2024), depending on size, as follows:

- Group 1: 5,000+ employees and €1,500m+ net worldwide turnover: three years (2027);
- Group 2: 3,000+ employees and €900m+ net worldwide turnover: four years (2028); and
- Group 3: 1,000+ employees and €450m+ net worldwide turnover: five years (2029).

Non-EU companies will also have between three and five years to comply, as set out below:

- Group 1: turnover in the EU of €1,500m+: three years (2027);
- Group 2: turnover in the EU of €900m+: four years (2028); and
- Group 3: turnover in the EU of €450m+: five years (2029).

Franchises have five years (until 2029) to comply.

Companies not already covered by the EU's Corporate Sustainability Reporting Directive (CSRD) must additionally publish an annual statement on their websites, including all relevant information on their performance of the duty of due diligence, starting for financial years on or after:

- Group 1 companies (as above): 1 January 2028; and
- Group 2 & 3 companies (as above) and franchises: 1 January 2029.

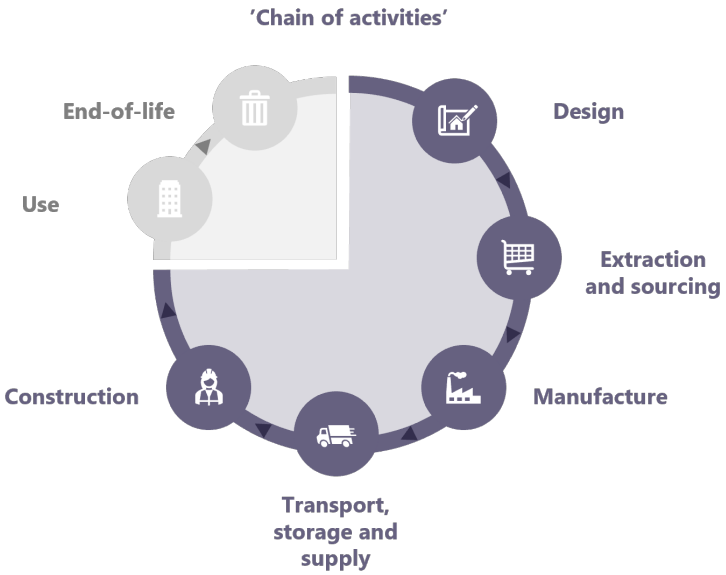
The duty of due diligence

Covered activities

The duty of due diligence applies not only to a company's own operations and those of its subsidiaries, but also extends across the company's worldwide 'chain of activities', as defined in the CS3D, covering specific segments of the value chain.

In the context of a construction project, the definition of 'chain of activities' is broad enough to encompass critical upstream phases, including architecture and design, sourcing and manufacturing of construction materials, transport and logistics, and on-site construction. However, downstream activities related to the building's use (eg, maintenance, repair and refurbishment), as well as end-of-life activities (eg, deconstruction or demolition, transport to disposal facilities, recycling or landfilling), are excluded from the definition.

The CS3D also provides that financial institutions are only subject to the due diligence obligations for their own operations, those of their subsidiaries and those of their upstream business partners. This means that financiers in the construction industry will not be held responsible under the CS3D for the impacts of the projects they finance.



Content of the duty

The duty of due diligence under the CS3D is modelled on existing international standards, including, in particular, the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises on Responsible Business Conduct and the United Nations Guiding Principles on Business and Human Rights (the 'UN Guiding Principles').

To fulfil their due diligence obligations:

- companies must integrate due diligence into policies and risk management systems;
- they must identify and assess potential and actual adverse impacts on human rights and the environment across their global chain of activities;
- they must prioritise adverse impacts by severity and likelihood where it is not feasible to address all of them at once. This risk-based approach allows companies to focus on addressing their most critical impacts first before turning to less urgent issues; and
- they must address adverse impacts by preventing or mitigating potential adverse impacts, and bringing to an end or minimising the extent of actual adverse impacts. This may entail developing and implementing action plans, seeking contractual assurances from business partners, making necessary investments, adapting business plans and strategies, providing training and capacity building. As a last resort, companies may have to suspend or terminate business relationships.

When addressing adverse impacts, companies should assess their level of involvement in the impact. They must take action to address potential or actual impacts they either (1) cause directly or (2) contribute to jointly with subsidiaries or business partners, including cases where the company facilitates or incentivises a business partner to cause the impact (excluding minor or trivial contributions). If a company is not directly or jointly responsible but is linked to the impact through a business partner, it should use its influence to address the harm. This may involve leveraging market power or linking business incentives to human rights and environmental performance.

The duty of due diligence extends across the company's worldwide 'chain of activities', covering specific segments of the value chain

- They must remediate actual impacts caused or contributed to by the company, this includes by providing financial or non-financial compensation to affected individuals. If the company is not directly or jointly responsible but is merely linked to the impact through a business partner, the company may provide voluntary remediation or use its influence to ensure that the business partner provides remediation.
- They must engage meaningfully with stakeholders throughout the due diligence process.
- They must provide a notification mechanism and complaints procedure.

- They must assess and monitor the adequacy and effectiveness of their due diligence measures at least every 12 months.
- They must communicate due diligence efforts and results in the form of an annual statement (unless already reporting under the CSRD).

Adverse impacts

The covered adverse impacts are listed in annexes to the CS3D.

Adverse human rights impacts encompass violations of various enumerated rights and prohibitions found in international human rights instruments, as outlined below.

- Right to life includes the obligation to ensure, through proper training and oversight, that security personnel prevent harm or death.
- Prohibition of torture includes the responsibility to ensure, through proper training and oversight, that security personnel refrain from subjecting individuals to inhumane treatment.
- Liberty and security refers to the duty to ensure that employees are not unlawfully detained or subjected to physical violence or harassment.
- Privacy is the prohibition of arbitrary or unlawful interference with a person's privacy, family, home or correspondence, and attacks on their honour or reputation.
- Freedom of thought and religion refers to the obligation to respect workers' freedom of conscience and religious expression.
- Just and favourable working conditions include the duty to ensure that workers are provided with an adequate living wage, safe and healthy working conditions, and reasonable working hours.
- Adequate housing and amenities refers to the prohibition of limiting workers' access to adequate housing, when provided by the company, and to essential needs like food, clothing, water and sanitation in the workplace.
- Rights of the child refers to the obligation to protect children's health, education, basic needs and safety, and to prevent their exploitation or engagement in hazardous work.
- Child labour refers to the prohibition of employing children below the age required for compulsory schooling, and in any case, under 15 years old, with limited exceptions as permitted by local law.
- The worst forms of child labour refers to the prohibition of forced labour, trafficking, exploitation or hazardous work for all persons under the age of 18.
- Forced labour refers to the prohibition of any

coerced work, including work under threat of penalty, debt bondage or human trafficking.
- Slavery refers to the prohibition of all forms of slavery or slavery-like practices, including severe economic or sexual exploitation.
- Freedom of association refers to the right of workers to form or join unions and engage in collective bargaining.
- Unequal treatment in employment refers to the prohibition of discriminatory practices in hiring, remuneration and promotions without legitimate justification.

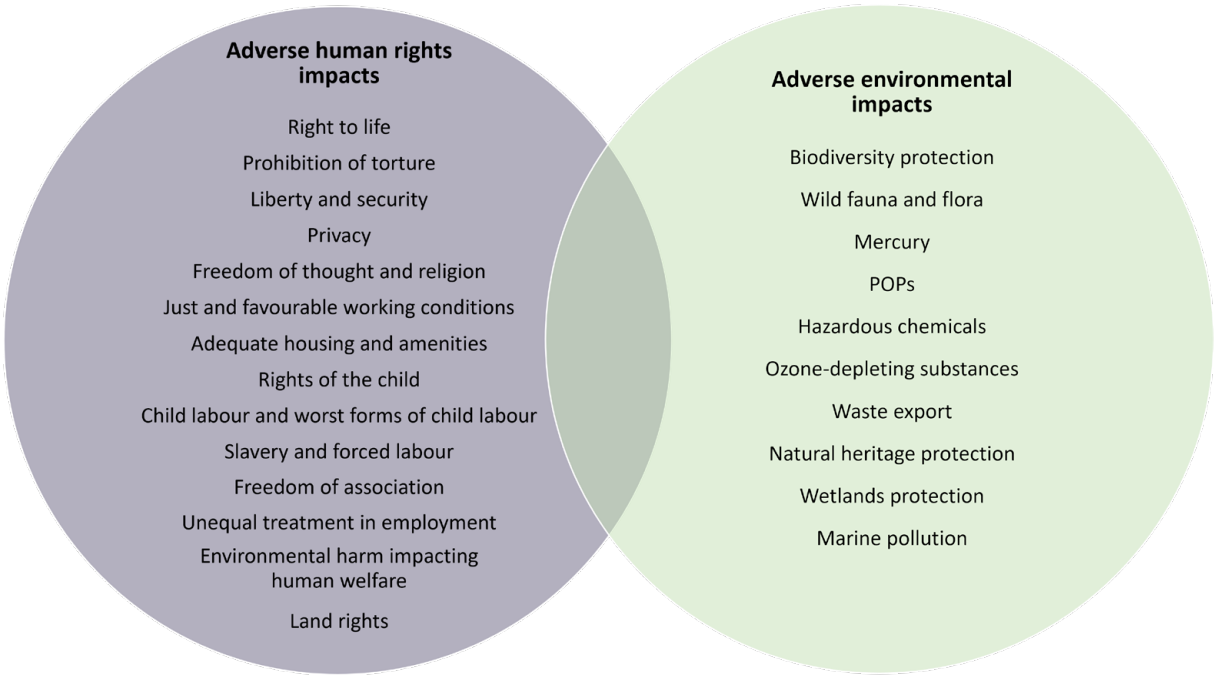
The CS3D does not address the issue of conflicts between these international standards and local laws (eg, minimum wage laws, which may fall short of the CS3D's requirement for an adequate living wage). The UN Guiding Principles stipulate that, in such cases, companies are expected to '[s]eek ways to honour the principles of internationally recognised human rights' to the greatest extent possible in the circumstances.

Finally, recognising that environmental harm can result in violations of human rights, adverse human rights impacts also encompass breaches of certain environmental rights and prohibitions, as follows:
- environmental harm impacting human welfare refers to the prohibition of causing environmental degradation (eg, soil, water or air pollution) or other impacts on natural resources (eg, deforestation) compromising essential human needs, including access to food, clean water, sanitation, health and safety; and
- land rights refer to the right to protection against loss of livelihood, including the prohibition of unlawful eviction or loss of land and resources belonging to local communities. This requires companies, when acquiring land rights for projects, to verify whether the land is occupied or used by individuals, paying particular attention to marginalised or vulnerable groups.

Adverse environmental impacts include the following, implicating a wide range of construction activities and materials.
- Biodiversity protection refers to the obligation to avoid or minimise adverse impacts on biological diversity, in line with the Convention on Biological Diversity.
- Wild fauna and flora refer to the prohibition on trading specimens listed in the Convention on International Trade in Endangered Species of Wild Fauna and Flora without a permit.
- Mercury refers to the prohibition on mercury-added products, the use of mercury in manufacturing and the unlawful treatment of mercury waste, in line with the Minamata Convention and EU regulations.
- POPs refers to the prohibition on the production, use and improper handling or disposal of substances listed in the Stockholm Convention on Persistent Organic Pollutants (POPs) and EU regulations.
- Hazardous chemicals refers to the prohibition on trading chemicals listed in the Rotterdam Convention.
- Ozone-depleting substances refers to the prohibition of the unlawful production, consumption and trade of ozone-depleting substances, in line with the Montreal Protocol.
- Waste export refers to the prohibition of hazardous and other waste export, in line with the Basel Convention and EU regulations.
- Natural heritage protection refers to the obligation to avoid or minimise adverse impacts on properties designated as natural heritage, in line with the World Heritage Convention.
- Wetlands protection refers to the obligation to avoid or minimise adverse impacts on wetlands, as defined by the Wetlands Convention.
- Marine pollution refers to the obligation to prevent marine pollution, including discharges from ships and dumping, in line with the Maritime Pollution (MARPOL) Convention and the UN Convention on the Law of the Sea (UNCLOS).

Adverse human rights impacts encompass violations of various enumerated rights and prohibitions found in international human rights instruments

The duty to conduct environmental impact due diligence under the CS3D operates independently of, and in addition to, any national laws mandating Environmental Impact Assessments (EIAs) for certain construction projects, such as those under the EU's EIA Directive. While EIAs typically focus on assessing and mitigating environmental impacts at a specific project site, the CS3D's due diligence requirement has a broader scope, requiring companies to continuously assess and address environmental and human rights risks across their worldwide 'chains of activities'.



The duty to adopt and implement a climate transition plan

In-scope companies not already subject to the CSRD must adopt and implement a climate transition plan to align, through best efforts, their business model and strategy with the transition to a net-zero economy.

The plan, which must be updated annually, should set time-bound targets for 2030 and every five years thereafter until 2050, covering scope 1, 2 and 3 emissions, as appropriate. For a construction project, scope 3 emissions notably encompass indirect emissions across the supply chain and project lifecycle. They include emissions from sourcing raw materials (aluminium (bauxite), copper, timber etc), manufacturing construction materials (cement, steel etc), transporting these materials to the construction site and end-of-life activities, such as demolition, recycling or landfilling.

The plan must additionally identify the company's exposure to coal, oil and gas-related activities. In the construction sector, this would include any involvement in projects related to hydrocarbon infrastructure, such as those focused on the extraction, storage, transportation or use of fossil fuels.

In November 2024, the European Financial Reporting Advisory Group (EFRAG) released draft guidance for companies on designing climate transition plans. According to this draft, plans should, in addition to setting emissions reduction targets, include the following elements.

- Target compatibility describes how the company's targets align with the Paris Agreement's 1.5°C target.
- Actions and decarbonisation levers provide an explanation of the specific measures and strategies the company will employ to meet its targets.
- Investment and funding refers to details of the investments and financial resources supporting the plan.
- EU Taxonomy alignment is a breakdown of the company's activities that qualify as environmentally sustainable in accordance with the criteria imposed under the EU Taxonomy (see below).
- Progress reporting refers to updates on the plan's implementation, assessing the effectiveness of actions taken and their contribution toward the company's targets.
- Impacts, risks and opportunities (IROs) refers to disclosures on social and biodiversity-related IROs linked to the plan, covering effects on workers, communities and ecosystems.

Further iterations of the draft guidance are expected.

The EU Taxonomy and the construction sector

Activities covered by the EU Taxonomy notably include the construction of new buildings, renovation of existing buildings, and demolition and wrecking of buildings and other structures.

For each activity, technical screening criteria are defined to determine whether the activity both makes a substantial contribution to at least one of six specified environmental objectives ('substantial contribution criteria'), while doing no significant harm to any of the other objectives ('do no significant harm criteria').

The six environmental objectives are: (1) climate change mitigation, (2) climate change adaptation, (3) sustainable use and protection of water and marine resources, (4) transition to a circular economy, (5) pollution prevention and control, and (6) protection and restoration of biodiversity and ecosystems.

For example, to substantially contribute to climate change mitigation, a new building must have a primary energy demand at least ten per cent lower than the threshold set for nearly net-zero building requirements in line with the Energy Performance of Buildings Directive. To ensure that the building does no significant harm to the transition to a circular economy, at least 70 per cent (by weight) of non-hazardous construction and demolition waste must be prepared for reuse or recycling.

Additionally, to be EU Taxonomy-aligned, the activity must adhere to certain minimum safeguards tied to human rights, bribery and corruption, taxation and fair competition.

Enforcement and civil liability

Each Member State will designate supervisory authorities to enforce CS3D compliance. These authorities will have the power to issue injunctive orders and impose penalties, including fines of at least five per cent of the non-compliant company's net worldwide turnover.

Companies may face civil liability in EU courts for breaching their CS3D due diligence obligations if they intentionally or negligently fail to prevent or mitigate potential adverse impacts, or fail to address actual adverse impacts. A company cannot, however, be held liable if the damage was solely caused by a business partner in its 'chain of activities', without any contribution from the company.

The duty of due diligence under the CS3D applies regardless of any contractual allocation of responsibility among stakeholders. Consequently, even if responsibility for specific aspects of the project, such as labour provision, or waste disposal, is assigned to the contractor, the owner remains accountable for fulfilling its due diligence obligations on these matters.

