# 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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**Force majeure and beyond: the evolution of risk allocation in Indian infrastructure contracts**

**The Colombian legal regime on future budgetary allocations in public private partnerships**

**A new legal regime redefining contractor's liability: a cautionary tale when contracting (FIDIC) projects in the Netherlands**

# International Bar Association
# Events 2026

## Conferences

### January

**Oral advocacy, cross examination and the emergence of AI in dispute resolution**
26 January, Dubai, United Arab Emirates

### February

**IBA Anti-Corruption Committee Asia Conference**
9–10 February, The Peninsula Tokyo, Tokyo, Japan

**IBA Middle East Conference: Law firms and in-house legal departments working together**
11–12 February, Dubai, United Arab Emirates

**UKELG - Evening Talk 2026**
25 February

### March

**Mergers and acquisitions in Latin America — building bridges through business: rethinking M&A in the Americas**
23–25 March, Enjoy Punta del Este Resort y Casino, Punta del Este, Uruguay

**ESG in Evolution: the legal imperatives of tomorrow**
26–27 March, Paris, France

### April

**Compliance, governance and innovation: balancing risks and opportunities of doing business in Latin America**
14–16 April, São Paulo, Brazil

**26th IBA/ABA Annual US and Europe Tax Practice Trends Conference**
15–17 April, Westin Excelsior, Rome, Italy

**IBA Annual Litigation Forum**
15–17 April, Four Seasons, Madrid, Spain

**IBA War Crimes Committee Conference 2026: Masters of war**
18 April, Leiden University Campus Wijnhaven (The Hague), The Hague, Netherlands

**Annual IBA Employment and Diversity Law Conference 2026**
22–24 April, Sofitel Warsaw Victoria, Warsaw, Poland

**35th Annual IBA Communications and Competition Law Conference**
27–28 April, Raffles Singapore, Singapore

### May

**41st International Financial Law Conference**
6–8 May, The Palace Hotel, Madrid, Spain

**28th Annual Transnational Crime Conference**
13–15 May, Athens, Greece

**10th Global Entrepreneurship Conference: Legal Challenges in Closely Held Businesses: Strategies for Success and Sustainability**
17–19 May, Sofiensäle, Vienna, Austria

**Insurance and reinsurance in uncertain times**
18 – 19 May, London, England

**Biennial Conference of the Section on Energy, Environment, Natural Resources and Infrastructure Law (SEERIL)**
18 – 20 May, Brussels, Belgium

**41st Annual IBA/IFA Joint Conference**
19 – 20 May, Washington, USA

**19th Annual Bar Leaders' Conference**
20 – 21 May, Prague, Czech Republic

**20th Annual IBA Competition Mid-Year Conference**
28 – 29 May, Sofitel Legend Amsterdam The Grand, Amsterdam, Netherlands

**31st Annual IBA Global Insolvency and Restructuring Conference**
31 May – 2 June, Berlin, Germany

### June

**23rd Annual International Mergers and Acquisitions Conference**
3 – 4 June, The Plaza Hotel, New York, USA

**12th Annual IBA World Life Sciences Conference**
3 – 5 June, Lisbon, Portugal

**35th IBA Global Challenges and Opportunities for the Asset Management Industry Conference**
7–9 June, The Ritz-Carlton, Boston, USA

**16th Annual IBA Real Estate Investments Conference**
10–12 June, New York, USA

**17th IBA/ABA Annual US and Latin American Tax Practice Trends Conference**
10 – 12 June, Grand Hyatt, São Paulo, Brazil

**3rd IBA Global Professional Ethics Symposium**
10–12 June, Lisbon, Portugal

**22nd Annual IBA Anti-Corruption Conference**
17 – 18 June, London, England

**11th World Women Lawyers' Conference**
24–26 June, Lisbon, Portugal

**IBA 2026**
**COPENHAGEN**
**4–9 OCTOBER**
ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

## Webinars

**How successful women rainmakers drive business**
8 January, 1400 – 1500 GMT

**Licensing with strategic partners in life sciences**
12 January, 1600 – 1700 GMT

**The role of civil society in international justice**
15 January, 1200 – 1300 GMT

**The future of legal services in the Asia Pacific**
16 January, 1230 – 1330 SGT

**Bridging borders: China's role in cross-border asset recovery**
21 January, 1300 – 1400 GMT

**@IBAevents**

Full and further information on upcoming IBA events can be found at: **bit.ly/IBAevents**

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Twilight view of the Mumbai cityscape in purple hues showing a lot of under-construction and existing residential and commercial skyscrapers and highrises. Credit: Towering Goals/Adobe Stock

# FROM THE EDITORS

Dear readers,

We are delighted to introduce the December issue of Construction Law International (CLInt) after the successful IBA Annual Conference in Toronto last month.

This will be my final issue as Committee Editor. I have found my two years as Committee Editor very enjoyable indeed reading articles and updates from around the world and seeing how much we all have in common and how interesting our few differences are. I have found it a pleasure working with our team of editors, who are ever ready to take on any additional task to ensure that CLInt remains an informative and engaging magazine.

We have an article from Colombia on budgetary allocations for public-private partnerships (PPPs) and an article from India on force majeure and the evolution of risk allocations. We also have an update from Norway pursuant to a significant judgment of the Supreme Court on changes or variations.

Last, but by no means least, we have an article on 'Dispute resolution fit for a queen' which arose from a panel discussion at the IBA Annual Conference last year in Mexico City.

Apart from this, I am very happy to share that the International Construction Arbitrators Association (ICAA) has been launched. The ICAA is the brainchild of Edward Corbett, a former Co-Chair of ICP and the founder of CLInt. The steering group that established ICAA includes ICP members Aisha Nadar, Aarta Alkarimi and Jim Perry. The ICAA lists arbitrators who are specialists from the international construction industry, whether lawyers or other professionals. Edward and the other founders believe that international construction disputes need specialist international construction arbitrators, but no such list currently exists. So, the ICAA is modelled on the London Maritime Arbitrators Association, which lists shipping specialists for maritime disputes. The ICAA list is a mix of construction lawyers and engineers from common and civil law countries.

One of the ICAA's objectives is to bring on the next generation of international construction arbitrators. So, the ICAA has set up its Next Generation Membership and will invite 20 men and 20 women in their 40s or 50s to join. They will be construction professionals working with FIDIC-type contracts, with some experience of international arbitration and available to accept nominations as international construction arbitrators. The lists are available on the ICAA website at www.intcaa.org. The ICAA will nominate arbitrators on request.

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

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# FROM THE CO-CHAIRS

## Celebrating the end of our term as Co-Chairs of the IBA International Construction Projects Committee

As our term as Co-Chairs of the International Construction Projects Committee (ICP Committee) of the International Bar Association (IBA) comes to an end, we would like to reflect on the past two years and thank all the members and non-members who have supported the ICP Committee.

In particular, we are grateful to the constructive collaboration established with the Arbitration Committee, the Mediation Committee and the Asia Pacific Regional Forum.

Serving together in 2024 and 2025 has been an honour and a privilege. These have been two years of exciting activity for the Committee. We were delighted to have presented five panels at the IBA Annual Conference in Mexico City in 2024 and five panels at the IBA Annual Conference in Toronto in November 2025, addressing a range of issues relevant to construction law in multiple jurisdictions.

The ICP Committee also organised a working weekend in Oxford in 2024 and in Rio de Janeiro in 2025. A working weekend is scheduled to take place in Genova (Italy) on 27–29 March 2026. These gatherings provide opportunities for ICP members to exchange knowledge and develop new ideas and initiatives.

During our term we particularly focused on encouraging active participation from ICP Committee members in underrepresented jurisdictions, with the aim of ensuring that the Committee's work reflects a wider range of perspectives and professional backgrounds.

For the 2026–27 term, we are pleased to introduce the nominated ICP Co-Chairs: Aarta Alkarimi and Douglas Stuart Oles. We look forward to supporting the new Co-Chairs and the new officers of the ICP Committee.

We encourage all ICP members to get involved in the Committee's initiatives and contribute to our magazine *Construction Law International*, which will have new editors starting in 2026.

We are immensely grateful to all members of the ICP Committee for sharing a successful experience together and invite you all to keep in touch with us.

Best wishes,

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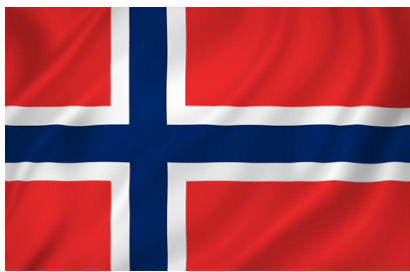

## COUNTRY UPDATE: NORWAY

### Limitations on client's right to instruct changes in Norwegian law

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**The primary legal sources governing construction contracts in Norway are various standard form contracts developed collaboratively by contractors and clients. These contracts define the client's rights to request changes. This article will examine the provisions related to changes and analyse a recent ruling by the Norwegian Supreme Court known as *Jordal Amfi* (HR-2025-977-A). In this ruling, the Supreme Court addresses fundamental questions of Norwegian construction law concerning the client's right and limitations to instruct changes.**

The fundamental principle is that parties to construction contracts are free to agree on any terms they choose – the principle of contractual freedom. However, most construction contracts in Norway are based on established standard form contracts (agreed documents). The most common standard contracts for onshore construction projects are the NS 8405 and NS 8407. NS 8405 outlines general conditions for building and civil engineering projects, while NS 8407 specifies general conditions for design and build contracts (turnkey). The client's right to instruct the contractor to make changes is inherent in all standard contracts. This article will focus on the client's right to make changes under NS 8407 (turnkey), though this regulation is also applicable to other standard contracts.

According to Norwegian standard contracts, the client has the unequivocal authority to instruct the contractor to modify the contract work and/or the contractor's original obligations, as stated in section 31.1 of NS 8407.

Changes may involve additional work or modifications to the originally agreed contract scope. This can include alterations in character, quality, nature, or execution. The right to make such changes is warranted, as the client may identify more effective solutions or may no longer require all the originally agreed contract work.

The term 'instruct' refers to the client's authority to direct the contractor to perform work via a change order. This applies even if there is a disagreement between the parties regarding whether the client's instruction constitutes a change entitling the contractor to additional payment and/or extension of time. Disputes may arise about whether the change is based on the client's or the contractor's liability, particularly if the client has not issued a change order. Under Norwegian law, the client's right to instruct the contractor is termed a 'duty to perform', which ensures that the execution of the contract continues despite disagreements between the parties.

The client's right to request changes is generally limited by two specific regulations: (1) Qualitative limitation – any change must relate to the contract's scope and not materially differ from the originally agreed duties; and (2) Quantitative limitation – the contractor is not required to perform work that increases the contract sum by more than 15 per cent.

The 15 per cent threshold is an important limitation on the right to instruct changes. First, the client cannot instruct the contractor to perform additional work if the changes and additional work exceed this threshold. Second, if the contractor declines to undertake additional work beyond this threshold, the contractor gains a new negotiating position, allowing the contractor to propose a new amount for work beyond this 15 per cent limit. If the client rejects this new offer, the contractor can refuse to execute the additional work.

Given the significance of the 15 per cent threshold, it is not uncommon to agree on deviations from this limit, enabling clients to request larger changes than permitted under NS contracts. Contractors, especially those working with public clients, should verify whether the contract includes an extended obligation to perform changes.

The client cannot impose negative changes on the contractor that exceed a 15 per cent net reduction of the contract sum. If a negative change results in a net reduction beyond 15 per cent, it will be treated as a partial cancellation, and the contractor will be entitled to compensation for loss of profit.

### What changes and additional work are relevant for the 15 per cent limitation?

In Norwegian construction law, there have been discussions on whether only changes explicitly ordered through change orders or also claims for additional compensation/time caused by client risks (eg, disturbance) fall within the ambit of the 15 per cent threshold. These issues were addressed in a recent ruling by the Norwegian Supreme Court, known as *Jordal Amfi*, (HR-2025-977-A).

The case involved the final settlement following the construction of Nye Jordal Amfi, Oslo's new ice hall. Early in the project, it was discovered that a box culvert, through which a stream flows, was located higher in the terrain than initially assumed. Additionally, acid-forming rock was found in the excavation pit, necessitating the activation of a pre-agreed option in the contract. The parties agreed that these risk factors entitled the contractor to both an extension of time and additional payment. However, they disagreed on the quantification and implications of these adjustments.

The Supreme Court ruled that only changes explicitly requested by the client will be considered in relation to the 15 per cent threshold. Only officially ordered changes fall within this 15 per cent limitation. Claims for additional payment arising from circumstances for which the client is responsible, do not qualify as relevant changes in this context and are therefore not included in the 15 per cent threshold.

The Supreme Court also ruled that pre-agreed options in the contract would not be included in the 15 per cent threshold when triggered.

### What are the implications of reaching the 15 per cent threshold during the project?

The consequences when a contractor performs change work beyond the 15 per cent limit are not defined in Norwegian standard contracts.

The Supreme Court began its assessment by stating that the standard form contracts' provisions on compensation for changes do not apply when the client exceeds their authority to instruct changes. In such cases, the contractor is generally released from the contract's rates for any additional change work.

In the absence of an agreement, the Supreme Court determined that compensation for change work beyond the 15 per cent limit must be interpreted based on the contract, with outcomes varying depending on specific circumstances.

The Supreme Court outlines various scenarios regarding the 15 per cent limit. If the parties agree that this limit has been reached and the client requests that the change work be settled at the contract prices, the contractor is generally considered to have accepted these terms by proceeding with the change work. Conversely, if the client does not object to the contractor's proposal to perform the change work at different prices, the client is regarded as having accepted the contractor's proposal.