Impact on public procurement procedures

The CS3D provides that compliance with its provisions, whether mandatory or voluntary, qualifies as an environmental and/or social aspect that may, in line with the EU Public Procurement Directives (2014/23/EU, 2014/24/EU and 2014/25/EU), be factored into the award criteria for public and concession contracts, or imposed as a condition for the performance of such contracts. According to the CS3D's recitals, non-compliant companies may also be excluded from public procurement procedures.

For construction companies, this means that aligning with the CS3D's requirements could be a determining factor in securing or successfully performing public contracts or concessions. Failure to meet the relevant standards could also result in exclusion from future procurement opportunities.

Other ripple effects

Approximately 6,000 EU companies and 900 non-EU companies are estimated to meet the CS3D's applicability thresholds. However, companies outside the CS3D's immediate scope will still face indirect pressures arising from their business relationships with in-scope companies or entities connected to those in-scope companies through shared supply chains.

In the construction context, due diligence and climate transition plan-related requirements are likely to be increasingly integrated into project processes and contractual documentation, ensuring that human rights and environmental impacts are considered over the project's lifecycle, starting from the planning and design phase.

For example, a key mechanism for companies to fulfil their due diligence obligations under the CS3D is contractual cascading. This process involves companies seeking contractual assurances from their direct business partners that they will comply with the applicable standards, and requiring these partners, in turn, to seek similar assurances from their own direct business

partners, and so on, continuing the chain of accountability. Consequently, construction contracts may increasingly incorporate provisions requiring contractors to conduct human rights and environmental due diligence in accordance with the CS3D's requirements, and to ensure that this obligation is passed on to subcontractors and suppliers.

As sustainability practices become more deeply embedded in regulations and industry standards, adhering to the CS3D will help companies stay ahead of fast-evolving requirements

The CS3D also mandates that companies verify compliance, which can be achieved through independent third-party verifications, or participation in industry or multi-stakeholder initiatives. Looking ahead, owners and contractors may insist on the right to impose penalties or sanctions for non-compliance, which could include fines, contract suspension or even termination. Additionally, they may reserve the right to withhold the approval of subcontractors who fail to meet specific sustainability standards.

These trends may, in turn, drive changes to standard form industry contracts, including the adoption of increasingly detailed human rights and environmental key performance indicators (KPIs), accompanied by monitoring and reporting obligations.

Additionally, the obligation to adopt and implement a climate transition plan will require many in-scope companies to significantly enhance the scope and quality of their emissions data. This will include gathering and reporting data from their suppliers. In the construction sector, subcontractors and suppliers may be asked to provide details on the carbon metrics of construction materials, transportation logistics or waste disposal practices. To ensure the accuracy and reliability of the information provided, they may be subject to audits or third-party verifications.

Conclusion

As outlined above, the CS3D will have a far-reaching impact on the industry, driving both in-scope companies and other stakeholders across the construction value chain to align with its requirements in order to stay competitive, maintain business relationships and qualify for public tenders within the EU.

Implementing the CS3D in the construction sector will present significant challenges due to the complexity of construction value chains and the number of actors involved. Stakeholders may operate across diverse regulatory frameworks, particularly on global infrastructure projects, making uniform compliance difficult. Smaller subcontractors and suppliers may lack the necessary resources or expertise to meet the CS3D's stringent due diligence and climate reporting requirements. These requirements may not, moreover, always easily align with the sector's traditional focus on delivering projects on time and within budget. The CS3D compels a fundamental shift in this regard, pushing companies to integrate human rights and environmental considerations at every stage of project planning and execution; an adjustment that may entail a steep learning curve for some.

Despite these challenges, the CS3D offers significant opportunities for the construction sector. As sustainability practices become more deeply embedded in regulations and industry standards across the EU and globally, adhering to the CS3D will help companies to stay ahead of fast-evolving requirements, minimising compliance and liability risks, while also building more resilient supply chains. In addition, embracing human rights and environmental due diligence can improve a company's reputation, setting it apart in a competitive market, and better positioning it to meet the rising demand for sustainable buildings and infrastructure.

Note

1 This means a company that has entered into, or is the ultimate parent company of a group that has entered into, franchising or licensing agreements within the EU in return for royalties, where these agreements ensure a common identity, a common business concept and the application of uniform business methods.

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FEATURE ARTICLE

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Unforeseen circumstances and contract rebalancing

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Although construction contracts are generally based on predictions as to the costs and time required to perform various tasks, the parties' terms must sometimes be rebalanced to adjust for unforeseen circumstances that are encountered. In this article, authors from seven countries compare how such unforeseen circumstances are handled in their respective jurisdictions, including analysis under both common law and civil law systems. This is the first of two parts; the second part and the bibliography will be published in the next issue of this journal.

When project risks are allocated in construction contracting (as in other commercial transactions), they are often assigned to the party who is best able to avoid or mitigate them. For example, employers are usually responsible for unexpected subsurface conditions on their own properties, and contractors are usually responsible for costs of correcting defective work by themselves and their subcontractors.

This article focuses on a series of risks that are generally outside the anticipation and control of the contract parties. These risks have had significant impacts over the last several years due to various volatile factors affecting construction markets.

In countries that apply the Napoleonic force majeure concept when unforeseen events cause project delays, many of these risks have traditionally been handled by granting uncompensated time extensions. Under that approach, the employer sustains losses arising from late project completion, while the contractor sustains increased costs of prolonged work. The relative sizes of such losses can vary widely according to the circumstances of each project, and the

contract parties may differ in their ability to bear the resulting financial burdens.

In a world where certain categories of impacts are foreseeable, but their extent cannot reasonably be estimated in advance, many contractors are unable or unwilling to sign a contract limiting their remedy for unforeseen conditions to a time extension. The market is therefore seeing an increased pressure for new risk allocation clauses and/or equitable remedies through the applicable disputes resolution process. This paper will look at some of these efforts, both in civil law and common law systems.

Wars and civil unrest

With the Russian invasion of Ukraine in February 2022, Europe was unexpectedly impacted by the first war since the Balkan conflicts of the early 1990s. Compared with the Balkan conflicts, this continuing war has involved much larger military forces, affecting larger populations and causing much wider economic disruption. After most Europeans had enjoyed more than 75 years of peace, they are now reminded of the sad fact that war remains a real and enduring risk.

many contractors are unable or unwilling to sign a contract limiting their remedy for unforeseen circumstances to a time extension

In Ukraine, construction and other commercial activities were already disrupted when Russia occupied Crimea in 2014. In the more recent war, almost every kind of business has been interrupted by military action.

In Israel, the surprise attack by Hamas in October 2023 led to a series of military actions that have disrupted business there and in surrounding countries. Meanwhile, ongoing piracy in the Gulf of Aden has disrupted shipping and added to the costs of international commerce.

On the other side of the world, Chinese Government threats to achieve reunification with Taiwan through military action have created heightened concern about future military disruptions to commercial life in that important high-tech economy.

There are, of course, other areas in the world where construction and other commercial activities have been disrupted by wars or civil unrest. In all such places, contractors are asked to submit fixed prices for construction projects, although the scope and duration of military disruptions to their work cannot reasonably be estimated.

In legal systems that recognise the principle of force majeure, acts of war are often a type of delay disruption for which contractors receive additional time but no compensation. When this rule was first promulgated in the Code Napoleon, the French emperor doubtless had war on his mind as a circumstance that should be anticipated by contract. Once the memories of the Second World War had faded, however, many contractors and employers in peaceful countries often gave little consideration to the risk of war, and they typically included no price contingency for such an occurrence. Since the wars in Ukraine and the Middle East, however, this approach has required re-examination.

FIDIC contracts

FIDIC contracts are the most widely used standard forms of construction contracts internationally.[1] They are recognised for their fair and balanced risk/reward allocation between the employer and the contractor. As we shall see below, this is particularly true and relevant in relation to the current economic crisis discussed in this paper, as FIDIC contracts contain several mechanisms designed to rebalance the parties' contractual obligations.

With regards to acts of war, both the 1999 and 2017 editions of the 'rainbow suite', (comprising the FIDIC Red,[2] Yellow[3] and Silver Books[4]) provide that a contractor may be entitled to an extension of the time and prolongation costs.

The 1999 edition of the FIDIC rainbow suite is identical across all three books. It provides that acts of war may qualify as force majeure events.

Sub-Clause 19.1 [definition of force majeure] reads as follows:

'In this Clause, "Force Majeure" means an exceptional event or circumstance:

(a) which is beyond a Party's control,

(b) which such Party could not reasonably have provided against before entering into the Contract,

(c) which, having arisen, such Party could not reasonably have avoided or overcome, and

(d) which is not substantially attributable to the other Party.

Force majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied:

(i) *war, hostilities (whether war be declared or not), invasion, act of foreign enemies,*

(ii) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war,

(iii) riot, commotion, disorder, strike or lockout by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors,

(iv) munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity, and

(v) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity' [emphasis authors' own].

Sub-Clause 19.1 expressly indicates that acts of war, whether declared or not, may qualify as force majeure. This provision may therefore apply to the war in Ukraine, regardless of how it is labelled.

Six conditions must be met under the 1999 edition of the FIDIC Red, Yellow and Silver Books for an event to qualify as force majeure. Five conditions are listed in Sub-Clause 19.1 [definition of force majeure]: in addition to conditions (a)–(d), the event or circumstance must be *exceptional*, as the first sentence indicates. Furthermore, Sub-Clauses 19.2 [notice of force majeure] and 19.4 [consequences of force majeure] require that the event *prevents* the affected party from performing any (ie, one or more) of its obligations.

Furthermore, Sub-Clause 19.4 [consequences of force majeure] provides that if the contractor is prevented from performing any of its obligations under the contract due to a force majeure event, it may be entitled to an extension of the time (provided that completion is delayed as a result) and to payment of 'cost' incurred. This applies even if the war does not occur in the country where the works are carried out. 'Cost' is defined as 'all expenditure reasonably incurred (or to be incurred) by the contractor, whether on or off the site, including overhead and similar charges, but does not include profit'. This may include prolongation costs, as well as head office overheads.

The expression 'force majeure' has caused some confusion among FIDIC users, particularly in cases where the governing law attributes a different legal meaning to the same expression. To address this, FIDIC has replaced 'force majeure' by the expression 'exceptional events' in the 2017 edition of the FIDIC rainbow suite.

In essence, however, in relation to war and hostilities, the provisions are virtually identical. Sub-Clause 18.1 [exceptional event] provides that 'war, hostilities (whether war be declared or not)' may qualify as exceptional events. The same six conditions as for a force majeure event, are required. In addition, the contractor may also be entitled to an extension of the time for completion and to payment of costs incurred as a result of the war, whether the war occurred in the country where the works are being carried out or not. Finally, '*costs*' are defined in an identical way in the 1999 and 2017 editions of the rainbow suite.

If an event meets the conditions of a force majeure event or exceptional event, the contractor could be entitled to an extension of time and additional cost arising from the war in Ukraine

Both the 1999 and 2017 editions of the FIDIC rainbow suite are therefore reasonably contractor-friendly. If an event meets the conditions of a force majeure event (1999 edition) or exceptional event (2017 edition), the contractor could be entitled to an extension of time and additional cost (excluding profit) arising from the war in Ukraine.

Italy

In Italy, there is no statutory definition of force majeure, but that principle is nonetheless recognised in the Italian Civil Code.[5] Force majeure is usually interpreted by Italian case law as an event of objective unpredictability and extraordinariness that irremediably prevents the performance of a contract obligation.

Supervening circumstances of war or civil unrest events that objectively and irremediably prevent the performance of contractual works can be deemed as force

majeure events discharging the contractor from liability.

In 2022, the Italian National Anti-Bribery Authority (Autorità Nazionale Anticorruzione or ANAC) issued a resolution clarifying that the invasion of Ukraine should be regarded as a force majeure, outside the control of suppliers,[6] and it suggested to administrations/public employers that they should consider suspending affected contracts. ANAC also excluded the applicability of penalties or default terminations in cases where it is objectively impossible to fulfil the supply of goods as originally stipulated in a contract.

The rules of remedies available in the case of supervening circumstances are those that are provided for impossibility and hardship in contract performance.

In particular: if the event of force majeure creates a temporary impossibility to perform a contract, the parties are entitled to an extension of time for completion at no additional cost,[7] whereas, if performance becomes truly impossible, the obligation is extinguished and the contract terminated.[8]

A right to contract termination may also be claimed when extraordinary and unforeseeable events have rendered performance of a contract excessively onerous for one of the parties, unless the other party proposes to fairly amend the contractual conditions.[9]

Price contingencies related to war risk are, under Italian law, subject to an agreement between the parties. These kinds of contingencies were uncommon in the past, but in recent months have been brought to the negotiation table more frequently.

Finally, the Italian Civil Code does not have a specific rule establishing a duty of renegotiation to restore balance of the contractual conditions in the event of unforeseen supervening circumstances.[10] Although it has been argued that a duty to renegotiate (but not to amend) the contractual conditions in good faith can be required under the good faith doctrine,[11] distinguished authors have highlighted the urgent need for an amendment of the Italian Civil Code in this regard.[12]

In this connection and interestingly, the new Italian Public Contracts Code includes the right of the disadvantaged party to renegotiate the contractual conditions in good faith when extraordinary, unforeseeable and non-culpable circumstances, unrelated to ordinary economic fluctuations and market risk and materially altering the original balance of the public contract have arisen.[13]

Germany

In Germany, there is no statutory law defining force majeure, but it is, nevertheless, recognised in the law. According to the interpretation of German courts, force majeure is an external event that is unpredictable, unforeseeable and unusual, and which cannot be prevented or rendered harmless by economically acceptable means, even by exercising the utmost care reasonably to be expected in the circumstances.

Many contracts contain clauses enumerating force majeure events, often allowing other similar events to be treated in the same way. War and civil unrest are usually included in the listed events.

A typical force majeure clause could read as follows:[14]

> 'The obligations of both parties under the contract may be suspended by either party without liability if the performance is obstructed or rendered impossible by events beyond the reasonable control of such party, eg act of god, war, riots, fire, explosion, epidemic, flood, strike or lockout. Each party agrees to notify the other party in the event of the suspension of any deliveries to be made under this contract and agrees to apply all reasonable efforts towards prompt resumption of such delivery after removal of the cause of suspension; provided however, that if any such delivery is delayed for more than [*insert a reasonable time limit*], then either party may elect, by written notice to the other party, to cancel such delivery without liability.'

Without a contractual agreement, the party who seeks relief from its obligation due to a force majeure event must generally take recourse to other statutory provisions or to good faith principles that are expressly recognised by German law.

There are basically two statutory provisions to be observed.

According to section 275 of the German Civil Code, the performance of contract obligations is excused to the extent that it is

impossible for the obligor or any other person to perform such obligations. The obligor may also refuse to perform its contractual obligations to the extent that they require unreasonable expense and effort.

Section 313 of the German Civil Code stipulates that if the circumstances forming the basis of a contract have significantly changed, the contract may be amended (if possible) or terminated if one of the parties cannot reasonably be expected to uphold the contract as originally written.

The provisions read as follows:

'Section 275 German Civil Code

Exclusion of the duty of performance

A claim for performance is excluded to the extent that performance is impossible for the obligor or for any other person.

The obligor may refuse performance to the extent that performance requires expense and effort which, taking into account the subject matter of the obligation and the requirements of good faith, is grossly disproportionate to the interest in performance of the obligee. When it is determined what efforts may reasonably be required of the obligor, it must also be taken into account whether he is responsible for the obstacle to performance.

In addition, the obligor may refuse performance if he is to render the performance in person and, when the obstacle to the performance of the obligor is weighed against the interest of the obligee in performance, performance cannot be reasonably required of the obligor.

The rights of the obligee are governed by sections 280, 283 to 285, 311a and 326.

Section 313 German Civil Code

Interference with the basis of the transaction

If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration.

It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect.

If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke.'

In addition, there is the good faith principle addressed in section 242 of the German Civil Code:

'An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.'

Regarding the war in Ukraine, several German ministries passed new regulations for the public sector addressing consequences of the war.[15] They referred to price increases for raw materials, price escalation clauses, current tender procedures and adjustments to existing contracts. The latter regulations are important for the applicability and interpretation of section 313 of the German Civil Code and might serve as a guidance also for business-to-business (B2B) contracts of private parties.