When the parties disagree on the terms for change work exceeding the 15 per cent limit, the Supreme Court's ruling provides limited guidance. It states that compensation must then be determined for each change order based on the contract, including change requests, change orders, correspondence, and meeting minutes. Furthermore, the Court indicates that disputes must ultimately be resolved in court, noting that the laws and legal principles on failing assumptions may be more significant when the 15 per cent limit is exceeded.

Oslo construction site by night. Credit: erikzunec/Adobe Stock

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Twilight view of the Mumbai cityscape. Credit: Towering Goals/Adobe Stock

# Force majeure and beyond: the evolution of risk allocation in Indian infrastructure contracts

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Infrastructure development in India is a cornerstone of economic growth, shaping connectivity, trade, and employment. Projects ranging from highways and metro systems to airports and power stations rely heavily on EPC contracts and PPP models, which combine public oversight with private expertise, while attempting to allocate risk predictably.

Recent global and domestic disruptions, including the Covid-19 pandemic, supply chain disruptions, and geopolitical tensions, have exposed the limits of traditional risk frameworks. Rising costs, project delays, and financial pressures on both concessionaires and government authorities have underlined the urgent question of who will bear the burden of unforeseen risk posed by unforeseen circumstances.

As India's infrastructure ambition expands, its contracting ecosystem has evolved. Traditional risk-sharing agreements are being revisited, contracts are being refined, and judicial approaches increasingly emphasise equitable allocation and appropriate risk mitigation. The revised contracting arrangement marks a significant shift in the force majeure clauses which were previously used to accommodate and safeguard the parties to the contract, ensuring effective risk mitigation and equitable risk distribution between the private concessionaire and the authority.

## Legal framework for risk allocation in India

Ongoing challenges in PPP and EPC projects were primarily recognised by the Government of India when it constituted the Kelkar Committee in 2015, chaired by Dr Vijay Kelkar. The Committee's mandate was to revisit and revitalise the PPP model of infrastructure, which, at that time, was facing widespread difficulties. Several PPP projects were facing obstructions in the form of disputes, the private investment had slowed, and banks were burdened with rising non-performing assets in infrastructure lending.

The Committee diagnosed the central problem as excessive and poorly designed risk allocation. It acknowledges the fact that the concessionaires were required to carry risks that they could not reasonably manage or control, such as delays in land acquisition, regulatory approvals, etc.

In India, allocating risk in infrastructure projects is as much an art as it is a science. While the law offers remedies when contracts cannot be performed, the real power lies in how parties write their agreements. Thoughtfully drafted contracts do not just assign risk, they can make or break a project, shaping outcomes long before courts ever get involved.

The current Indian legal framework offers both contractual and statutory mechanisms for addressing unforeseen events. Particularly, section 56 of the Indian Contract Act, 1872, recognises frustration of contracts and allows agreements to be declared void where performance becomes impossible. However, the Hon'ble Supreme Court in *Energy Watchdog v CERC* made it clear that when a contract/PPA already contains a force majeure clause, relief must be sought under that clause, rather than through section 56 of the 1872 Act.[1]

This principle highlights the primacy of contractual arrangements. When parties have anticipated potential contingencies and set out agreed mechanisms for addressing them, the courts will uphold those negotiated provisions. Put simply, the agreed contractual terms take precedence over the statutory doctrine of frustration. Frustration under Section 56 of the Indian Contract Act, 1872, terminates the contract entirely, which is likely to hinder long-term infrastructure projects. In contrast, force majeure clauses provide additional, circumstantially specific relief to the parties, such as suspending obligations, granting time extensions, or offering limited compensation to ensure the continuity of the contract. This flexibility is particularly significant in EPC and PPP projects, where disruption does not necessarily mean failure; instead, keeping the project alive often serves the broader public interest.

Indian courts have applied this principle in other cases of *Halliburton Offshore Services v Vedanta Ltd*.[2] The Court granted interim protection to the contractor whose performance was hindered by the Covid-19 lockdown, recognising that the pandemic could fall within the scope of force majeure. Similarly, in *Standard Retail Pvt Ltd v G S Global*,[3] the Court emphasised that force majeure relief must be tested against the actual wording of the clause, rather than being assumed under general hardship.

These cases reflect a growing judicial sensitivity to commercial realities. Courts are not quick to discharge contracts under Section 56 but instead prefer to uphold the contractual framework that the parties themselves devised, while interpreting force majeure clauses in a manner which balances fairness, economic sustainability, and public interest.

## The evolution of force majeure clauses in India

The trajectory of force majeure in India has been significantly influenced by contemporary crises. The onset of the Covid-19 pandemic exposed serious drafting deficiencies in many contracts, particularly in the infrastructure sector, where supply chains were paralysed and projects brought to a standstill. In response, the Ministry of Finance issued its Office Memorandum in February 2020,[4] recognising Covid-19 related disruptions as qualifying force majeure events in the context of government procurement. However, this memorandum was merely advisory in nature and did not displace the supremacy of contractual terms in private agreements. For many stakeholders, this underlined the limitations of relying on generic clauses and the urgent need for greater contractual precision.

In the aftermath, procurement manuals and contractual practices evolved to address these shortcomings. Structured notice requirements, mitigation obligations, comprehensive documentation standards, and reliance on technical expertise have since become central features of force majeure management. Courts and arbitral tribunals, while cautious in their treatment of supply-chain disruption claims, have consistently insisted on two key thresholds: that the disruption must have directly impeded performance, and that the affected party must demonstrate genuine efforts to mitigate delay. In practice, evidentiary records such as correspondence with suppliers, attempts at alternative sourcing, and contemporaneous communications have often determined the success of such claims.

The drafting of force majeure clauses has also undergone a marked transformation. Moving beyond the traditional and vague reference to 'Acts of God', modern contracts specifically identify events such as pandemics, quarantines, port closures, import/export restrictions, supplier insolvency, cyber-attacks, and geopolitical disruptions, including sanctions and trade embargoes. These clauses are increasingly supplemented by obligations requiring timely notifications, proactive mitigation efforts, the pursuit of insurance, and regular updates to the employer on remedial steps undertaken. Such drafting developments reflect the lessons drawn from the uncertainties of the pandemic period, during which imprecise or incomplete provisions resulted in inconsistent judicial outcomes and, in some instances, project failures.

Concurrently, government procurement contracts have revived and reinforced the use of price-variation clauses, particularly in the wake of Covid-19. By linking payments to indices such as the Wholesale Price Index (WPI) or sector-specific commodity benchmarks, these clauses provide a degree of predictability in volatile markets and complement force majeure provisions, by mitigating risks associated with long-term projects.

*Moving beyond the traditional and vague references to 'Acts of God', modern contracts specifically identify events such as pandemics, quarantines, port closures and import/export restrictions [among others]*

Ultimately, the approach to force majeure has shifted from being a peripheral consideration to a critical component of contractual architecture. Today, these clauses are designed not only to apportion risk fairly but also to ensure continuity of projects in times of crisis. By specifically addressing risks ranging from pandemics to geopolitical conflicts, and by embedding obligations of mitigation and documentation, force majeure provisions safeguard the interests of contracting parties, while simultaneously supporting the resilience of infrastructure development in India.

## Force majeure in PPP and EPC projects: lessons from practice

Force majeure has become a defining feature of risk management in PPP and EPC projects. The Covid-19 pandemic starkly revealed how vulnerable infrastructure contracts could be when provisions were vaguely worded or procedurally weak. Many concessionaires discovered that, even where force majeure was contractually recognised, the absence of clear notice procedures, mitigation requirements, or adequate insurance left them struggling to secure meaningful relief. Prolonged stoppages often resulted in case-by-case negotiations or costly litigation, undermining the financial viability of projects.

In response, recent drafting practices in Indian PPP and EPC contracts have shifted focus from merely listing qualifying events to embedding operational clarity. Contracts are increasingly mandating structured notices,

obligations to mitigate, contemporaneous documentation, and stepwise remedies, such as deadline extensions or partial cost sharing. This emphasis on process ensures that relief is not only recognised in theory but also practically accessible in times of crisis.

The pandemic also highlighted that force majeure clauses cannot function in isolation. A critical gap was the underuse of insurance policies covering political risk, construction delays, or even health-related disruptions, which existed but were rarely integrated into concession frameworks. Without such mechanisms, concessionaires remained financially exposed despite contractual relief. Going forward, the integration of risk-transfer tools such as political risk insurance, delay-in-start-up cover, and specialised products for pandemics or supply chain shocks is increasingly seen as essential.

*effective force majeure management requires more than careful drafting. It must combine precise contractual obligations with fair risk allocation and robust financial safeguards*

The evolution in India mirrors international best practice. Standardised forms such as the World Bank's PPP frameworks and FIDIC contracts not only define force majeure with precision but also align it with structured notice, mitigation, and compensation mechanisms. They further stress the importance of linking contractual relief to financial structures, including insurance and guarantees, thereby ensuring project continuity even under extreme disruptions. Indian practice is gradually moving in this direction, although gaps remain in implementation and enforcement.

The central lesson is clear: effective force majeure management requires more than careful drafting. It must combine precise contractual obligations with fair risk allocation and robust financial safeguards. Only then can PPP and EPC projects withstand crises, without derailing the broader infrastructure ambitions on which they depend.

## Judicial perspectives and case studies from Indian projects

The judiciary has played a significant role in shaping the practical allocation of risk. Courts have repeatedly stressed that contracts must be interpreted in accordance with their precise terms, while also recognising fairness where extraordinary events occur.

In *Halliburton Offshore Services v Vedanta Ltd*,[5] interim relief was granted recognising that Covid-19 lockdowns had severely affected performance. In this case, Halliburton Offshore Services Inc was contracted by Vedanta Ltd for oil and gas exploration activities in Rajasthan. Due to the Covid-19 lockdown, Halliburton invoked the force majeure clause, seeking to prevent Vedanta from encashing eight performance bank guarantees. The Delhi High Court, in its *ad-interim* order dated 20 April 2020, restrained Vedanta from invoking the guarantees, recognising the lockdown as a prima facie force majeure event.

Several high-profile projects illustrate how risk allocation plays out practically. The Delhi-Gurgaon Expressway became embroiled in disputes over toll revenue sharing and traffic management.[6] The lack of clear renegotiation mechanisms meant that disagreements escalated into prolonged litigation, delaying the resolution and undermining public confidence.

In the airport sector, disputes at Delhi International Airport highlight how unclear terms in PPP contracts can lead to conflicts between government regulations and the autonomy of private operators.[7] For instance, during the Covid-19 pandemic, Delhi International Airport Limited (DIAL) invoked a force majeure clause in its 2006 agreement with the Airports Authority of India (AAI) to suspend its revenue-sharing obligations. This move was prompted by a significant decline in passenger traffic, which had a severe impact on revenue. Subsequently, an arbitral tribunal ruled in favour of DIAL, ordering AAI to refund approximately INR500 crore and waive about INR1,800 crore in dues for the period from March 2020 to February 2022. The tribunal's decision also extended DIAL's concession period by nearly two years to compensate for the force majeure period. The Delhi High Court upheld this arbitral award, affirming the relief granted to DIAL. These developments underline how ambiguities in PPP contracts can disrupt even high-profile projects when unforeseen events occur.

The shift in the highways sector from Build-Operate-Transfer (BOT) to Hybrid Annuity Model (HAM) projects is itself a

case study in adaptive risk allocation. Under BOT, traffic and revenue risks left many concessionaires financially stressed, with several projects stalled or abandoned. Under HAM, risk is more evenly distributed, and projects have achieved higher completion rates. These examples underline that risk allocation is not a theoretical construct but a determinant of real project outcomes.

## Future directions

The evolving experience of India's infrastructure projects suggests several directions for reforms. Contracts must move beyond rigid or contemporary templates that combine certainty with adaptability. Risks should be allocated not simply on paper but in ways that reflect the practical capacity of parties to manage them. Dispute resolution must be swift and credible, with institutional mechanisms that prevent projects from stalling. Financial and insurance innovations must be mainstreamed into project design, ensuring that disruptions do not immediately translate into insolvency or abandonment.

These insights have particular resonance in the present world scenario. With global supply chain shocks, inflationary pressures, and geopolitical risks disrupting projects, the need for adaptable and equitable risk allocation is greater than ever. The Kelkar Committee's framework provides a valuable foundation for reforming and understanding India's contractual practices.

**Notes**

1 *Energy Watchdog v CERC*, (2017)14 SCC 80.
2 *Halliburton Offshore Services v Vedanta Ltd*, (2020 SCC OnLine Del 542).
3 *Standard Retail Pvt Ltd v G S Global Corporation*, (2020 SCC OnLine Bom 704).
4 Government of India, Department of Expenditure Procurement Policy Division, Ministry of Finance, Office Memorandum on force majeure, https://doe.gov.in/files/circulars_document/FMC.pdf accessed 27 September 2025.
5 See n 2, above.
6 'No toll on Delhi-Gurgaon expressway, agrees Supreme Court', *NDTV*, 12 September 2012 https://www.ndtv.com/india-news/no-toll-on-delhi-gurgaon-expressway-agrees-supreme-court-499134 accessed 28 September 2025.
7 'Delhi Airport wins arbitration against AAI, secures refund & payment waiver', *Business Standard*, 8 January 2024 https://www.business-standard.com/india-news/delhi-airport-wins-arbitration-against-aai-secures-refund-payment-waiver-124010800331_1.html accessed 28 September 2025.

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Skyline of Bogotá, Colombia. Credit: bydronevideos/Adobe Stock

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# The Colombian legal regime on future budgetary allocations in public-private partnerships

## Contextualisation

### *PPPs in Colombia*

More than 13 years ago, Law 1508 of 2012 was enacted by the Congress of the Republic of Colombia. It aimed to regulate public-private partnerships (PPPs) as a new mechanism to develop infrastructure projects in Colombia. This important milestone was later accompanied by implementing legislation which is of pivotal importance in the construction of a broad and strong legal framework for PPPs, Decree 1082 of 2015 being the most relevant example.