With regard to German law, the war in Ukraine is considered as a force majeure event. How far a party's obligations are affected is a matter of each individual case.

First, it is stated that, in principle, the risk to procure materials is with the contractor. However, the war in Ukraine and its effects on the materials markets can be deemed sufficient to interfere with the basis of the transaction. The most important question – and this has to be decided in each individual case – is whether it is unreasonable for the contractor to be bound by the agreed terms (the regulations passed by the ministries only look at price development; this will be addressed later).

With regard to German law, the war in Ukraine is considered as a force majeure event. How far a party's obligations are affected is a matter of each individual case. If the result is considered as an impossibility to perform, a party can invoke section 275 of the German Civil Code. If it is only (extremely) burdensome to perform, a modification to the agreed terms can be demanded on the basis of section 313 of the German Civil Code, as long as it does not create unreasonable circumstances for the other party. If this is not possible, the affected party can revoke or terminate the contract.

It should be noted that, so far, no relevant

court decisions are available on this subject. In general, the courts were previously quite restrictive in applying section 313 of the German Civil Code.[16] However, recently – in connection with the Covid-19 pandemic – some courts have shown a tendency to allow a wider application.[17] This might change in the future.[18]

Austria

In Austria, there is a model contract for construction contracts, known as the ÖNORM B 2110,[19] which is published by Austrian Standards International.[20] ÖNORM B 2110 is the basis for the vast majority of construction contracts, even though it is regularly modified in favour of the employer, like FIDIC contracts.

Therefore, the following comments are based on ÖNORM B 2110.

Force majeure

In Austria, there is also no statutory definition of force majeure, even though the concept is recognised by the courts. ÖNORM B 2110 also does not contain a definition of force majeure.

In Austria, the idea of a force majeure is generally understood to be an extraordinary event affecting a transaction from outside the control of the parties. It must be unforeseeable, and it cannot be averted without endangering the economic success of the contractor, even when exercising the utmost care. It is unexpected and cannot reasonably be accepted and tolerated by the contractor because of its frequency.[21]

Entitlement to compensation

According to contractual provisions of the Austrian General Civil Code (ABGB), the contractor bears the risk of events that originate from its own sphere or from the neutral sphere, that is, events outside the parties' control.[22] Force majeure events are assigned to the neutral sphere; thus, according to the statutory provisions, a contractor generally bears the risk of increased costs arising from a force majeure event.

ÖNORM B 2110 partially shifts this risk to the employer in clause 7.2.1. According to this provision, the responsibility for events is thereby assigned to the sphere of the employer if they:

1. make the contractual performance of the services objectively impossible; or
2. were not foreseeable at the time of the conclusion of the contract and cannot reasonably be avoided by the contractor.

Therefore, if events occur that either make the contractual performance of the service objectively impossible or were not foreseeable at the time of the conclusion of the contract and cannot be avoided by the contractor in a reasonable manner, under Austrian law, a contractor is generally entitled to additional/compensation and additional time for performing the construction contract. For events attributable to Covid-19, the Austrian Supreme Court[23] has recently ruled with reference to clause 7.2.1 that the employer bears the risk of additional cost claims by the contractor. Based on this decision, it can be assumed that the same principle will apply to risks arising from the Ukraine war.[24] The scope of this leading decision is still being debated among legal commentators. However, it is clear that price increases at a construction site that are directly attributable to such an event can be charged to the employer. Whether and to what extent home office costs of a construction company can also be charged remained open in the recent decision.

Assumption of risk

The concept of force majeure also plays a major role in what Austrian courts call assumption of risk. This concerns the question of who bears the risk if a construction project is damaged or sinks before it is handed over to the employer. In principle, according to both the ABGB and ÖNORM B 2110, the contractor bears this risk.[25]

Therefore, if the building under construction is damaged before it is handed over to the employer the contractor (or its insurer) must repair it or potentially rebuild it (clause 11.1.1. ÖNORM B 2110).

However, ÖNORM B 2110 provides for an exception in favour of the contractor. If construction work or parts thereof provided by the employer are damaged or destroyed by an unavoidable event, and the contractor has taken all necessary and reasonable measures to avert the consequences of such events, the employer will generally bear the risk (clause 11.1.1. lit b ÖNORM B 2110). This means that the employer must pay to repair or restore work on the construction project at the contractually agreed prices

(clause 11.1.2. ÖNORM B 2110). This exception does not apply to the contractor's site equipment, stored materials and so on, which are not considered to be part of the construction project.

In summary, it can therefore be said that, according to the principles of ÖNORM B 2110, in cases of force majeure, the employer generally bears the risk. In practice, however, the contractor-friendly regulatory approach of this model construction contract is often modified in contracts, at least partially, to the detriment of the contractor.

Cessation of the basis of the contract

A contract in Austria can be challenged by any party on the grounds that the basis of the contract has ceased to exist. Unlike in Germany, Austria has no statutory provision for this, but the legal principle of the cessation of the basis of contract is recognised by the courts. Cases of force majeure can also be handled under this cessation approach.

In general, the principle of contractual compliance (*pacta sunt servanda*) means that Austrian contracts must be upheld even if circumstances subsequently change. The parties are free, however, to provide for changes of circumstances in their contract.[26]

The requirements for asserting a cessation of the basis of the contract are as follows.[27]

1. It must be a typical circumstance that is associated with such a transaction and not merely individual motives of the specific contracting parties.
2. The circumstance must not fall within the sphere of interest of the party who wishes to invoke the changed circumstances; rather, the change must come from an external source.
3. In addition, the change in the basis of the transaction must have been unforeseeable for the party invoking its cessation.

It should also be noted that, according to Austrian case law, the legal concept of cessation/change of the basis of the contract is an '*ultima ratio*', a measure of last resort that should be applied with restraint in order to protect the integrity of negotiated contracts.[28]

According to the case law, changes in prices are generally not taken into account as a basis for increased compensation to a contractor because price changes are usually viewed as foreseeable.[29]

Finland

In Finland, there is no statutory law defining force majeure in the context of construction contracts, but the concept is recognised by courts.

It is very typical for parties to include force majeure provisions in their commercial contracts. Also, a general analogy can be inferred from rules of interpretation governing contracts under the Sale of Goods Act (355/1987).[30]

In the Finnish Sale of Goods Act, the equivalent of a force majeure situation and principle of hardship is included in section 23 of chapter 5, and it reads as follows:

> 'The buyer is entitled to hold to the contract and to require its performance. The seller is, nevertheless, not obliged to perform the contract if there is an impediment that he cannot overcome or if the performance would require sacrifices that are disproportionate to the buyer's interest in performance by the seller.
>
> If the impediment or disproportion ceases to exist within a reasonable time, the buyer may, nevertheless, require performance of the contract.
>
> The buyer loses his right to require performance of the contract if he defers his claim for an unreasonably long time.'

In accordance with Finnish court praxis, the essential elements applying to force majeure can be summarised as follows, with certain relevant court judgments referring to respective assessments indicated in footnotes:

- *Performance obstructed or rendered impossible* means that mere difficulty of performance or reduced profitability does not constitute force majeure.[31]
- *Unforeseeability* refers to a recurring event or something that may have been anticipated to happen at the time of contracting cannot lead to force majeure compensation.[32]
- *Reason beyond party's control* refers to a party's partial contribution to the course of events obstructing performance that should be taken into account and force majeure may not be viably invoked.[33]
- *Inability to overcome* means that a party should, in any event, aim to minimise effects of any delay or obstruction, thus force majeure may only be invoked to the extent that one cannot overcome it or mitigation would require measures that are considered economically unreasonable.[34]

In local construction contracts in Finland, a standardised set of general conditions is widely applied, namely the Finnish General Conditions for Building Contracts, YSE 1998. In YSE 1998, force majeure terms reflect the above explained general criteria, and specific relief events are set out as follows (as may be individually modified case by case):

A contract in Austria can be challenged by any part on the grounds that the basis of the contract has ceased to exist. Austria has no statutory provision for this, but the legal principle of the cessation of the basis of contract is recognised by the courts.

'Section 20 Force majeure

1. The contractor is entitled to receive a reasonable extension to the building contract period if the obstacle to completion of the building contract in accordance with the contract is one of the following reasons:

a) an exceptional circumstance referred to in the State of Defence Act or the Readiness Act or a comparable circumstance which causes the contractor considerable difficulties in engaging employees and procuring construction goods or otherwise prevents execution of the building contract;

b) a strike, boycott or embargo preventing the work of the contractor, his subcontractor or supplier, or a nominated subcontractor, or a lockout approved or decided by employers' organisations, or other similar industrial action materially preventing the work from being carried out;

c) exceptional weather conditions seriously inconveniencing the contractor's work;

d) other exceptional circumstance beyond the control of the contracting parties that creates significant difficulty in fulfilling the obligations of the contract and which the contracting party could not have taken into account beforehand and the inconvenience from which he could not reasonably be expected to have eliminated.

2. The contractor is not entitled to receive an extension to the building contract period if the obstacle concerns procurement of construction goods necessary to complete the building contract which the contractor could procure from elsewhere within the time required by the contract without any significant additional costs.

3. The contractor is not entitled to receive an extension to the building contract period on the basis of a strike, boycott or embargo that is caused by the contractor or his subcontractor failing to fulfil his contractual or legal obligations to his employees, their employee organisations or employers' associations.

4. The contractor is not entitled to an extension to the building contract period if the obstacle concerns work which has already been delayed from the completion date under the contract for a reason due to the contractor, unless there are special grounds for an extension.'

In Finland, the war in Ukraine could generally be accepted as a force majeure event (in contracts entered into before the start of the conflict), falling at least under subsection (d) of the first paragraph of section 20, while the 'comparable circumstance' in subsection (a) would have to occur in the place where construction works take place. In accordance with YSE 1998 section 20, the contractor would be entitled to an extension of time, and as regards costs, there is a limited compensation scheme set out in YSE 1998 section 50 as follows:

'Section 50 Effect of force majeure on contract price

1. If building contract work is interrupted in whole or in part for a reason beyond the control of the contracting parties as referred to in section 20, with the exception of the reason stated in item c of paragraph 1 of the said section, and loss or damage is incurred by the contractor as a result, the client shall compensate the contractor for the site security expenses, heating and other energy costs and the costs of protecting, servicing and maintaining the site as a consequence of the interruption.

2. Furthermore, the client shall contribute towards the other costs incurred by the contractor, the size of the contribution amounting to 2 per cent of the average daily cost of the building contract per working day for the first 5 working days of the period of interruption, and 1 per cent per working day thereafter, the average daily cost being calculated by dividing the contract price exclusive of value added tax by the number of working days in the building contract period.

3. Calculation of the costs caused by the interruption shall take into account the shifting of the building contract period to a less advantageous or more advantageous time of year.

4. The contractor is not entitled to receive from the client any other compensation for an interruption.'

In addition to force majeure effects interpreted in accordance with individual construction contract terms, statutory legislation stemming from section 36 of the Finnish Contracts Act (228/1929, with relevant clause amended by statute 956/1982) may be invoked to adjust terms of the contract. The relevant statute, which also specifically confirms applicability to pricing terms, is as follows:

'Section 36

(1) If a contract term is unfair or its application would lead to an unfair result, the term may be adjusted or set aside. In determining what is unfair, regard shall be had to the entire contents of the contract, the positions of the parties, the circumstances prevailing at and after the conclusion of the contract, and to other factors.

(2) If a term referred to in paragraph (1) is such that it would be unfair to enforce the rest of the contract after the adjustment of the term, the rest of the contract may also be adjusted or declared terminated.

(3) A provision relating to the amount of consideration shall also be deemed a contract term.

(4) The provisions of the Consumer Protection Act (38/1978) apply to the adjustment of consumer contracts.'

This provision effectively compares to the civil law hardship doctrine, but it is worth noting that there is a very high bar applied to a commercial contract term being modified. The main rule under Finnish law is to respect the binding nature of contracts (*pacta sunt servanda*), and to presume that prudent parties addressed such events that may lead to a rightful claim for compensation of costs in their contract. Thus, the assessment of hardship is based on the balance of risks agreed between the parties to a contract, with the basic notion often being that contractors bear the risk of normal market disruptions and the like. To apply section 36 of the Contracts Act, a contractor would be likely to have to demonstrate, by objective standards, that the original contract balance is so significantly altered by unforeseen market disruption that no contractor in similar circumstances could be expected to bear the risk.[35]

There is one fairly recent decision from the Kouvola Court of Appeal on 17 January 2014 (no 25, docket no S 13/383) concerning the applicability of section 36 of the Finnish Contracts Act that may shed light on the legal threshold for contract adjustment. The Court of Appeal upheld a trial court ruling that the price provision of a fuel oil supply agreement should be adjusted under section 36 of the Finnish Contracts Act. In that case, the market price of fuel oil had almost tripled during the contract term and the fuel supplier had incurred substantial losses in providing its goods in accordance with the agreement. The trial court had ruled that, although the risk of price fluctuation would usually be borne by the supplier (as the parties to the agreement were of equal standing), the price in this case had to be adjusted because it was ultimately unfair. The trial court justified its ruling in part by stating that, because the reason for price escalation was beyond the control of either party, neither party could have foreseen the significant increase the fuel oil would undergo when concluding the original agreement; therefore the agreement should be equitably modified.[36]

England

In England, there is no statutory definition of force majeure, but there have been a number of attempts to define it for the purposes of contracts.

The expression force majeure does not exist under English contract law, but the generally perceived view is that it is something that makes the contract impossible, is unforeseen, and was unavoidable in occurrence and effects. Some people use the slightly more pithy phrase of 'Act of God' to describe the equivalent of force majeure, although this suggests natural causes and, in reality, is not wide enough. English common law has the doctrine of frustration, which is a defence to a claim for breach of contract. Force majeure may be drafted into a contract as a ground for extending the completion date for performance.

McCardie J reviewed the authorities on force majeure over 100 years ago in the case of *Lebeaupin v Richard Crispin & Co*:[37]

'The meaning of the phrase as used on the continent of Europe is discussed in CALVO'S DICTIONNAIRE DE DROIT INTERNATIONAL, title "Force Majeure" and by DALLOZ, JURISPRUDENCE GENERALE, tome 24, p 755, article "Force Majeure." A broad statement on the matter appears in GOIRAND'S FRENCH COMMERCIAL LAW (2nd Edn) p 854, who says:

"'Force Majeure.' This term is used with reference to all circumstances independent of the will of man, and which it is not in his power to control, and such force majeure is sufficient to justify the non-execution of a contract. Thus war, inundation, and epidemics are cases of force majeure; it has even been decided that a strike of workmen constitutes a case of force majeure."

This is a wide definition, but I think that it usefully, though loosely, suggests not only the meaning of the phrase as used on the continent, but also the meaning of the phrase as often employed in English contracts. That "war" comes within the meaning of force majeure would seem to be the opinion of SWINFEN EADY, LJ, in Zinc Corpn, Ltd v Hirsch (7).'

In England, there is not statutory definition of force majeure, but there have been a number of attempts to define it for the purposes of contracts.

The following is a definition of force majeure used in an English construction contract:

'Force Majeure: an event which prevents or delays either Party from performing its obligations under this Contract, and which results from events, circumstances or causes outside the Parties' control, and which would have been judged to have such a small chance of occurring at the Base Date that it would have been unreasonable for the Parties to allow for it.'

In England, there are a number of standard form contracts produced, primarily by the Joint Contracts Tribunal (JCT), which is the leading supplier of standard contracts and the NEC suite of contracts. The standard JCT provision does not define force majeure, but refers to it as a Relevant Event, in most of the forms of contract, which can entitle the contractor to an extension to the date for completion. The JCT Design and Build Contract 2016 lists force majeure as Relevant Event 14, the final Relevant Event in the list of possible events. There is no similar Relevant Matter entitling the contractor to loss and expense for a force majeure. Covid-19 was often claimed as a force majeure in the early stages of the pandemic in the United Kingdom.

The NEC takes a different approach and does not use the phrase force majeure, but it has a provision that achieves the same thing. Core Clause 19 is titled Prevention and stands separate from Core Clause 6 Compensation Events. Clause 19.1 states the following:

'19.1 If an event occurs which

• Stops the Contractor completing the whole of the works or

• Stops the Contractor completing the whole of the works by the date for planned Completion shown on the Accepted Programme.

And which

• Neither Party could prevent and

• An experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable to have allowed for it.

The Employer gives an instruction to the Contractor stating how the event is to be dealt with.'

The above clause amounts to a force majeure clause, but without using that phrase. By doing so, it allows the provision to be used internationally as there can be no argument over the use of the term force majeure and its application under the applicable law of the contract.

In conclusion, there is no single contractual definition of force majeure in English law and there is a similar provision in the doctrine of frustration, which may be used as a defence in any event. The term has, however, come into regular use in England and is now regularly referred to in contracts, sometimes as a defined term and, on other occasions, not. War is a force majeure, but it is also a potentially frustrating event.

United States

In the US, standard contracts generally continue to treat acts of war and civil unrest as uncompensated force majeure events.

Example 1

US Federal Acquisition Regulation (FAR) 52.249-14 [Excusable Delays]:

> 'Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be the control and without the fault or negligence of the Contractor. "Default" includes failure to make progress in the work so as to endanger performance.'

Example 2

US American Institute of Architects (AIA) Document A201-2017, General Condition 8.3.1:

> If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented..., or other causes beyond the Contractor's control; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.'

France

French law establishes a formal distinction between private law and public law. Private law regulates relationships between private individuals, while public law regulates the organisation of the state (constitutional law), and the relationships between the state (and institutions deriving from it) and private individuals (administrative law).

According to French legal thinking, the laws relating to administrative contracts are fundamentally different from those governing contracts between private individuals. This is because the administration must safeguard the public interest and ensure the continuity of public services. As a result, administrative law invokes a more distinct set of regulations than those applied to relationships between private persons.

In France, private construction contracts are governed by the law of obligations included in the French Civil Code, and disputes relating to such contracts, in the absence of an arbitration clause, are heard by the French civil courts.

French administrative law operates as a completely separate legal system. It was largely created and developed by administrative courts, which have exclusive competence to hear disputes arising out of administrative contracts. These courts do not apply the French Civil Code, although they may refer to it as a source of inspiration for creating rules applicable to administrative contracts. To protect the public interest, administrative courts have developed rules that endow the public party with special and exceptional powers, which apply regardless of whether they are explicitly provided for in the contract. These powers are counterbalanced by special rights to compensation for the private party, some of which will be discussed below.

Under French private law, historically, force majeure was defined as an event that was (1) external to the parties; (2) unforeseeable; and (3) unavoidable or insurmountable. However, as of 2006, the French Supreme Court (Cour de cassation) abandoned the requirement that the event be external to the parties. This change was subsequently codified in the 2016 reform of French contract law. Article 1218 of the French Civil Code now provides that:

> 'In contractual matters, there is force majeure where an event beyond the control of the debtor, which could not reasonably have been foreseen at entry into the contract and whose effects cannot be avoided by appropriate measures, prevents the debtor from performing his obligation.
>
> If the impediment is temporary, the performance of the obligation is suspended unless the resulting delay would justify termination of the contract. If the

impediment is permanent, the contract is automatically terminated, and the parties are free from their obligations pursuant to the conditions laid down in articles 1351 and 1351-1.'[38]

In the context of a construction contract, if a force majeure event has a temporary effect, the contractor is entitled to suspend performance of the works and, therefore, to receive additional time. However, it is not entitled to compensation for prolongation costs.

Whether the war in Ukraine constitutes a force majeure event under French law is likely to depend on the facts. In every case, the party invoking a force majeure must establish that the event was unforeseeable at the time the contract was entered into. This is typically assessed on the date of the contract's signature. The war in Ukraine is likely to be considered unforeseeable before Russia's invasion on 24 February 2022, but not after that date. An obligor would also have to demonstrate that the war in Ukraine had prevented the performance of its obligation.

Under French private law, the rules governing force majeure are not mandatory, meaning the parties are free to negotiate, modify or exclude them contractually.

The main standard forms of contract for private construction works in France are published by the Association Française de Normalisation (AFNOR). These include the NF P 03-001 for private building works (last revised in 2017) and the NF P 03-002 for civil engineering works (last revised in 2014). These forms align with the position under French private law, treating acts of war as uncompensated force majeure events (Articles 10.3.1.2 and 9.1.4 of NF P 03-001; and Articles 10.5.1.2 and 9.1.1 of NF P 03-002).

Under French administrative law, the position is more contractor-friendly, although it does not go as far as the 1999 and 2017 editions of FIDIC rainbow suite.

As mentioned above, administrative courts do not apply the French Civil Code, but they may use it as a source of inspiration for creating the rules applicable to administrative contracts.

This is the case in relation to force majeure. French administrative law continues to define force majeure events in accordance with the original private law definition, that is, that the event shall be (1) external to the parties; (2) unforeseeable; and (3) unavoidable or insurmountable. This remains the case today, despite the evolution of case law since 2006, and the 2016 reform of the French Civil Code.

However, unlike private contracts, in the case of an administrative contract, a contractor may recover damages suffered directly as a result of force majeure. This includes damages caused to the works by the force majeure event, but does not include prolongation costs.

Similar to the situation under French private law, the standard form of contract for public works in France (Cahier des Clauses Administratives Générales or CCAG, Marchés publics de travaux, last published in 2021) codifies the default position under administrative law. It provides that a contractor may be entitled to an extension of time and compensation for damages caused to the works by a force majeure event (Articles 17.3 and 18.2 of the CCAG, Marchés publics de travaux).

Notes

1 FIDIC stands for Fédération Internationale des Ingénieurs-Conseils (the International Federation of Consulting Engineers).

2 The Red Book is the Contract for Construction for Building and Engineering Works Designed by the Employer.

3 The Yellow Book is the Contract for Plant and Design-Build for Electrical and Mechanical Plant, and for Building and Engineering Works Designed by the Contractor.

4 The Silver Book is the Contract for EPC/Turnkey Projects.

5 Italian Civil Code (as of 2025) Art 1218 provides that the obliged party 'who does not exactly perform his obligation is liable for damages, unless he proves that the non-performance or delay was due to impossibility of performance for a cause not attributable to him'.

6 ANAC Resolution 227 dated 11 May 2022.

7 Italian Civil Code (as of 2025), Art 1256, para 2. In case law, the Italian Supreme Court, decision no 1037/1995.

8 *Ibid*, para 1.

9 Italian Civil Code (as of 2025) Art 1467.

10 Aurelio Gentili, 'Una proposta sui contratti d'impresa al tempo del Coronavirus' (2020) www.giustiziacivile.com accessed 3 March 2025. Massimo Franzoni, 'Il covid-19 e l'esecuzione del contratto' (2021) Rivista Trimestrale di Diritto e Procedura Civile 1.

11 Italian Supreme Court, Relazione della Corte di cassazione 2020, no 56 www.cortedicassazione.it accessed 3 March 2025.

12 Guido Alpa, *Note in margine agli effetti della pandemia sui contratti di durata'* (2022), *Il diritto dei contratti e l'emergenza sanitaria* – Quaderni della Scuola Superiore di Magistratura. An amendment of the Italian Civil Code including the renegotiation duty was proposed in 2019 in Disegno di legge di revisione del codice civile, Ddl 19 March 2019, Atti del Senato, no 115, but, as of today, it has not been enacted.

13 Public Contracts Code (Legislative Decree 36/2023), Art 9.

14 A more detailed clause in German could read as follows: "Höhere Gewalt' bedeutet das Eintreten eines Ereignisses oder Umstands, das eine Partei daran hindert, eine oder mehrere ihrer vertraglichen Verpflichtungen aus dem Vertrag zu erfüllen, wenn und soweit die von dem Hindernis betroffene Partei nachweist, dass: (a) dieses Hindernis außerhalb der ihr zumutbaren Kontrolle liegt; und (b) es zum Zeitpunkt des Vertragsabschlusses nicht in zumutbarer Weise vorhersehbar war; und (c) die Auswirkungen des Hindernisses von der betroffenen Partei nicht in zumutbarer Weise hätten vermieden oder überwunden werden können.

1. Bis zum Beweis des Gegenteils wird bei den folgenden Ereignissen vermutet, die eine Partei betreffen, sie würden die Voraussetzungen unter Absatz 1 lit. (a) und lit. (b) nach Absatz 1 dieser Klausel erfüllen:

(i) Krieg (erklärt oder nicht erklärt), Feindseligkeiten, Angriff, Handlungen ausländischer Feinde, umfangreiche militärische Mobilisierung;

(ii) Bürgerkrieg, Aufruhr, Rebellion und Revolution, militärische oder sonstige Machtergreifung, Aufstand, Terrorakte, Sabotage oder Piraterie;

(iii) Währungs- und Handelsbeschränkungen, Embargo, Sanktionen;

(iv) rechtmäßige oder unrechtmäßige Amtshandlungen, Befolgung von Gesetzen oder Regierungsanordnungen, Enteignung, Beschlagnahme von Werken, Requisition, Verstaatlichung;

(v) Pest, Epidemie, Pandemie, Naturkatastrophe oder extremes Naturereignis;

(vi) Explosion, Feuer, Zerstörung von Ausrüstung, längerer Ausfall von Transportmitteln, Telekommunikation, Informationssystemen oder Energie;

(vii) allgemeine Arbeitsunruhen wie Boykott, Streik und Aussperrung, Bummelstreik, Besetzung von Fabriken und Gebäuden.

Eine Partei, die sich mit Erfolg auf diese Klausel beruft, ist ab dem Zeitpunkt, zu dem das Hindernis ihr die Leistungserbringung unmöglich macht, von ihrer Pflicht zur Erfüllung ihrer vertraglichen Verpflichtungen und von jeder Schadenersatzpflicht oder von jedem anderen vertraglichen Rechtsbehelf wegen Vertragsverletzung befreit; sofern dies unverzüglich mitgeteilt wird. Erfolgt die Mitteilung nicht unverzüglich, so wird die Befreiung von dem Zeitpunkt an wirksam, zu dem die Mitteilung die andere Partei erreicht. Ist die Auswirkung des geltend gemachten Hindernisses oder Ereignisses vorübergehend, so gelten die eben dargelegten Folgen nur so lange, wie das geltend gemachte Hindernis die Vertragserfüllung durch die betroffene Partei verhindert. Hat die Dauer des geltend gemachten Hindernisses zur Folge, dass den Vertragsparteien dasjenige, was sie kraft des Vertrages berechtigterweise erwarten durften, in erheblichem Maße entzogen wird, so hat jede Partei das Recht, den Vertrag durch Benachrichtigung der anderen Partei innerhalb eines angemessenen Zeitraums zu kündigen. Sofern nicht anders vereinbart, vereinbaren die Parteien ausdrücklich, dass der Vertrag von jeder Partei gekündigt werden kann, wenn die Dauer des Hindernisses 120 Tage überschreitet."

15 Bundesministerium für Wohnen, Stadtentwicklung und Bauwesen; Bundesministerium für Digitales und Verkehr, both on 25 March 2022.

16 OLG Hamburg, 14 U 124/05, 28.12.2005 and BGH, VII ZR 55/06, 23.11.2006 (increase of steel prices); OLG Düsseldorf, 23 U 48/08, 19.01.2008 https://openjur.de/u/138157.html accessed 3 March 2025.

17 BGH, XII ZR 8/21, 12.01.2022 http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=126855&pos=0&anz=1 accessed 3 March 2025. OLG Düsseldorf, 10 U 192/21, 23.06.2022 (adaptation of lease) https://beck-online.beck.de/Print/CurrentMagazine?vpath=bibdata%5Cents%5Cbeckrs%5C2022%5Ccont%5Cbeckrs.2022.20509.htm&hlwords=on&printdialogmode=CurrentDoc&actionname=Index&gesamtversionpath=&timezone=Europe%2FBerlin&exportFormat=print&options=WithLinks accessed 3 March 2025.

18 An excellent overview with specific reference to the Ukraine war: Lührmann/Egle/Thomas: *Störung der Geschäftsgrundlage: Preisanpassung durch Ukraine-Krieg?* (NZBau 2022, 251); Leinemann: *Der Ukraine-Krieg als ein auf (Bau-) Verträge einwirkendes Ereignis höherer Gewalt im Vertrags- und Vergaberecht* (UKuR 2022, 53).

19 ÖNORM B211 is regularly amended, this article refers to the latest version of 1 May 2023.

20 See www.austrian-standards.at accessed 3 March 2025.

21 Karasek, ÖNORM B 2110, margin no 1189.

22 See ss 1168 and 1168a ABGB.

23 6 Ob 136/22a.

24 See Pochmarski/Kober, Mehrkosten für Preissteigerungen (Additional Costs for Price Increases), ImmoZak 2023/11.

25 Karasek, ÖNORM B2110, margin no 2038.

26 Riedler in Schwimann/Kodek, ABGB Praxiskommentar, marginal no 6 to s 901.

27 *Ibid*, marginal no 8 to s 901.

28 *Ibid*, marginal no 11 to s 901.

29 OGH 5 Ob 64/74; 6 Ob 148/07v.

30 The Sale of Goods Act in Finland may be considered in interpreting commercial contract terms. It has been put forward in Finnish jurisprudence that where the parties have not been clear as to their respective objectives, interpretation in accordance with accepted norms may be pursued (Hemmo, Mika: Sopimusoikeus I [in English: Contract Law I], 2003, p 592). Rules of Interpretation in non-mandatory legislation are among the benchmarks of reasonableness that can be applied. (Government proposal to the Parliament for legislation concerning amendment of a legal action for reasons of equity (247/1981), pp 13–14).

31 See, eg, justifications in Turku Court of Appeal judgment 26.6.1991 no 705 in this regard.

32 Turku Court of Appeal judgment 14.2.1996 no 582.

33 Vaasa Court of Appeal judgment 16.12.1997 no 1870.

34 Helsinki Court of Appeal judgment 30.5.2008 no 1553.

35 Halila, Halila – Rakennusurakan yleisiin sopimusehtoihin perustumaton urakkahinnan tarkistaminen in Defensor Legis, 1987.

36 For more insights on the judgment in question, see Klami-Wetterstein, Paula – *Kustannusten nousu, muuttuneet olosuhteet ja sopimuksen sovittelu* in Finnish legal bulletin Oikeustieto 1/2015.

37 [1920] All ER Rep 353.

38 Free translation. The original text in French provides: 'Il y a force majeure en matière contractuelle lorsqu'un événement échappant au contrôle du débiteur, qui ne pouvait être raisonnablement prévu lors de la conclusion du contrat et dont les effets ne peuvent être évités par des mesures appropriées, empêche l'exécution de son obligation par le débiteur.
Si l'empêchement est temporaire, l'exécution de l'obligation est suspendue à moins que le retard qui en résulterait ne justifie la résolution du contrat. Si l'empêchement est définitif, le contrat est résolu de plein droit et les parties sont libérées de leurs obligations dans les conditions prévues aux articles 1351 et 1351-1.'

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FEATURE ARTICLE

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Clash or complementarity? Exploring interim relief powers of emergency arbitrators and dispute adjudication boards

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There is some debate in the dispute resolution community regarding the coexistence of dispute adjudication boards (DABs) and emergency arbitration (EA) in multi-tiered dispute resolution clauses in construction contracts.[1] The discussion centres on the powers both mechanisms hold to order temporary interim and conservatory measures, and on the perception that the interaction between these two dispute resolution systems may lead to issues of competence or admissibility of claims.

This article explores the nature of EAs and DABs, highlighting similarities and differences in purpose. It also discusses admissibility criteria for requests of interim and conservatory measures, differentiates procedural structures and scopes, and raises some questions that hopefully will contribute to the existing debate.

Emergency arbitrator

Overview

The EA procedure is intended for urgent applications that need immediate redress. This mechanism is available to any contract of all industries adopting arbitration rules, such as those of the International Chamber of Commerce (ICC),[2] the International Centre for Dispute Resolution (ICDR)[3] and the London Court of International Arbitration (LCIA),[4]

to settle disputes, and not only in construction, as is primarily the case for DABs.