In the years since, Colombia has become a jurisdiction of reference in Latin America for the development of PPP projects. The most recent *Economist Impact Infrascope Index* commissioned by the Interamerican Development Bank ranks Colombia third overall out of a total of 26 countries in the Latin America and the Caribbean region to develop PPPs.[1] Furthermore, according to Fedesarrollo (a first-rate independent think tank and investigation centre in Colombia), from 2012 to 2024, PPP schemes have amounted to approximately COP70.05bn (approx US$18.67m) in CAPEX and COP71.24bn (approx US$19m) in OPEX through private financing.[2]

Under Law 1508 of 2012, the PPPs mechanism has several features which have helped it to prosper as a tool to develop high quality infrastructure. The following three main characteristics have been outlined by authors including Juan Carlos Quiñonez Guzmán, from the Colombian Infrastructure Chamber:[3]

1. PPPs closely and strictly follow a 'value for money' approach. The PPP mechanism can only be used when it brings more value for money than any alternative scheme such as public construction contracts.
2. Law 1508 of 2012 embraces an FIDIC international principle according to which project risks are allocated to the party which is in the best position to manage them. This therefore mitigates their impact over the development of the infrastructure and the provision of services.
3. PPPs in Colombia provide for remuneration payments to concessionaires as long as the relevant infrastructure is available and certain pre-established Key Project Indicators (KPIs) are complied with. This vital characteristic has been of utmost importance for the correct implementation of the PPP mechanism and has become an important factor in attracting investors to the infrastructure sector.

Considering the above characteristics, PPPs in Colombia have gone through a decade of breakthroughs and development. Both public and PPPs of private initiative (the latter are also known as 'unsolicited proposals'), have been successfully structured, awarded, financed and in the case of the toll road concessions most are into their operation phase. The mechanism has allowed Colombian governments to release funds that otherwise would have been allocated in the construction of roads for the benefit of sectors such as public education and health, among others.

The mechanism has proved so successful that some sectors have even looked on the PPP regime to find the best practices to be replicated in their own schemes, even if the relevant project is not regulated by Law 1508 of 2012, but rather by the general public procurement regime. An example of this is the current Bogotá's First and Second Metro Lines of Bogotá, or the first light rail train to connect Bogotá with its suburbs (*Regiotram de Occidente*). These are projects which, despite not being considered as regulated by the PPP mechanism, have incorporated most of the PPP's features in their contractual agreements. The adoption of PPP mechanisms has been fundamental to these projects in attracting the interest of investors, sponsors, lenders and constructors alike.

The PPP scheme in Colombia has been replicated in different sectors of the infrastructure market. Most relevantly, since the passing of Law 1508 of 2012, the national government released the fourth-generation programme of toll road concessions, which is a group of over 25 toll road projects (between public and private initiatives) all regulated by the PPP mechanism. As of 2024, according to the Republic of Colombia Presidential Office, the average progress rate of the programme reached 89 per cent with an estimate CAPEX investment of COP63bn.[4] The Government of Colombia further replicated the lessons learned, and most recently launched the fifth generation of concessions programme, an ambitious programme with the aim of expanding the PPP schemes across other transport sectors other than roads, to increase the country's competitiveness via multimodal transport. This led to the awarding of waterway and train projects through the PPP mechanism.

*PPPs in Colombia provide for remuneration payments to concessionaires as long as the relevant infrastructure is available and certain pre-established Key Project Indicators (KPIs) are complied with*

PPPs have also been successful outside of the transport sector, especially in the regional governments. Local administrations have been able to successfully structure and develop PPP projects in social infrastructure sectors (eg, hospitals, correctional facilities, schools and parks) as well as entertainment venues (eg, stadia and concert venues).

### *Future budgetary allocations regime*

While PPPs have provided some flexibility to Colombian governments given the fact that private investors and banks do allocate funds in projects that otherwise would have been funded solely by the former, still the government entities must make payments to concessions which extend for long periods of time. In this context, the Colombian Government has become committed to making budgetary allocations to fund projects for periods of time which go beyond a single fiscal year. This legal instrument is known as Future Budgetary Allocations (FBAs) or *Vigencias Futuras*.

FBAs are essential in providing the necessary cash flow for sponsors and financial entities once the relevant infrastructure is available and some KPIs are met. FBAs are also the main source of

payments for the private sector. Given their relevance to project developments, and their importance as a public budget mechanism, FBAs may only be adopted and allocated after a complicated and meticulous procedure which involves several branches of government being carried out.

For FBAs to be approved, the corresponding project must have achieved feasibility designs, as well as having favourable opinions from the National Planning Department and the Ministry in charge of the project. The process also considers the need to consult the mid-term budget estimates (*marco fiscal de mediano plazo*) and for the Ministry of Finance to approve the financial conditions of the relevant project. Finally, the FBAs are approved by the Fiscal Policy National Council (CONFIS), a body of several high-ranking government officials with the task of overseeing Colombia's fiscal policy. It is CONFIS which will ultimately determine the amount of FBAs that will be authorised and the payment allocations during the term of the relevant concession agreement.

Despite the in-depth regulation of FBAs in Colombia, perhaps its most relevant characteristic is that, once approved by CONFIS, government and congress officials in charge of budget are bound to allocate the relevant financial resources for each fiscal year, so that the project receives the necessary funding. This obligation constitutes a mandate for officials that cannot be ignored, and is generally enforceable by law, which has led to consider FBAs being considered reliable as Colombia's public debt bonds. This has allowed most of the PPP projects now in place to achieve financial closings.

## The importance of FBA in PPP projects in Colombia

Having given a general contextualisation of the PPP in Colombia and the general notion of FBAs, this article will now outline the pivotal role FBAs have played in the success of the PPPs mechanism in Colombia, both as means to compensate and remunerate the private investor, and also as collateral to secure project financing for its adequate development.

To comply with the provisions of our PPP law and the best industry practices, once approved, FBAs must be deposited annually by the government in each project's specific trust. Such trusts occupy the very centre of any PPP and are where all project-related resources are managed. FBAs are deposited in accordance with their approved disbursement schedule, and will fulfil their role as remuneration for the sponsors of the project, or even as collateral for lenders of the concessionaire.

### *Future budgetary allocations as remuneration in PPP projects*

As mentioned, the main characteristic of FBAs instruments is that they allow the government to budget resources which exceed each fiscal year, therefore committing to future budgets. This FBA characteristic has been fundamental for PPP projects given their long-term nature. The complexity and size of PPPs projects, as well as the requirement to secure value for money, demands that this mechanism is implemented in large-scale projects to be undertaken and developed in more than one year.