EA's nature is both contractual and jurisdictional.[5] It is contractual because the parties have agreed under a contract to submit their disputes to arbitration pursuant to specific rules and procedures, and it is jurisdictional because EA acts as a quasi-judicial figure to resolve urgent matters before the constitution of the arbitral tribunal.

the measures granted by EA may be enforced through legal systems, providing a critical safeguard for parties in international disputes where time sensitive relief is essential

The legitimacy of EA stems from its foundation in international law, institutional arbitration rules and its recognition under local law in some jurisdictions,[6] which may facilitate enforcement. This leaves aside jurisdictions that adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law[7] and the discussion on whether interim relief orders issued by EA are enforceable under the New York Convention.[8] This ensures that the measures granted by EA may be enforced through legal systems, providing a critical safeguard for parties in international disputes where time-sensitive relief is essential.

Interim measures under ICC Rules.

ICC Arbitration Rules (the 'Rules') provide that EAs are entitled to render 'urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal' at the request of an aggrieved party and define those as 'Emergency Measures'.[9]

The Rules do not define or clarify the nature, scope or application of these Emergency Measures, nor do they specify what EA can order within the framework of their emergency powers.

The UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules 2021 provide valuable guidance. Article 17 of the Model Law and Article 26 of the Rules define interim measures as:

> 'any temporary measure [...] by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to: (a) maintain or restore the status quo pending determination of the dispute; (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; (c) provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) preserve evidence that may be relevant and material to the resolution of the dispute'.

EA's nature implies that Emergency Measures tend to align with the interim and preliminary relief traditionally handled by arbitral tribunals and courts of justice, albeit with notable limitations.

On the one hand, Emergency Measures in arbitration typically aim to safeguard the subject matter, preserve the effectiveness of the procedure and award, and address specific concerns, like asset protection, maintaining the status quo or preventing irreparable harm.[10] However, they remain confined to the contractual framework of the arbitration.

By contrast, courts of justice generally have a broader scope, as they can normally grant interim measures within both contractual and extra-contractual contexts. For instance, a court can order the attachment of assets, the suspension of administrative actions, arbitration or judicial proceedings, or issuing injunctions or seizures, even if these measures are not directly related to the disputed contract. Furthermore, courts have greater flexibility in adapting measures to the specific circumstances of each situation, as may be the case with so-called self-satisfying or innovative interim measures available in some jurisdictions.

The enforceability of interim measures issued by an emergency arbitrator largely depends on the recognition granted by local laws to provisional arbitral decisions. While many jurisdictions, particularly those that have adopted the UNCITRAL Model Law, recognise and enforce interim measures issued by arbitrators, not all national legal systems provide precise mechanisms for executing EA's orders. This can create a practical issue: even though the measures are binding on the parties, their coercive enforcement may require validation by a court of law, introducing the risk of delays or even outright rejection.

By contrast, interim measures issued by courts of justice are generally inherently enforceable, as the state's coercive power

backs them. Courts can mobilise state resources, such as law enforcement or administrative bodies, to ensure compliance with their orders. This provides immediate certainty and effectiveness that EA measures do not inherently possess.

Obtaining interim measures from EA

Under the Rules, the emergency measures process offers a streamlined method to address urgent situations before an arbitral tribunal is constituted. A party must submit a written request to the ICC Secretariat detailing the specific emergency measures sought, the urgency of the situation and supporting evidence. The Secretariat reviews the application promptly and, if admissible, appoints an emergency arbitrator within two days,[11] ensuring a rapid response to time-sensitive needs.

Once appointed, the emergency arbitrator conducts expedited proceedings that balance the urgency of the matter with fairness, allowing both parties a brief opportunity to present their cases through written submissions, virtual hearings or other suitable formats. Unlike many judicial courts, where interim measures are often granted without hearing the opposing party (*inaudita parte*), this process aligns with the UNCITRAL Model Law and national arbitration laws, ensuring due process.

The emergency arbitrator is required to issue a decision within 15 days,[12] unless the ICC Secretariat grants an extension or it is agreed upon by the parties. This decision is binding, yet does not affect the final arbitral tribunal's ruling, as the tribunal retains complete independence to decide on the merits and any subsequent provisional measures, emphasising the temporary nature of the emergency measures.

The framework raises concerns about the interaction between EA interim measures and those issued by national courts, as provided under Article 29.7 of the 2021 ICC Arbitration Rules, especially when orders conflict or parties attempt to use judicial decisions to undermine EA measures. The absence of a uniform enforcement framework for EA decisions could lead to challenges, as some legal systems might prioritise local court orders or require enforcement through the court of justice.

DABs

Overview of DABs

DABs are increasingly critical for ensuring robust, effective, and efficient dispute management and resolution in construction contracts, and their role has been significantly enhanced through international guidelines and best practices.[13] They provide a neutral experience to tackle problems proactively as they arise to avoid disputes, prevent conflict escalation, cost overruns and disruption and, most importantly, ensure project continuity.

DAB decisions and orders are fundamentally contractual,[14] meaning that their authority and scope derive directly from an agreement between the parties. As a result, they become contractual obligations that the parties must comply with, in the same way as any other contract clause.

DABs are normally taken as permanent or ad hoc in construction works, especially under FIDIC or NEC contracts, or other types of contracts, including dispute board rules. Permanent DABs are introduced at the project's outset and remain involved throughout its execution, while ad hoc DABs are activated when a dispute arises.

The DAB's contemporaneity with the project and its deep knowledge of issues relating to the works, particularly when they are permanent, are key elements that should be carefully considered when assessing its role concerning interim and conservatory measures.

FIDIC model contracts

FIDIC model contracts include DAB provisions in its Red, Yellow and Silver books. The Red Book, for example, notes that 'the Parties shall jointly appoint the member(s) of the DAAB.[15] Within the time stated in the Contract Data (if not stated, 28 days) after the date the Contractor receives the Letter of Acceptance',[16] and emphasises that '[t]he DAAB proceeding shall not be deemed to be an arbitration and the DAAB shall not act as arbitrator(s)'.[17]

NEC model contracts

DABs in the NEC model contracts reflect the framework's emphasis on collaboration and proactive dispute resolution. Unlike FIDIC contracts, where DABs are more prescriptive and dispute resolution, in general, may

depend on a three-step process (engineer, DAB and arbitration), the NEC approach integrates adjudication or DABs as part of a flexible and cooperative dispute management process through a set of optional clauses identified as 'W Clauses'.[18] NEC contracts encourage early engagement and dialogue, with DABs often playing a preventive role before disputes escalate. This aligns with NEC's core principles of fostering trust, mitigating risks and promoting effective communication between parties.

It is worth noting that, while FIDIC model contracts typically provide for their own DAB procedural rules, NEC model contracts, which were initially drafted to include mandatory adjudication under the United Kingdom Construction Act as a dispute resolution option, tend to include ICC Dispute Board rules when internationalised.

Interim measures under DABs

DAB Procedural Rules under FIDIC model contracts, ICC Dispute Board Rules and other dispute board rules used internationally provide that DABs are empowered to order interim or conservatory measures. However, as in the case of EAs, neither of these rules and procedures clearly define the exact meaning and scope of the interim and conservatory measures that a DAB can order.

This lack of definition in both systems often leads to interpretative conflicts when determining the scope of authority for interim measures issued by a DAB and EA, particularly when both systems coexist within multi-tiered dispute resolution clauses.

The distinction lies in the contractual nature of DAB decisions versus the judicial framework of EAs, making DABs integral to maintaining project continuity, whereas EAs serve broader protective purposes

In contrast to the typical scope of Emergency Measures under EA, interim and conservatory measures sought before a DAB may involve the temporary suspension of the application of penalties or orders for the removal of key personnel; execution of emergency works to prevent disasters or damage; instructions for continuing work or to access the site; preservation of items; and payment orders, among others. These measures are related to the contractual ecosystem and, in general, have as their primary objective the continuity of the works, the preservation of cashflow and the avoidance of disruption.

A DAB decision, including one dealing with interim or conservatory measures, is binding upon the parties immediately, meaning that the parties must comply with it until the same DAB potentially overturns it at a later stage in the process, or through arbitration or litigation. For a DAB decision to be reviewed, and potentially overturned, by an arbitral tribunal or a court of justice, one of the parties must submit a Notice of Dissatisfaction (NoD) within the applicable contractual timeframe (eg, 28 days from decision issuance under the FIDIC Red Book[19]). If no NoD is submitted, the DAB decision becomes binding and final, effectively closing the matter without further recourse.

By contrast, EA decisions are binding, but lack finality, as they are inherently temporary and subject to potential termination if a request for arbitration has not been submitted within ten days of initiating EA,[20] and subject to review and modification, termination or annulment by the arbitral tribunal.[21] Unlike DABs, EAs operate within the procedural arbitration framework and do not require an equivalent to a NoD to trigger further proceedings. The distinction lies in the contractual nature of DAB decisions versus the jurisdictional framework of EAs, making DABs integral to maintaining project continuity, whereas EAs serve broader protective purposes.

The concepts of 'binding', and 'binding and final' in the context of DAB decisions often generate debate, as they directly impact enforceability and the possibility of advancing the dispute to further stages. This matter may become more complex when dealing with interim or conservatory measures ordered by a DAB, as may be evidenced by the following questions: Can or must a party submit a NoD against an interim or conservatory order issued by a DAB, to prevent it from becoming final? What would the effect of the NoD be in that context? Could a party resort to EA to review and obtain an interim measure that overrides a provisional measure ordered by the DAB?

The answer to the first question is that a party does not need to submit a NoD

against an interim or conservatory order issued by a DAB because its nature is essentially temporary. Such an order will be confirmed or left without effect with the DAB's final decision on the matter. At that point, any unhappy party will have the contractually afforded term to submit the respective NoD, enabling access to arbitral or judicial review at a later stage.

Many construction contracts stipulate that if NoDs have been submitted against DAB decisions throughout the project, all those challenged decisions may be reviewed in a single arbitration after the project's completion. This approach can be beneficial when the goal is for the parties to focus all their efforts on advancing the project (which may even involve working to reconcile their differences) rather than investing time and resources in conducting arbitration in parallel to the project's execution or, even worse, suspending the project while arbitration is underway.

This means that, whenever a NoD is submitted, all challenged DAB decisions will be revised after the project is completed. But does this prevent a discomforted party from resorting to EA to seek emergency revision and potentially overriding a DAB conservatory measure?

Given its jurisdictional nature, EA may have the authority to issue interim measures that supersede the DAB's decision, particularly if EA determines that urgent and irreparable harm would result from enforcing the DAB's order. However, this could create procedural conflicts and undermine the contract and the role of the DAB, which is designed to address disputes within the project framework.

Consequently, I believe that when a party disagrees with an interim measure ordered by a DAB, the most reasonable approach would be to express its disagreement when responding to the statement of case (potentially even registering it as a NoD at that time, even if not strictly necessary as mentioned above). Subsequently, the disagreeing party could submit the formal NoD if the DAB's final decision is also unsatisfactory. In this way, the contractual terms agreed upon by the parties for resolving their disputes would be upheld while preserving each party's rights regarding the aspects they disagree with.

Obtaining interim measures from DABs

DAB procedures are generally more flexible and informal than EA procedures, even though DABs must still adhere to certain procedural and contractual guidelines. This inherent flexibility and informality are aligned with the DABs primary role in preventing disputes from arising or escalating, making it a fundamental aspect of the system.

Unlike Emergency Measures, which have a specific procedure set forth under ICC Arbitration Rules, there is no interim or conservatory measures procedure provided for under FIDIC model contracts or ICC Dispute Board rules. In both cases, the rules indicate that the DAB has the power to decide on any provisional relief, such as interim or conservatory measures and that the parties must include any such request in their statement of the case.

DAB procedures are generally more flexible and informal than EA procedures, even though DABs must still adhere to certain guidelines

Because there are no special guidelines related to interim or conservatory measures in the procedure applicable to DABs, except for what is mentioned in the preceding paragraph, it seems reasonable to assume that they can only be requested in the context of a formal submission. This implies that the DAB will be aware of the entire context of the dispute and its supporting documentation while addressing the request for protective measures from one of the parties. This is a significant difference from EA, as EA only focuses on resolving the interim measure, and the main arbitration action must be initiated within ten days from the date the interim measure request is submitted to avoid the EA procedure from being terminated, as noted above.

When a request for interim measures is made within the framework of a formal submission to the DAB, it must urgently make a decision regarding the request. However, the ICC Dispute Board Rules specify that anyone initiating a formal submission must simultaneously notify both the DAB and the other party by sending or providing all documentation they rely on. This means that the party against whom the requested interim measure is directed

becomes aware of the request at the same time as the DAB and the ICC rules grant the respondent 30 days to present its response, which must include, as it was noted, 'a statement of the issues on which the responding Party requests the DB's Conclusion, including any request for interim or conservatory measures'.[22] However, this 30-day period seems to overlook that urgency is a key characteristic of any protective request, making it notoriously excessive, especially when compared to the emergency procedures outlined in the ICC Arbitration Rules, which are much shorter.

In this context, one of the DAB's essential functions becomes particularly relevant: ensuring the continuity of the project, with a special focus on its cashflow, thus avoiding interruptions and delays attributable to conflicts between the parties.

In that context, one of the powers granted to DABs under ICC Dispute Board Rules is particularly useful: 'take any measures necessary for it to fulfill its function as a DB'.[23] Considering the inherent urgency of the interim measure request and the short deadlines provided in the ICC rules or FIDIC contracts for resolving and deciding a dispute before a DAB, my interpretation is that the DAB has an obligation to address the interim measure request with urgency. Accordingly, the DAB could request additional information from the applicant to better understand the situation and decide whether to grant the requested measure as submitted or with some modification, all without immediately involving the opposing party, that is, *inaudita parte*.

This is particularly relevant considering that Article 20 of the ICC Dispute Board Rules stipulates that the response to the statement of the case (ie, the document that initiates the formal submission process before a DAB) must include a 'statement of the issues on which the responding Party requests the DB's Conclusion, including any request for interim or conservatory measures'. In any case, that response could serve as the appropriate opportunity for the party against whom the interim measure is directed to express its position on the matter and, if necessary, submit a NoD regarding the DAB's interim or conservatory decision.

Once the interim measure has been granted, the respondent may present its position in its answer to the statement of case within the 30-day period. Once the response is received, the DAB can review the interim measure granted in light of the responding party's arguments. It may confirm, modify or rescind it, if deemed appropriate, always acting in the project's best interest.

Any different approach, which may include providing for a mini substantiation procedure of the interim measure request by allowing the counterparty an opportunity to present its position or even admitting an impromptu presentation by the counterparty against the requested measure, would openly exceed what is provided under FIDIC or ICC dispute board rules and create a 'process within a process' situation, with all the problems and negative aspects that may arise from it, all of which can significantly delay the formal submission procedure and distort the DAB mechanism, jeopardising its credibility and independence.

The range of situations that can give rise to requests for interim protection in the context of DABs is as diverse as the projects and contracts themselves. While it could lead to an interesting case analysis, it far exceeds the scope of this article. For reference, it is worth noting that some of the most common requests are related to the suspension of penalties; requests for payments that are blocked due to particular circumstances; conflicts related to the appointment or removal of key personnel; issues concerning access to the work site; or matters related to insurance and guarantees.

The scope of the interim measures that can be requested before a DAB may seem broader than EA's. However, this is only partially true, as this supposed breadth is confined to the ecosystem of the contract and the project within which the DAB must operate.

On the other hand, EA's jurisdictional nature would grant it the authority to rule not only on measures or preliminary actions (eg, the production of evidence in advance, securing evidence in the possession of the counterparty or third parties etc) but also on those interim measures expressly provided for in the applicable legislation for the contract (generally, injunctions, measures to maintain status quo etc).

Therefore, it seems clear that the DAB and EA have a well-defined and differentiated scope of action regarding interim and

protective measures. This can be quickly clarified by answering the following question: Which of the two systems is better positioned to analyse and resolve, with the required urgency, the requested protective measure, considering the nature of the matter and the level of prior knowledge of the context that gives rise to it?

The previous discussion logically assumes that we are dealing with a case presented to a permanent DAB that is constituted in time and fully operational. However, extraordinary situations may arise in the context of a contract that provides for the action and decision of a DAB as a preliminary procedure to arbitration. One of these could be that the parties failed to establish a permanent DAB in a timely manner or that, otherwise, the DAB is not fully operational (due to the resignation of its sole member or two members in a three-member DAB) so that it is unavailable to address a dispute when it arises. The other situation could be that the contract provides for the involvement of an ad hoc DAB, meaning a DAB that is constituted and comes into function only when a dispute arises.

In either of these two special situations, it is evident that the DAB is not available to address the request for interim relief from one of the parties and that, in the best-case scenario, the constitution and functioning of an ad hoc DAB could take much longer than logically expected to resolve an urgent request. Therefore, in these scenarios, the only possible solution is for the request for interim protection to be made before EA.

Comparison: DABs vs EAs

As we have seen, one of the most significant differences between DABs and EAs lies in their jurisdiction and scope.

DABs are typically limited to disputes arising from the contract or project, making them highly specialised for construction-related issues. They are integrated into on-site project management, offering rapid and often informal responses tailored to the immediate needs of ongoing construction projects. Their decisions are informed by a deep technical understanding, as mandated by FIDIC, which requires that DAB members possess significant expertise in construction. This specialised knowledge allows DABs to make decisions that are contextual and informed by the specific details of the project, ensuring that the unique circumstances and relationships between the parties are considered. Additionally, because permanent DABs are established at the project's outset and remain involved throughout its execution, they offer the advantage of immediacy, often resolving disputes in real time and at lower costs due to fewer formalities.

DABs are typically limited to disputes arising from the contract or project, making them highly specialised for construction-related issues

By contrast, EAs have a broader jurisdiction and apply to a wider range of commercial disputes beyond the narrow confines of construction projects. They operate within the formal arbitration process, where the need for urgency is balanced with strict procedural rigour. The ICC's EA process is designed to address emergencies swiftly, although the procedure can take a couple of weeks to complete under the ICC Arbitration Rules. While EA decisions are also binding, their enforceability may depend on subsequent jurisdictional support, which varies according to local legal recognition.

Coexistence of DABs and EAs

Role in multi-tiered dispute resolution

Multi-tiered clauses, such as those in FIDIC or NEC contracts, aim to establish a step-by-step process to promote early and efficient dispute resolution. In this framework, the DAB acts as the initial mechanism for dispute resolution, with the authority to issue binding decisions that the parties must comply with immediately. This is without prejudice to their ability to challenge such a decision through a NoD, allowing for a review in a subsequent arbitration. After these steps are exhausted, arbitration becomes available, ensuring a structured and sequential process.

Introducing EA under the applicable arbitration rules (eg, ICC Rules) creates tensions regarding the hierarchy and admissibility of interim relief requests. Specifically, the key question is whether EA can act before the DAB has issued a decision, given that multi-tiered clauses designate the DAB as the first level of dispute resolution.

The DAB's decision as a condition precedent

Establishing a DAB as a condition precedent to arbitration[24] has a clear contractual foundation: the parties voluntarily agree to submit disputes to a DAB before escalating them to higher instances. Fulfilling these conditions is not merely a formality; it has significant practical implications. On the one hand, it ensures that disputes are addressed efficiently and directly within the project's context, avoiding immediate recourse to costlier or more formal mechanisms. On the other hand, it guarantees that the parties exhaust the agreed-upon processes before seeking more intrusive or disruptive measures, such as those that EA can grant.

However, this condition raises particular challenges when a party requires immediate interim measures. If the DAB's decision or the necessary process to obtain it has not been completed, one could argue that arbitration, even EA, is premature. This raises the question of whether EA can act without the DAB first addressing the matter.

Admissibility of requests before EA

Several factors determine EA's ability to act before the conditions precedent to arbitration have been fulfilled.

The nature of the interim relief requested must be considered first. If the measure sought is directly related to the DAB's scope (eg, orders to ensure project cashflow), it would be reasonable to argue that the DAB should have priority over EA. However, if the measure involves aspects beyond the DAB's scope, such as protecting off-contract assets or safeguarding procedural rights, EA may be justified in intervening.

Second, the inherent urgency of the request and risk of irreparable harm may justify EA's intervention, even if the DAB has not made a decision, provided that the measure is necessary to prevent irreparable harm or to avoid rendering the parties' rights illusory.[25]

2021 ICC Arbitration Rules do not exclude the possibility of EA acting in urgent situations, even when prior mechanisms like the DAB exist. This was not the case in the 2012 and 2017 rules, which excluded EA when the parties had agreed to another pre-arbitral procedure providing for granting interim or conservatory measures, such as DABs.[26] However, in these cases, EA may require the party to demonstrate why the DAB process is not viable or sufficient in the specific context.

Allowing EA to act without the DAB issuing a decision poses significant risks. It could weaken the effectiveness of multi-tiered clauses, undermine the DAB's role as a preliminary dispute resolution instance and may lead to jurisdictional conflicts, especially if the parties interpret the conditions precedent to arbitration differently.

Admissibility criteria for interim or conservatory measures

In arbitration, interim and conservatory measures are generally admitted based on institutional rules, past arbitral practices, and national and/or international legal principles that consider issues such as urgency, irreparable harm, proportionality and likelihood of success.[27] In some jurisdictions, these criteria are interpreted restrictively, meaning that granting conservatory measures is always exceptional and temporary.

These criteria are also relevant to interim relief requests made before DABs, but they should be applied with a more practical focus that aligns better with the DAB's role and scope in construction projects.

Urgency is just as important for DABs as it is in arbitration, but in the DAB context, urgency usually means addressing immediate threats to the project or its cashflow, such as delays, safety issues, site access, or other issues that could cause disruption or additional costs. Similarly, the need to prove imminent and irreparable harm in the context of a DAB is often related to harm that could interfere with the project's timeline or cashflow or create significant disruption.

As regards the likelihood of success, DABs typically look at whether the facts and claimant's arguments are strong enough to justify the requested measure without delving too deeply into the merits of the case, a task that is reserved for other stages of the process. The focus is on practical and contractual issues, ensuring that the requested measure aligns as much as possible with the contract terms and makes general sense under the applicant's overall arguments, always trying to ensure project continuity. This is closely related to proportionality, as DABs need to carefully

weigh the impact of their decision on the project's progress and the parties' rights under the contract.

In essence, while the same general principles apply in the context of DABs, these criteria must be adapted to meet the DAB's specific purpose and the needs of construction projects. Their decisions focus on what's practical and necessary to keep the project moving while balancing the interests of both parties.

Conclusion

DABs and EAs are both relevant to interim and conservatory measures. However, they serve different purposes.

DABs are creatures of contract and relate to disputes that arise during the construction works, aiming to solve these disputes as they emerge. Their involvement from the very beginning gives them a contemporaneous appreciation of the whole project, which makes it possible for them to issue practical and specific measures aimed precisely at preventing disruption and loss of cashflow.

EAs, on the other hand, operate under rules of arbitration and provide dispute resolution power and interim relief within jurisdictional boundaries. Hence, they are capable of dealing with urgent and extreme situations well beyond the scope of DABs.

Because their scopes of work are different, DABs and EAs are not competitive in the same way; instead, they can be used together, DABs dealing with disputes that arise within the course of a project and EAs dealing with disputes in such cases where DABs are unavailable or are inadequate. It is this comprehensive appreciation of the mechanisms that helps parties avoid inappropriate and excessive burden on one of them and, instead, utilise both systems, which have different strengths, to resolve disputes promptly without risking the enforceability and uninterrupted operations.

Notes

1 Gustavo Paredes, Jugando a las vencidas: Dispute Boards vs Arbitro de Emergencia, Revista Derecho y Sociedad, Pontificia Universidad Católica del Perú No 55, pp 255–264. Gustavo Scheffer da Silveira, El árbitro de emergencia y el dispute board – coexistencia y compatibilidad, Revista ALARB, vol III (2024), pp 108–118.

2 ICC Arbitration Rules (2021), Art 29.

3 ICDR International Dispute Resolution Procedures (2014), International Arbitration Rules, Art 6.

4 LCIA Arbitration Rules (2020), Art 9B.

5 Junmin Zhang, The enforceability of interim measures granted by an emergency arbitrator in international commercial arbitration (2020), Doctoral Thesis, Maastricht University, ProefschriftMaken, ch 4 and pp 277 https://doi.org/10.26481/dis.20201130jz accessed 5 March 2025.

6 Singapore, Hong Kong, the United States, and the United Kingdom have explicitly recognised EA as a mechanism for obtaining interim relief before the constitution of an arbitral tribunal, either directly under local law or through uniform court decisions.

7 Art 17 et seq, 1985 UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006, does not provide a definition for 'arbitral tribunal', leaving uncertainty about whether an emergency arbitrator is included within that scope.

8 Francesco Cámpora Gatica, Reconocimiento y Ejecución de Medidas Cautelares Arbitrales y de Emergencia: Una Nota acerca de las Posibilidades y Límites bajo la Convención de Nueva York de 1958, Revista ALARB vol III (2024), pp 69–75.

9 See ICC Arbitration Rules (2021), Art 29.

10 Andrea Carlevaris and José Ricardo Feris, ICC International Court of Arbitration Bulletin vol 25 no 1 (2014).

11 See ICC Arbitration Rules (2021), Art 29 and Appendix V.

12 ICC Arbitration Rules (2021), Appendix V, Art 6.

13 Dispute Board Manual: A Guide to Best Practices and Procedures, Dispute Resolution Board Foundation, 2019. Dispute Board Manual, Japan International Cooperation Agency, 2019.

14 Mauro Rubino Samartano, Nature and articulated effects of the decisions of dispute adjudication boards; Construction Law International, IBA, November 2019.

15 A development of FIDIC, the Dispute Avoidance and Adjudication Board (DAAB) builds on the traditional DAB model by placing greater focus on proactive measures to prevent disputes, while still fulfilling its adjudication role.

16 FIDIC Conditions of Contract (Red Book, 2017), clause 21.2.

17 FIDIC Conditions of Contract (Red Book, 2017), clause 21.4.3.

18 While the NEC3 model contract includes Options W1 and W2, which provide procedures for adjudication and subsequent dispute resolution, they do not explicitly reference dispute boards. The NEC4 model contract, however, introduces Option W3, which specifically incorporates the use of a DAB.

19 FIDIC Conditions of Contract (Red Book, 2017), clause 21.4.4.

20 ICC Arbitration Rules (2021), Appendix V, Art 2, 6.

21 ICC Arbitration Rules (2021), Appendix V, Art 6, 8.
22 ICC Dispute Resolution Board Rules (2015–2018), Art 20.1.
23 ICC Dispute Resolution Board Rules (2015–2018), Art 15.1.
24 FIDIC Conditions of Contract (Red Book) 2017, clause 21.1 and NEC4 Engineering and Construction Contract, Option Clause W3.2.
25 Eg, see *Gerald Metals SA v Timis* [2016] EWHC 2327 (QB).
26 ICC Dispute Board Rules, 2012 and 2017, Art 29(6)(c).
27 Ch 17: Provisional Relief in International Arbitration, in Gary B Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) pp 2601–2758.

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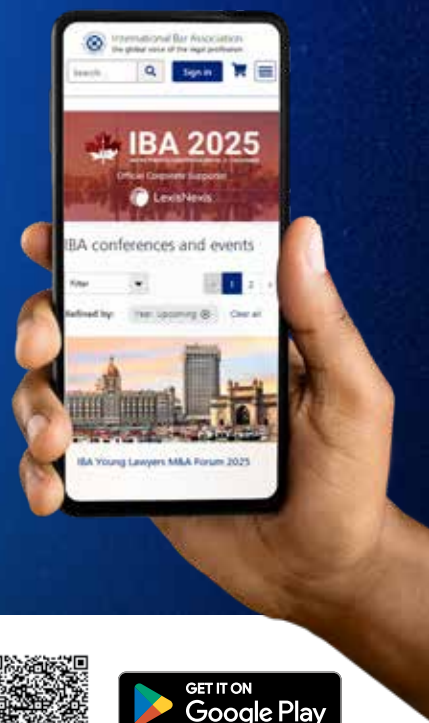

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FEATURE ARTICLE

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Recent English cases reaffirm certainty in contractual interpretation

Mathias Cheung
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Introduction

English law has long been valued by parties for its virtues of certainty and predictability, both at home and abroad. Writing extrajudicially, Sir Kim Lewison, a current Lord Justice of Appeal, observed that '[t]he promotion of certainty is a theme that has run through English commercial law for centuries'.[1] In large part, this has been the mainstay of the success of English law as a preferred choice of governing law for many international contracts and transactions.

Modern judicial approval of legal and commercial certainty rings through the English law reports of the highest appellate courts. In *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha (The Golden Victory)*,[2] for instance, Lord Bingham stated that '[t]he importance of certainty and predictability in commercial transactions has been a constant theme of English commercial law'.[3] More recently, in *JTI POLSKA Sp Z o o and Others v Jakubowski and Others*,[4] Lord Hamblen reiterated that '[c]ertainty and predictability are of particular importance in the context of English commercial law, all the more so given the frequent choice of English law as the governing law in international commercial transactions'.[5]

The importance given to the notion of certainty underlies the English Courts' objective approach to the interpretation of contracts. In *President of India v Jebsens (UK) Ltd (The General Capinpin, The Proteus, The Free Wave and The Dinera)*,[6] Lord Goff observed that 'the objective interpretation is of paramount importance in commercial affairs', noting that commercial people should be able to rely on tribunals to

'adopt the same objective approach as they themselves have to adopt in the daily administration of their contracts' if a dispute arises.[7] Similarly, in *BP Exploration Operating Co Ltd v Kvaerner Oilfield Products Ltd*,[8] Colman J emphasised that '[t]he whole basis of contractual certainty is the words actually used in their ordinary meaning' and that '[d]eparture from the ordinary meaning cannot normally be justified merely because another construction would have produced a result more reasonable in commercial terms for both parties'.[9]

the English courts' approach is still very emphatically focused on the express language of the contract and the importance of certainty

The high point of the promotion of certainty in the interpretation of contracts was probably the well-known case *Arnold v Britton and Others*, which concerned the interpretation of a provision in the lease for the yearly increase of a fixed annual service charge on a compound basis. In upholding the natural and ordinary meaning of this provision in the landlord's favour, the Court of Appeal took the view that the provision 'has a similarity with a liquidated damages clause', and that 'the advantage is certainty' because '[t]he parties know from the outset where they stand'.[10] The United Kingdom Supreme Court endorsed the Court of Appeal's reasoning and dismissed the appeal,[11] stressing that 'the reliance placed in some cases on commercial common sense and surrounding circumstances [...] should not be invoked to undervalue the importance of the language of the provision which is to be construed'.[12]

Although the Supreme Court has since advocated a more nuanced approach and pointed out that '[t]extualism and contextualism are not conflicting paradigms' but instead complementary 'tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement', the extent of their helpfulness varying in each particular case,[13] a number of recent cases in 2024 serve to demonstrate that the English courts' approach is still very emphatically focused on the express language of the contract and the importance of certainty, while at the same time giving effect to the wider policy considerations in play.

Force majeure clauses: *RTI Ltd v MUR Shipping BV*

The first notable case of 2024 (and one that has been widely discussed) is the UK Supreme Court's decision in *RTI Ltd v MUR Shipping BV*,[14] which was a contractual dispute over a force majeure clause in a charterparty for the continuous bulk carriage of bauxite shipments from Guinea to Ukraine. As a result of United States sanctions, the charterer was unable to make timely payments in US dollars, and the shipowner gave a force majeure notice and suspended performance. The Supreme Court therefore had to consider whether the proviso in the force majeure clause that the event 'cannot be overcome by reasonable endeavours from the Party affected' meant that the shipowner should have accepted payment in some other currency.

Lord Hamblen and Lord Burrows began their judgment by summarising the key principles militating in favour of the shipowner's case, including the principle that 'freedom not to contract includes freedom not to accept the offer of a non-contractual performance of the contract',[15] and '[t]he need for clear words to be used for there to be any contractually required change to the parties' rights'.[16] Above all, they reiterated the importance of certainty in commercial contracts (citing *JTI Polska*),[17] and pointed out that '[i]t is not unmeritorious or unjust to insist on contractual performance, all the more so if being precluded from doing so would introduce uncertainty contrary to the expectations of reasonable business people'.[18]

With the above principles in mind, the Supreme Court unanimously held that the 'reasonable endeavours' provision did not operate to require the shipowner to accept non-contractual performance, and that such a provision was only 'geared towards achieving contractual performance: it is concerned with reasonable efforts to overcome the sanctions by achieving payment in US dollars'.[19] This is the clearest and most direct expression of the continuing importance of promoting certainty and predictability in the parties' contractual bargain, and it will be seen that this is also a running theme in the other cases discussed below.