In this context, private investors seek favourable conditions for their projects, the sources of remuneration must be clear, certain and secure, as the risk that is being taken to develop the project is considerable. In that sense, FBAs as a source of payment are a secure tool for investors who are aware of the irrevocable commitment the government makes in allocating budgetary resources in each fiscal year to serve as remuneration for each specific project.

In practice, FBAs are allocated to a specific project and therefore disbursed and deposited periodically in the project's trust fund. Pursuant to the applicable principles of the PPP regime in Colombia, these FBAs will only be available to the concessionaire or private investor on compliance with its obligations, and more importantly, on availability of the infrastructure and compliance with the project's KPI. In the intervening time, the FBAs are safely secured under the administration of a trust company, which manages the resources generating market-standard interests.

Consequently, private parties and investors understand that, if they comply with the project's KPI in the terms of the relevant contract, their remuneration will be available in an independent trust fund. The remuneration's availability is unconditional, as FBAs are mandatory commitments not contingent on any additional requirement other than those mentioned above.

### *Future budgetary allocations as collateral*

One of the most important obligations that the private party assumes in a PPP is the financing of the project, by obtaining the necessary resources to perform its obligations under the relevant contract. This financing may often come either through direct equity transfer from the project's sponsors, or through debt resources from lenders. The obligation to achieve financial closing needs to be accredited before the contracting entity during the first stages of the project.

Financial closings are a convincing indicator on the success of the PPP mechanism in Colombia. Most of the PPP projects currently under development have successfully secured their financial closing, which has allowed them to complete construction successfully, and are now moving towards refinancings during their operative stage. The PPP mechanism has attracted a wide range of financial institutions to participate in financial closings, including local and foreign banks, private equity and infrastructure funds from all over the world. Institutional investors and other capital markets players are among the most relevant sector represented in the financial closing of Colombia's PPPs.

The main reason behind support for the PPP scheme from the financial sector is the level of bankability for each project through its terms and conditions. This includes, among others, step-in rights, termination formulas or trust fund management of resources. Among these bankability characteristics, FBAs and their regime are the most important features which may attract business for a financial entity to a PPP project.

Given the complex and robust structure of FBAs as source of payment in an infrastructure project, lenders in financial closings have relied heavily on these mechanisms to act as collateral of the resources owed by the debtor. The FBAs mechanism gives lenders a collateral with absolute certainty of availability, which is more secure than any other collateral that can be offered in the guarantee package of a project finance. As the disbursed FBAs are deposited with trusts managed by trust companies, this makes the payment of debts reliable as trust companies cannot divert funds for payments which are not contemplated in the initial trust agreements or their amendments.

The above characteristics have allowed a handful of projects to reach financial closing in very favourable conditions, because the presence of strong and solid collateral reduces lenders' uncertainty and risk exposure, leading to cheaper financings. The mechanism has also allowed for certain standardisation of the project finance market practice in Colombia, generating an approachable and appealing investment environment for different financial institutions.

## Recent challenges of FBAs in Colombia

Despite the many proven advantages and features of FBAs in project development in Colombia, the mechanism and its principles are currently facing legal challenges. These have been motivated by the government seeking an amendment to the applicable rules, so that FBAs already approved and secured may be available to be diverted to unrelated projects or initiatives to be undertaken by the Colombian government.

This government decision brings important questions and improvement opportunities for the FBA mechanism, particularly considering that, in projects in which FBAs have already been authorised and approved, there is a valid and enforceable commitment in place to allocate those resources in the corresponding fiscal year. This means that, in principle, there is no alternative means under which those projects could be not-financed.

The fact that the FBAs have to be mandatorily deposited and managed through a trust fund until the concessionaire reaches and necessary availability of the infrastructure means that, in some cases, FBAs will be deposited in advance of their actual need, and would then become unused resources in a trust fund, waiting for the project's KPIs to be complied with so that the concessionaire acquires the right to compensation. Furthermore, whenever a project falls into delays, FBAs end up deposited for long periods of time until they are required. However, it is that very same characteristic, meaning its availability without prejudice of the construction status, which has proved useful in gaining the trust of investors, contractors, and financial institutions, among others.

In addition, the difficult macroeconomic and fiscal situation Colombia is enduring,

and serves as a perfect scenario to bring the discussion on FBAs to the table. Some question whether it is fair and responsible to keep disbursing FBA's resources into a project-specific trust fund, even when those FBAs will probably not be used in the near future, while the government faces other public spending challenges which could become a priority and for which the public resources that comprise the FBA could be used; especially in those projects in which, for reasons attributable or not to the private party, the construction progress is not coherent with the need for resources.

There have been several attempts to amend and modify the regime on FBAs throughout 2025, so that the route to obtaining a modification, rescheduling or cancellation of the authorisation for FBAs is made easier. These different attempts have: firstly, demonstrated that there might be room for improvement when it comes to FBAs' mid project development; but, secondly, and perhaps more importantly, it demonstrated that the complex pillars and foundations of the FBAs regime are solid, reaffirming the reasons why the mechanism is trustworthy.

*a presidential decree dealing with budgetary postponements looked to introduce the possibility to postpone and push the allocation of FBAs, with the purpose of reducing public spending from the national budget of 2025*

In early 2025, a presidential decree dealing with budgetary postponements looked to introduce the possibility to postpone and push the allocation of FBAs, with the purpose of reducing public spending from the national budget of 2025.[5] The rule would only be applicable to projects in which prior agreement had been reached with the private party (in application of the freedom of contract and *pacta sunt servanda* principles),[6] or in projects that had suffered delays in their works schedule. In practice, there are no projects to which this decree was applied, particularly because of the restrictions and guarantees imposed by Colombia's public procurement regime, as well as the strict requirements under which an FBA could be subject to postponement which required prior approval from CONFIS.

Moreover, in July 2025, the government released a draft decree with the purpose of amending the procedure to be undertaken to obtain the authorisation from CONFIS to reschedule approved FBAs. Although the draft decree has not been officially issued and is therefore not yet binding, the purpose is: to clarify that FBAs could be amended both in amount and term (as the original provision limited the reschedule only to term but not to amounts); and to propose a stricter procedure to obtain the relevant CONFIS authorisation. The process would eventually require a number of different favourable opinions and justifications, but, nevertheless, when this attempt at modification is read in conjunction with the presidential decree, the aim is for projects suffering delays to undertake a smoother procedure to obtain an authorisation to reallocate the disbursement of FBAs.

On a different note, more recently a draft proposal has become known, which is to be included within the national budget law.[7] This draft bill seeks to allow entities in the transport sector unilaterally to reorganise their budget and relocate resources coming from FBAs (which are project-specific allocations) to other types of projects. It is worth noting that this draft bill has not yet been enacted and is currently being discussed in Congress.