Construction adjudication under collateral warranties: *Abbey Healthcare (Mill Hill) Ltd v Augusta 2008 LLP*

One of the most highly anticipated decisions in 2024 in the field of construction law was the UK Supreme Court's judgment in *Abbey Healthcare (Mill Hill) Ltd v Augusta 2008 LLP*,[20] which considered whether a collateral warranty executed some four years after practical completion and eight months after all defect rectification works had been completed by another contractor could nonetheless be construed as a 'construction contract' under section 104 of the Housing Grants, Construction and Regeneration Act 1996 ('HGCRA'), such that the statutory adjudication provisions would apply.

At first instance, Deputy High Court Judge Martin Bowdery KC held that the collateral warranty in question was not a 'construction contract' in the circumstances, for 'where the works have already been completed, and as in this case even latent defects have been remedied by other contractors, a construction contract is unlikely to arise and there will be no right to adjudicate'.[21] This was reversed by a majority of the Court of Appeal (with Stuart-Smith LJ dissenting) on the basis that the wording of the collateral warranty was 'warranting that, not only have they carried out the construction operations in accordance with the building contract, but they will continue so to carry out the construction operations in the future'.[22] It is noteworthy that, in reaching this conclusion, Coulson LJ considered that any other result would be 'counter-intuitive' and 'unsatisfactory' because it 'would make for considerable uncertainty' to have a warranty construed as a 'construction contract' (or not) depending on whether a contractor executes the warranty before or after completion.[23]

Given the divergence of judicial opinions on this issue, it is perhaps unsurprising that the UK Supreme Court ultimately took a different view and unanimously overruled the Court of Appeal's decision. Lord Hamblen approached the issue essentially as a question of interpretation of the wording in the HGCRA and warranty. Fundamentally, Lord Hamblen disagreed that the reference to an agreement 'for [...] the carrying out of construction operations' under section 104(1) of the HGCRA can be read as synonymous with an agreement 'in respect of' construction operations; rather, the natural and ordinary meaning of the word 'for' indicated that the question is 'whether the object or purpose of the agreement is the carrying out of construction operations'.[24]

Based on the above reasoning, Lord Hamblen observed generally that 'it is difficult to see how the object or purpose of a collateral warranty is the carrying out of construction operations' because the 'main object or purpose of such a warranty is to afford a right of action in respect of defectively carried out construction work, not the carrying out of such work'. It follows that the collateral warranty in question was not a 'construction agreement' for the purposes of the HGCRA.[25]

It is interesting that both Coulson LJ in the Court of Appeal and Lord Hamblen in the Supreme Court invoked the notion of 'certainty' but ended up reaching diametrically opposite conclusions.

Notably, Lord Hamblen's conclusion was very much driven by what he perceived to be 'in the interests of certainty', namely that 'there is a dividing line which means that collateral warranties are generally outside the 1996 Act rather than everything being dependent on the wording of the particular collateral warranty in issue', and he considered that this would 'assist those in the construction industry, and those advising them, to know where they stand'. This is the clearest possible example of the importance attached by English Courts to legal/commercial certainty when dealing with problems of contractual interpretation.

It is interesting that both Coulson LJ in the Court of Appeal and Lord Hamblen in the Supreme Court invoked the notion of 'certainty' but ended up reaching diametrically opposite conclusions. It is clear that certainty was only one part of the equation and that policy was another key factor, whereas Coulson LJ was heavily influenced by what he considered to be 'the intended purpose of the 1996 Act' of achieving 'the availability of a swift and inexpensive adjudication procedure' to all parties in a construction project,[26] Lord Hamblen was of the view that this policy 'does not assist in interpreting how it has drawn the boundaries of section 104(1)'.[27] In the end, it was the policy of 'certainty' that emerged triumphant. For Lord Hamblen, it was preferable to avoid 'fine distinctions being drawn and to disputes in

relation both to the drafting of collateral warranties and to their proper interpretation', and to leave it to the parties to voluntarily and expressly opt into adjudication under a warranty if desired.[28]

In practice, what is seen as certain by one may be considered as uncertain by another, and there is not necessarily a bright-line distinction between the principle of certainty on the one hand and interests of policy/justice on the other. Put another way, the consideration of which outcome produces the greatest certainty is, almost inevitably, informed per se by other considerations of underlying policy objectives and the practical consequences. Nevertheless, the overarching policy that is of paramount importance is that of enabling commercial men to predict the legal outcome on a principled basis and arrange their affairs accordingly.

Termination clauses: *Providence Building Services Ltd v Hexagon Housing Association Ltd*

After *Abbey Healthcare*, the English Court of Appeal was faced with another bitter contest between parties for what they each consider to be commercial certainty, this time in the context of the contractual termination provisions under an amended JCT Design and Build Contract 2016 in *Providence Building Services Ltd v Hexagon Housing Association Ltd*.[29]

The dispute arose from an attempt by the contractor ('Providence') to terminate the contract upon a repetition of a specified default, that being repeated failures by the employer ('Hexagon') to pay the 'notified sum' that had contractually fallen due in respect of interim payments. In December 2022, Providence issued a default notice under clause 8.9.1 of the contract in respect of Hexagon's failure to pay the notified sum by the final date for payment, but this sum was eventually paid before the 28-day cure period under clause 8.9.3 had expired. In May 2023, however, Hexagon failed to pay another notified sum by the final date for payment, which led Providence to give notice to Hexagon to terminate the contract under clause 8.9.4. The issue was whether Providence was entitled to rely on clause 8.9.4 to terminate the contract for a repeated default.

Clause 8.9.4 provided for a right to terminate the contract for a repetition of a specified default '[i]f the Contractor for any reason does not give the further notice referred to in clause 8.9.3'. At first instance, Deputy High Court Judge Adrian Williamson KC rejected Providence's contentions and held that 'clause 8.9.4 requires that a clause 8.9.3 notice could have been given but the Contractor has decided not to do so for whatever reason', but does not envisage a right to give a clause 8.9.4 notice in circumstances where the right to give a clause 8.9.3 notice has never arisen.[30]

The Court of Appeal, however, took a very different view and reached the opposite conclusion. Stuart-Smith LJ started by emphasising that, for a standard form contract, 'the process of interpretation will ultimately depend upon an intense focus on the words used'.[31] On that approach, Stuart-Smith LJ considered that the language of clause 8.9.4 was 'clear' and 'broad enough to cover any state of affairs other than one where the Contractor does give notice', such that 'the natural meaning of the words in Clause 8.9.4 viewed on their own does not give rise to an inference or an implication that the Contractor could have given a further notice but did not do so'.[32] This was further reinforced if one construes the related provisions under the structurally similar clause 8.4 that governed termination for a contractor's default: although clause 8.4.3 did not use the words 'for any reason', it nonetheless provided for the right to terminate for a repeated default if no termination notice was previously given for a specified default 'whether as a result of the ending of any specified default or otherwise', which is similarly broad.[33]

It is worth noting that 'certainty' again played an important part in this case: counsel for Providence emphasised that 'Providence's interpretation has the advantage of certainty, without which the Parties would be left with the time- (and money-)consuming uncertainties of alleging and proving repudiatory conduct',[34] and Stuart-Smith LJ observed that despite there being other potential remedies for non-payment, 'none provides a satisfactory and immediate solution to the typical case of late payment: each involves a measure of delay and, in the case of suspension or resorting to adjudication, additional cost and uncertainty for the contractor in pursuing them'.[35]

The Court of Appeal's decision in *Providence Building* is therefore another recent example of the importance attached

by the English courts to legal and commercial certainty, both in terms of the primacy of the natural and ordinary meaning of the contractual language and the practical outcome produced by the interpretation (here, the ability to resort to termination as a remedy for repeated non-payment, which reduces cost and uncertainty of a protracted dispute). Above all, it is also a good illustration of how the principle of certainty is intimately linked to other underlying policy considerations such as the protection of cashflow and the promotion of efficient resolution of disputes. The UK Supreme Court has just granted permission to appeal, and so it will be interesting to see if the balance struck by the Court of Appeal will withstand scrutiny.

Payment provisions in construction contracts: *Morganstone Ltd v Birkemp Ltd*

A typical issue in a building or engineering contract is ambiguities/inconsistencies in the parties' interim payment mechanism, and the English courts are frequently asked to make certain what may at first sight seem to be uncertain. The recent decision of the English High Court in *Morganstone Ltd v Birkemp Ltd* is one such case,[36] which raised the question of whether a subcontractor had a continuing entitlement to interim payments after the dates contained in a payment schedule ran out.

The subcontract in question contained a payment schedule setting out the dates on which each interim application was to be made, and this schedule originally contained payment application dates up to 28 February 2022. This was later updated by the parties to cover payment applications for the rest of 2022, but no further payment application dates were ever agreed for 2023.

The above facts were reminiscent at first sight of the English Court of Appeal decision of *Balfour Beatty Regional Construction Ltd v Grove Developments Ltd*.[37] However, there is a crucial difference in *Morganstone v Birkemp*: clause 10 of the subcontract contained a detailed payment mechanism by which the default payment application dates, due dates and final dates for payment could be calculated. The payment schedule dates were a bespoke amendment to clause 10 by virtue of a manuscript amendment alongside clause 10 that stated 'PAYMENT SCHEDULE TAKES PRECEDENCE' in red ink.

The matter came before HHJ Keyser KC as a claim for declarations under CPR Part 8.[38] The judge cited the well-known authorities on the objective approach to contractual interpretation (including *Arnold v Britton* and *Wood v Capita*), and then noted that *Balfour Beatty* was 'a case that turned on the precise terms of the parties' agreement', and that '[t]he question before [him] concerns the extent and limits of the agreement between Morganstone and Birkemp'.[39] The focus was therefore on the particular provisions adopted by the parties in question, and very much with a view to preserving the commercial certainty of the parties' bargain.

the principle of certainty is intimately linked to other underlying policy considerations such as the protection of cashflow and the promotion of efficient resolution of disputes

In *Balfour Beatty*, the payment mechanism was defined solely by reference to the payment schedule dates, such that the Court of Appeal could not accept that the relevant payment dates could be implied or otherwise left open for a tribunal to determine post-contract, as '[b]oth parties needed to know with certainty what were the applicable dates'.[40] In other words, the need for certainty militated in favour of refusing to go beyond the agreed payment schedule on that particular set of facts.

By contrast, clause 10 of the subcontract in *Morganstone v Birkemp* provided a fully workable payment mechanism. That mechanism was subject only to the manuscript amendment, which HHJ Keyser KC construed as meaning that 'in the case of conflict between the monthly payment schedule and clause 10 [...] the monthly payment schedule would take precedence', but 'once the schedule and any further agreed schedule ended, there was nothing to displace the timetable provided by clause 10'.[41]

Unlike in *Balfour Beatty*, therefore, the court in *Morganstone v Birkemp* could give effect to the natural and ordinary meaning of clause 10 and provide legal and commercial certainty to the parties as to the subcontractor's right to apply for interim payments. Again, this is not only an expression of the English courts' constant search for certainty in parties' transactions,

but also intrinsically linked to other substantive policy considerations, such as the preservation of contractors' cashflow and interim payment entitlements.

Conclusion

The recent case law on contractual interpretation considered above shows the English courts' continuing emphasis on the notion of certainty in giving effect to parties' contractual bargains and also any applicable statutory regime. This is primarily achieved by focusing in the first instance on the natural and ordinary meaning of the language used in the relevant contract/statute.

That is not to say, however, that the commercial context/purpose of the contract in question is irrelevant, as one can see from the English courts' reasoning in the cases above. Nevertheless, it is clear that the policy considerations that the English courts give weight to tend to go hand in hand with the notion of certainty, be it protecting a party's cashflow/financial expectations or ensuring that parties know their rights and remedies in advance. These factors should all be borne in mind by any practitioner advising a party on a contractual dispute involving a question of interpretation under English law.

Notes

1 Lewison K, *The Interpretation of Contracts*, (8th edn, London, 2024), [2.26].
2 [2007] 2 AC 353 (UK House of Lords).
3 See n 2 above, [23], citing *Vallejo v Wheeler* (1774) 1 Cowp 143, 153 (Court of King's Bench, Chancery and Common Pleas in England and Wales); *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 AC 694, 703–704 (UK House of Lords); *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2004] 1 AC 715, 738 (UK House of Lords); and *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc (The Jordan II)* [2005] 1 WLR 1363, 1370 (UK House of Lords).
4 [2024] AC 621 (UK Supreme Court).
5 See n 4 above, [39].
6 [1991] 1 Lloyd's Rep 1 (UK House of Lords).
7 See n 6 above, p 9.
8 [2005] 1 Lloyd's Rep 307 (High Court of England and Wales).
9 See n 8 above, p 321.
10 [2013] EWCA Civ 902 (Court of Appeal of England and Wales), [52] (Davis LJ).
11 [2015] AC 1619 (UK Supreme Court), [24]–[27] (Lord Neuberger).
12 See n 22 above, [17] (Lord Neuberger).
13 *Wood v Capita Insurance Services Ltd* [2017] AC 1173 (UK Supreme Court), [13] (Lord Hodge).
14 [2024] Bus LR 1492 (UK Supreme Court).
15 See n 14 above, [42].
16 See n 14 above, [46].
17 See n 14 above, [47].
18 See n 14 above, [58].
19 See n 14 above, [57].
20 [2024] Bus LR 1263 (UK Supreme Court).
21 [2021] Bus LR 1357 (High Court of England and Wales), [26]–[27].
22 [2022] Bus LR 1079 (Court of Appeal of England and Wales), [62] (Coulson LJ).
23 See n 22 above, [74] (Coulson LJ).
24 See n 20 above, [62]–[64].
25 See n 20 above, [65] and [72].
26 See n 22 above, [41].
27 See n 20 above, [61].
28 See n 20 above, [75] and [78].
29 [2024] EWCA Civ 962 (Court of Appeal of England and Wales).
30 [2023] EWHC 2965 (TCC) (High Court of England and Wales), [19].
31 See n 30 above, [25].
32 See n 30 above, [29].
33 See n 30 above, [32]–[33].
34 See n 30 above, [20].
35 See n 30 above, [43].
36 [2024] EWHC 933 (TCC) (English High Court).
37 [2017] BLR 1 (English Court of Appeal).
38 CPR pt 8 is a simplified procedure under the English rules of civil procedure which allows a party to expeditiously seek the court's decision on a question which is unlikely to involve a substantial dispute of fact; such claims typically involve no disclosure and no or limited factual witness evidence, with a hearing for oral legal submissions lasting one to two days.
39 See n 36 above, [36].
40 See n 37 above, [37] (Jackson LJ).
41 See n 36 above, [37].

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UNCITRAL's new adjudication clause: takeaways for construction dispute board proceedings

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In November 2024, the United Nations Commission on International Trade Law (UNCITRAL) published a series of specialised express dispute resolution model clauses covering adjudication, highly expedited arbitration, technical advisers and confidentiality. This article looks at some of the notable features of UNCITRAL's model adjudication clause[1] and considers whether any of the clause's concepts could be deployed in relation to dispute board proceedings on construction projects.

UNCITRAL's adjudication clause

In summary, UNCITRAL's adjudication clause sets out a contractual adjudication regime under which:

- a dispute is decided within 30 days by a sole adjudicator: in the model clause, this period is in square brackets, suggesting that the parties are invited to consider this timeframe and amend as necessary when drafting their dispute resolution provisions;
- the adjudicator is appointed on an ad hoc basis, that is, only once a dispute arises and solely to decide that dispute;
- the decision is interim binding, that is:
  - the parties must immediately comply with the decision; and
  - if a party is unhappy with the decision, it can refer the dispute to arbitration, but it still must comply with the adjudicator's decision in the meantime; and
- adjudication is optional, that is, a party can go straight to arbitration and bypass the adjudication process if it wishes.

The clause is intended for use across various industries. However, much of it will be familiar to those involved in construction projects, as being generally consistent with the mechanisms for adjudication (either statutory adjudication where this applies or contractual adjudication) or binding dispute board proceedings.

The proceedings are limited to the question of whether a party has breached its contractual undertaking to comply with the interim decision

Notwithstanding the above, there are some notable features of UNCITRAL's adjudication clause that may be of interest to those in the construction industry. In this article, I look at three key features and consider whether they could be used to improve dispute board proceedings on construction projects (specifically those that result in a binding decision, sometimes referred to as dispute adjudication board proceedings).

A point to note is that, where a construction contract is subject to local legislation that provides a mandatory right to adjudication, the scope to incorporate features from the UNCITRAL clause may well be restricted.

Enforcement

The enforcement mechanism is arguably the most interesting feature of UNCITRAL's model clause.

According to comprehensive data on global dispute board proceedings published by King's College London in December 2024, when asked how often parties voluntarily complied with binding decisions of dispute boards, the responses were as follows:[2]

- always: 32 per cent;
- most of the time: 38 per cent;
- sometimes: 13 per cent;
- rarely: ten per cent; and
- never: eight per cent.

The above figures indicate that, even if a dispute board decision is binding, whether or not it is actually complied with is a different matter. In fact, compliance with binding decisions was not significantly better than compliance with non-binding recommendations.[3]

While some jurisdictions (eg, England and Wales) have developed efficient and effective regimes to enforce statutory adjudication decisions in their national courts, the enforcement of dispute board decisions remains a problem. On international construction projects, a barrier to enforcement is the time and cost it can take to obtain an arbitral award to enforce the terms of the dispute board decision.

Sophisticated contracts, such as FIDIC contracts, contain a specific mechanism to refer a failure to comply with a dispute board decision to arbitration.[4] Even though such arbitration should only consider the unsuccessful party's failure to comply with the decision, rather than the underlying merits of the dispute, it can still be a costly and slow process. While recent years have seen the introduction of expedited arbitration regimes in several institutional rules, these often apply only to low value disputes and/or require consent, so are unlikely to be available for enforcing most dispute board decisions.

The UNCITRAL model adjudication clause seeks to address the above concerns by providing for 'compliance arbitration' as a mechanism to enforce the decision. As is the case in FIDIC contracts, for example, the proceedings are limited to the question of whether a party has breached its contractual undertaking to comply with the interim decision, without taking into account the underlying merits of the dispute (although

enforcement can be refused where there has been a breach of natural justice). However, the key difference is that the clause provides for arbitration to be conducted under the UNCITRAL Expedited Arbitration Rules that are then modified to make the process even quicker. For example:

- the parties have seven days to reach agreement on the appointment of a sole arbitrator (this is 15 days in the unmodified Expedited Arbitration Rules);
- the award must be made within 30 days (six months in the unmodified Expedited Arbitration Rules); and
- if extended, the total period for making the award cannot exceed 60 days (nine months in the unmodified Expedited Arbitration Rules).

The above process would enable a party to obtain an arbitral award within a very short timeframe. The costs of doing so should also be lower under this process. Obtaining the award then opens the gateway to international enforcement under the New York Convention.

Introducing a similar process into construction contracts, by which parties agree to the enforcement of dispute board decisions by way of highly expedited arbitration proceedings, could go some way to speed up the process for the enforcement of such decisions. In turn, this may even increase the voluntary compliance rate if the parties know an arbitral award can be obtained relatively quickly. Indeed, at the FIDIC International Contract Users' Conference in December 2024 there was a high degree of interest in the compliance arbitration mechanism contained in UNCITRAL's model clause.

Ability to limit the scope of the adjudication clause

The parties can select from two options when drafting the clause:

1. any dispute may be referred to adjudication; or
2. only certain types of disputes may be referred to adjudication (a footnote to the text of the clause suggests that adjudication could be limited to 'claims solely for monetary relief').

Dispute is widely defined as '[a]ny dispute, controversy or claim arising out of or relating to this contract, or breach termination or invalidity thereof' (Article 1).

Dispute board proceedings play an important role in reducing the number of disputes that are ultimately referred to arbitration. In the aforementioned global disputes boards survey by King's College London, 67 per cent of individuals said that subsequent proceedings, such as litigation or arbitration, were only commenced between zero per cent and ten per cent of the time.[5] This suggests that, in many cases, the parties decide to accept the dispute board's decision and avoid further escalation.

However, dispute board proceedings may not always be the best solution for every type of dispute and, in some cases, might be regarded as leading to wasted time and costs. The approach taken by UNCITRAL of providing the ability to limit the scope of the clause could encourage parties to turn their mind to this issue, and the role they wish dispute board proceedings to play, at the contracting stage.

Introducing a similar process into construction projects […] could go some way to speed up the process for the enforcement of such decisions

What to include (or not include) depends on the nature of the project and the wishes of the parties. By way of example, in security of payment legislation, the scope of adjudication clauses is often limited to payment disputes. For example:

- in Victoria, Australia, the Building and Construction Industry Security of Payment Act 2002 provides for adjudication in relation to 'payment claims' (a similar approach is taken in other Australian states and territories); and
- in Hong Kong, the recently enacted Construction Industry Security of Payment Ordinance provides that adjudication proceedings may be initiated in relation to 'payment disputes'.

By contrast, in the United Kingdom, parties have the right to refer any dispute arising under a construction contract to adjudication pursuant to the Housing Grants, Construction and Regeneration Act 1996, not just those relating to payment.

The adjudicator can decline jurisdiction

Article 1(g) sets out a short but potentially very significant provision: 'The adjudicator

may determine that the dispute is, in whole or in part, not suitable to adjudication'.

The Explanatory Notes provide some non-exhaustive examples as to when an adjudicator might determine that the dispute is not suitable to adjudication (paragraph 20):

1. the dispute is too complex to make a determination in the limited amount of time;
2. the adjudicator has expertise on technical matters and the dispute focuses predominantly on legal issues not suitable for that adjudicator's determination; or
3. the relief sought is irreversible once performed or enforced and cannot be compensated by monetary payments.

Regarding suggested ground (1), complexity, this has been rejected by English courts as a basis on which the enforcement of an adjudicator's decision can be resisted in the context of statutory adjudication.[6] However, some may agree that, as a matter of practice, some disputes are arguably too complex for adjudication or dispute board proceedings given the limited time available. Including a mechanism in a construction contract by which a dispute board can decline to act where it considers the dispute to be too complex to determine in the time available could provide comfort to parties who are wary of seeing all disputes submitted to dispute board proceedings.

Suggested ground (2) appears to relate to the question of whether the specific adjudicator is suited to determine the dispute rather than whether the dispute is suitable for adjudication more generally. This may not be an issue in practice; a key benefit of having an ad hoc adjudicator or dispute board should be that the parties can select an adjudicator/board who is suited to determining the dispute at hand.

One fundamental risk of an adjudicator or dispute board having an express right to decline jurisdiction is the risk of satellite arguments during the proceedings around whether they should do so. Such arguments could also cause delays and/or problems during the enforcement stage, for example, an unsuccessful party may argue that jurisdiction should have been declined. Accordingly, if the parties are considering conferring such a power on the dispute board, it may be worth considering some safeguards, for example:

- an express statement that the dispute board's determination as to whether the dispute is suited to dispute board proceedings is final and cannot be challenged; and/or
- a list of clear and defined circumstances as to when the dispute will not be suitable for dispute board proceedings.

Conclusion

The publication of UNCITRAL's model adjudication clause is a welcome development. While much of it may seem familiar to construction lawyers, it contains some interesting features that could be usefully deployed in relation to dispute board proceedings on construction projects, subject to some safeguards. In particular, the use of highly expedited compliance arbitration as a way to enforce dispute board decisions could serve as an efficient and effective enforcement mechanism.

Any views expressed in this publication are strictly those of the author and should not be attributed in any way to White & Case.

Notes

1 The model clause is available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mc-adjudication_2419436e-ebook.pdf accessed 5 March 2025.

2 *2024 Dispute Boards International Survey: A Study on the Worldwide Use of Dispute Boards over the Past Six Years*, King's College London, Nazzini and Moreira, Figure 62.

3 *Ibid*, Figure 60.

4 Eg, Sub-Clause 21.7 in the FIDIC Red Book 2017.

5 Figure 68.

6 See *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358.

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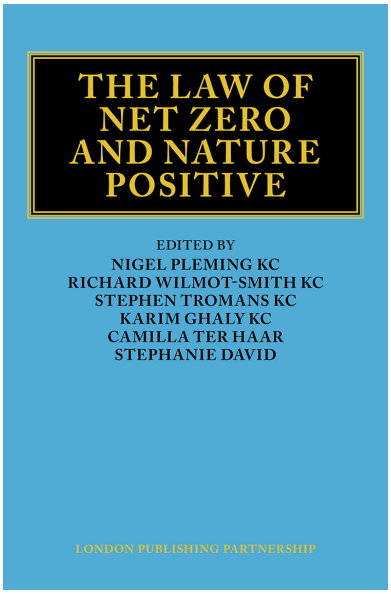

The Law of Net Zero and Nature Positive consists of eight parts. Each part comprises chapters that deal with net zero and nature positive goals.

Chapter 1 explores broad concepts, such as climate change, net zero, the biodiversity crisis and nature positive, and these concepts then form the theme of the book. Chapter 2 then looks at the overall legal framework governing environmental concerns. Relevant international treaties are considered, for example, the Paris Agreement, which is aimed at reducing greenhouse gas (GHG) emissions to achieve long term temperature goals that are below an increase of 2°C and with an effort to limit it to 1.5°C.

Chapter 35, in particular, emphasises that the construction industry needs to adopt designs for buildings that are resilient to the impact of climate change. There should be development and use of methods and materials to reduce carbon emissions.[1] There is an urgent need for this, as this chapter explains, because buildings account for about six per cent of global GHG emissions. This may be reduced by using low-carbon construction materials and retrofits.[2]

Chapter 37 looks at the construction phase of buildings and steps that may be taken to reduce emissions. From the initiatives described in this chapter, one that is particularly interesting is the Cradle to Cradle initiative. This is a global standard for certifying product safety and environmental impact. Under the Cradle to Cradle initiative, assessments are made every two years against five criteria: (1) safety of materials used in production; (2) reusability and recyclability; (3) air quality and carbon reduction; (4) water and soil quality; and (5) social impact.

Chapter 41 goes on to discuss the obligations of construction professionals to advise on environmental issues. This chapter looks at the usual codes of conduct published by the Royal Institution of British Architects (RIBA) and the Institution of Civil Engineers (ICE). This chapter then explores the provisions of these codes that deal with environmental issues. For example, Guideline 7 of The Institution of Structural Engineers' Code of Conduct states that 'Members should be aware of the impact their professional duties have on the environment and take proactive measures to operate in a sustainable manner...' Accordingly, professional designers should consider materials that are environmentally friendly and sustainable. However, there may be reluctance to try new materials and untested designs, due to the risks attached.

Chapter 41 suggests that, when considering the standard expected of a designer when dealing with the effects of climate change and mitigation techniques, reference may be made to the practice of other professionals and to the defence that, because it was commonplace, it cannot have been negligent. However, the authors emphasise

that the courts are not simply focused on what conclusion a body of opinion reached. The courts will also examine the way in which that body of opinion reached its conclusion. If it cannot be demonstrated that this was reached as a result of a process by which the risks had been actively considered, it cannot be logical. Chapter 41 suggests that this approach is particularly relevant for professionals discharging their duties in relation to net zero and climate change. Professionals will not be exonerated from their duties simply by proving that others were just as negligent at the relevant time. There is a clear obligation to keep up to date and to understand the impact of the materials being used on a building.

Overall, the book provides comprehensive and excellent guidance on a new and developing area of practice, which will be invaluable to all construction lawyers.

Notes

1 *Ibid*, 849, paras 35.01–35.03.

2 *Ibid*, 852, para 35.15.

Construction Law (Fourth Edition)

Julian Bailey

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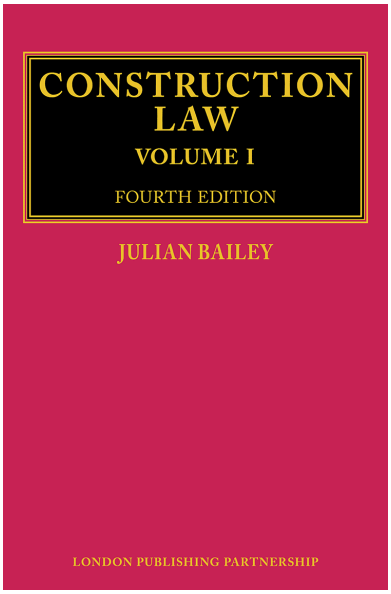
Reviewed by Phillip Greenham



I am often asked, 'If I were to purchase one text on Construction Law, which would I recommend?' Without hesitation, my answer is Julian Bailey's book, *Construction Law*.

Now in its fourth edition, this three-volume encyclopaedic exploration of Construction Law continues the tradition Julian began over a decade ago. Its comprehensive nature is evident in the sheer scale of its references: the more than 400-page Table of Cases lists over 10,000 cases, with nearly 2,500 of those added since the third edition.

Some might worry that such a detailed text could be overwhelming or impenetrable. Not so. The book is thoughtfully structured and follows a logical, project-centric framework, making it easy to locate sections on any topic of interest. The coverage is extensive, including some often-overlooked aspects of construction law – for example, economic torts.

Prospective readers might also feel intimidated by the prospect of deep scholarly analysis. Again, there's no need for concern. The writing is clear and succinct, presenting complex topics in an accessible, logical, and understandable way. This clarity of style does not come at the expense of rigorous analysis; the text also provides historical context and reflective perspectives that enrich its insights.

The text reflects the highly practical landscape in which construction law is practised. The discussions on procurement and contract administration are prime examples of this. While these chapters explore the relevant legal issues, they do so in a way that resonates with the practical realities of project delivery. It is particularly pleasing to see the coverage of contract administration, an activity often overlooked by lawyers yet prone to a disproportionate prevalence of disputes.

What sets this publication apart is not just the breadth of topics covered but also its detailed examination of four key common law jurisdictions: Australia, England, Hong Kong, and Singapore. This comparative approach offers a rich landscape for understanding the diverging and converging evolution of the common law. Practitioners will find it invaluable for integrating these evolving threads into their assessments of the current state of the law and its likely future trajectory.

My answer to the often-posed question remains unchanged: Julian Bailey's *Construction Law* is unquestionably the definitive text on the subject.

Construction Law International

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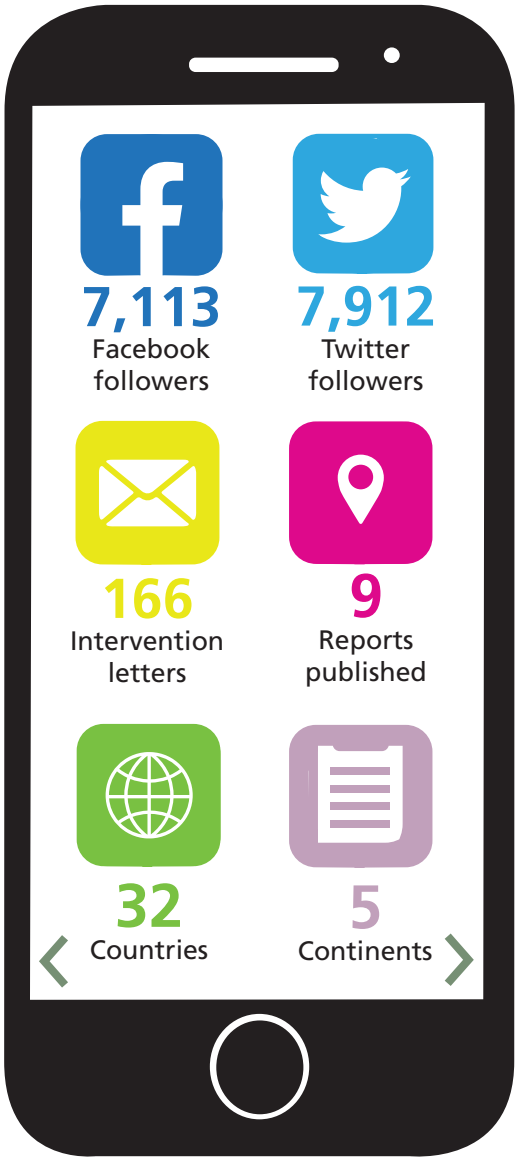

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