Considering all the above, it is important to highlight that, without prejudice of the FBAs regime in Colombia, there are other principles and regulations which need to be considered when discussing the possibility of rescheduling budgetary commitments affecting a specific project. The rules on public procurement,[8] public administration,[9] administrative morality,[10] among others, make it difficult to amend budgetary commitments unilaterally without proper and due justification. This is something that needs to be maintained despite the intention to modify the FBAs regime. In fact, even though the public procurement regime provides for the possibility for contracting entities to amend a public contract unilaterally,[11] this power is subject to strict compliance with specific prerequisites, which are not present to proceed with a unilateral modification of the FBAs schedule.

In view of this, apart from the draft modification analysed, the bottom line is that, under the current applicable regulation, there is still a need to obtain due authorisation by CONFIS to be able to modify or reschedule FBAs that serve a particular project. Furthermore, by virtue of

the rules on public procurement and freedom of contract, it is also possible to construe that the acquiescence of the private party developing the relevant project will be needed beforehand to proceed with a modification of the agreed payment scheme.

Notwithstanding the above, the infrastructure sector in Colombia is still very dependent on the perception that investors have of the Colombian economy's stability; this is probably one of the reasons why the FBA mechanism became so popular and desirable in project developments. However, the constant attempts to modify the applicable rules partway through project developments may have adverse consequences for Colombia's perception in the eyes of investors, contractors and lenders, which is not ideal for the upcoming projects and exposes the government to national and international claims by project developers.

It is worth highlighting that, despite the different attempts made to modify the regime applicable to FBAs, there have not been any relevant reschedules, amendments or modifications to already approved FBAs for current projects in operation in Colombia. This demonstrates, once again, that the legal framework surrounding this budgetary mechanism remains strong and trustworthy, making it a very appropriate tool for the successful development of future projects.

On a different note, the need identified by the Colombian government which supports the rescheduling and amending of FBAs also reveals a clear opportunity for improvements to the infrastructure sector, in the search for alternate payment sources for projects, other than direct budgetary allocations. This would eventually reduce the need for FBAs, allowing the government to prioritise its public spending goals while aiming for continued progress in the projects that Colombia needs.

**Notes**

1 'Infrascope 2023/2024', *Economist Impact*, https://impact.economist.com/new-globalisation/infrascope-2024/es accessed 17 November 2025.

2 J Benavides, G Lleras and A Montenegro, 'Aportes del modelo de Asociación Público Privada (APP) al desarrollo de la infraestructura vial, la tecnificación del sector de transporte, el crecimiento económico y la convergencia regional de Colombia', Bogotá: Fedesarrollo (2024), 20 http://hdl.handle.net/11445/4657 accessed 17 November 2025.

3 J C Quiñonez Guzman, *Contratos de asociación público-privada e infraestructura de transporte*, 1st edn, 2020, pp16-17.

4 https://www.presidencia.gov.co/prensa/Paginas/Proyectos-4G-cerraron-el-2024-con-un-avance-cercano-al-89-clave-para-la-gen-250102.

5 Art 1 of Decree 069 of 2025.

6 Art 2 of Decree 069 of 2025.

7 Art 88 of draft bill 102-2025SC.

8 Law 80 of 1993, Law 1150 of 2007; Law 1474 of 2011, among others.

9 Art 209 of the Colombian Political Constitution.

10 Law 1437 of 2011.

11 Art 16 of Law 80 of 1993.

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Netherlands flag depicted in paint colours on a multi-storey residental building under construction. Credit: mehaniq41/Adobe Stock

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# A new legal regime redefining contractor's liability: a cautionary tale when contracting (FIDIC) projects in the Netherlands

## Introduction

On 1 January 2024 the Quality Assurance Act for Construction[1] (the Act) came into force in the Netherlands. The Act is – inter alia – aimed at strengthening the legal position of Employers and improving the quality and safety of construction projects. In order to achieve this aim, stricter supervision and accountability measures for contractors have been introduced.[2]

The Act amends the Dutch Civil Code (DCC) on five different topics, which are all found in the statutory provisions dealing with Contracting of Work (title 7.12 DCC). The focus in this article is on one of these five amendments, namely the new and revised liability provision introduced by this Act. The amendment to the current statutory liability provision is considered the most relevant and impactful.

I will preface the new liability provision of the Act against the current legal backdrop of the liability provision in title 7.12 DCC, which helps to give a better understanding of the amendment itself and its implications for FIDIC projects in the Netherlands.

## The new Dutch liability provision

The Act introduces a new paragraph (named paragraph 4) to the existing article 7:758 DCC paragraphs 1–3, of which paragraph 3 already deals with the issue of the Contractor's liability. Article 7:758 paragraph 3 DCC reads: 'The Contractor is released from liability for defects that the Employer reasonably should have discovered at the time of delivery.'

Dutch law, dealing with Contracting of Work, consequently has a cut-off point at the time of delivery when it comes to Contractor's liability for defects or damages to the works. Central to that cut-off point is whether or not the Employer should have noticed a defect in the works at the time of delivery.

Paragraph 4 (introduced by the Act) also deals with contractor's liability and reads:

> 'By way of derogation from the third paragraph, in the case of contracting for construction works, the contractor is liable for defects that were not discovered at the time of delivery of the work, unless these defects cannot be attributed to the contractor. This paragraph may not be deviated from to the detriment of the employer, insofar as the employer is a natural person not acting in the course of a profession or business. In other cases, deviation to the detriment of the employer is only permitted if it is explicitly included in the agreement.'

There are five noteworthy changes introduced by this new liability provision, which are highlighted below.

## Five noteworthy changes to contractor's liability in the Netherlands

First, the new liability provision is only relevant to so-called 'construction works'. The reason why this is relevant to note is that 'Contracting of Work' in the Netherlands is far broader and covers much more than only construction works. To give just two examples, repairs to a bicycle or a television fall under the same legal regime as the construction of an underground multi-level parking garage or complex road infrastructure work. They all are considered 'Contracting of Work' under the DCC. The Act therefore introduces a liability provision specifically aimed at construction works, which is to be considered one of the subcategories of Contracting of Work. This also means that as from 1 January 2024 the Netherlands has two different liability regimes in title 7.12 DCC, which is expressed in the Act: 'By way of derogation from the third paragraph, in the case of contracting for construction works [...]'. The third paragraph (mentioned above) remains in place, while a new fourth paragraph is added to the provision.

Second, and again this is specifically for construction works, there is no longer a cut-off point at the time of project delivery when it comes to the Contractor's liability for defects. The situation is reversed. The Act makes clear that the Contractor is and remains liable for defects that were not discovered (by the Employer) at the time of delivery of the work. This means that if an Employer complains to the Contractor about a defect that should have been discovered at the time of project delivery, but does so after project delivery, the Contractor would still be liable for defects, except for defects not attributable to the Contractor. This is illustrated by the part of the provision that reads: '[...] the contractor is liable for defects that were not discovered at the time of delivery of the work, unless these defects cannot be attributed to the contractor.' This is new and redefines contractor's liability for construction works in the Netherlands.

*The Contractor is released from liability for defects that the Employer reasonably should have discovered at the time of delivery*

Of course, under Dutch law there are still time bars which need to be taken into account as well as the obligation for an Employer to complain about a defect within a reasonable time. But the cut-off point for liability after project delivery for defects that the Employer should have discovered at the time of delivery no longer applies to construction works in the Netherlands. This ties into one of the main goals of the Act, mentioned in the introduction to this article, the aim of which is to strengthen the legal position of Employers.

Third, and connected with the previous point, is that the allocation of the burden of proof also changes as a result of the new paragraph 4. The statutory text implies that the Employer must make it plausible that there is damage resulting from a defect that was not discovered at the time of delivery of the work. If the Employer succeeds in proving this, it is then up to the Contractor to defend themselves by arguing that the defect was indeed discovered and/or that the defect cannot be attributed to the Contractor.

Also, if the agreement is with a natural person (as the Employer), the Contractor may not deviate from the liability provision to their detriment. It is therefore a mandatory provision in business-to-consumer construction agreements as evidenced by the phrase: 'This paragraph may not be deviated from to the detriment of the employer, insofar as the employer is a natural person not acting in the course of a profession or business.'

Lastly, in other cases (meaning business-to-business transactions between professionals), deviation of the liability provision to the detriment of the Employer is only permitted if it is explicitly included in the agreement: 'In other cases, deviation to the detriment of the employer is only permitted if it is explicitly included in the agreement.' As described in the Explanatory Memorandum, this means that the parties can only agree to a different allocation of liability by express mutual agreement to that effect. It has been made clear in the Explanatory Memorandum that, from a legal point of view, it would not suffice to have a deviating condition included in general terms and conditions applicable to the agreement.[3]

## Consequences for the Dutch construction market

The fact that under the Act the parties can only agree to a different allocation of liability by specific mutual agreement to that effect and not through reference to general terms and conditions, has affected the way in which agreements for Dutch construction projects are negotiated and concluded. While in the Netherlands there has been legislation (albeit fairly concise) dealing with Contracting of Work since 2003, there is a much longer tradition of concluding agreements for construction work by referencing much older, well-known, widely used and elaborate general terms and conditions.

Prominent examples are the Uniform Administrative Conditions for the Execution of Works and Technical Installation Works 2012 (the Dutch abbreviation is UAV 2012) for execution-only agreements; and the Uniform Administrative Conditions for integrated contracts 2005 (the Dutch abbreviation is UAV-GC) for design and construction projects (hereinafter together GTCs).

When the legislation came into force, these GTCs had a liability provision that was contrary to the Act.[4] This resulted – among other things – in it being necessary to update the liability provision of the UAV-GC: the 2005 version was updated in a 2025 version. In this updated version, provision was aligned with the Act by placing the liability clause in the Model Agreement rather than in the general terms and conditions together with an option clause in the Model Agreement to be chosen by the negotiating parties.

However, the UAV 2012 update is still being discussed. In an attempt to eliminate the contradiction between the liability provisions in the Act and in the UAV 2012, the Dutch Government – in a move that rather surprised the Dutch construction market – proceeded to publish a new 2025 version of the UAV on 26 February 2025. This deleted the liability provisions in the UAV 2012 (known as par. 12 UAV 2012). The rationale was that by deleting these contradictory provisions, there would no longer be a contradiction and the statutory liability in the Act would apply.

This means that for the Dutch construction market a mere reference to the UAV 2012 or the UAV-GC 2005, in an agreement for construction works, will be in violation of the law, specifically on the aspect of liability of the contractor for defects that the Employer should have noticed at the time of delivery of the project. In business-to-business agreements for construction works, such a violation leads to the provision being voidable on the grounds of being contrary to a mandatory provision of law.

## How does the Act affect FIDIC projects in the Netherlands?

My professional experience as a construction lawyer has been that over the past ten years it has become increasingly common to find FIDIC-based projects in the Netherlands. A reason for this could be found in the further liberalisation of the European market and the need for Employers to contract specialised contractors out of their home states for specific projects. The influx of offshore and onshore wind projects in the Netherlands also seems to be a contributing factor. The most used FIDIC conditions of contract in the Netherlands, seen in my practice, are the Red, Yellow and Silver Books which will be the focus of the following paragraphs.

Regarding the FIDIC conditions of contracts, let us take the FIDIC Red Book (second edition, 2017) as an example. It uses Particular Conditions A (contract data) for the parties to enter the project-specific data such as the total liability of the Contractor under or in

connection with the Contract (sub-clause 1.15 of the Particular Conditions part A). This is similar to the FIDIC Yellow Book 2017 (also sub-clause 1.15 of the Particular Conditions part A) and the FIDIC Silver Book 2017 where this is stated in sub-clause 1.14 of the Particular Conditions part A.

As the FIDIC General Conditions and the Particular Conditions part B, by which the General Conditions may be amended, are interconnected, I will discuss them together in the paragraph below. In the General Conditions of the FIDIC Red Book there is a limitation of liability provision in (unsurprisingly) sub-clause 1.15. This limitation of liability provision, including the carve-out in the last paragraph in cases of fraud, gross negligence, deliberate default or reckless misconduct, is not contrary to the Act. The same goes for the limitation of liability provision in sub-clause 1.15 of the FIDIC Yellow Book 2017 and in sub-clause 1.14 of the FIDIC Silver Book 2017. The reason is that the nucleus of the liability provision in the Act is that the Contractor *is* liable towards the Employer for defects that were not discovered at the time of delivery of the work. The Act does not go as far as to ban any limitations to said liability of the Contractor.

Another provision in the General Conditions worth consulting is Clause 11 – *Defects after Taking Over*, and the way in which the Contractor's liability is dealt with, specifically in sub-clause 11.1 – *Completion of Outstanding Work and Remedying Defects*; and sub-clause 11.2 – *Costs of Remedying Defects*. Sub-clause 11.1 makes it clear that the Contractor shall execute all work required to remedy defects or damage of which a Notice is given to the Contractor by (or on behalf of) the Employer on or before the expiry date of the DNP for the Works or Section or Part.[5] All work mentioned above shall be executed at the risk and cost of the Contractor.[6]

This limitation in time regarding the Contractor's liability under Clause 11 of the General Conditions is also not contrary to the Act because it does not absolve the Contractor of liability for defects or damage arising after Taking-Over. Therefore, it is safe to conclude that the parties negotiating a FIDIC Red Book, Yellow Book or Silver Book contract may refer to these clauses in the General Conditions without amendments and at the same time be compliant with the Act.

However, if the negotiating parties to a FIDIC contract decide to amend the General Conditions through Particular Conditions part B, for example by agreeing that the Contractor is absolved of liability towards the Employer on project delivery as an amendment to sub-clause 11 FIDIC Red, Yellow or Silver Book 2017 (eg, as a reference to the provision in article 7:758 paragraph 3 DCC), it is important to take into account that for construction works the Act does not allow to deviate from its liability provision unless the parties have explicitly and willingly done so by express mutual agreement. It is therefore advised to keep all relevant records of the negotiations taking place on the subject of liability and make sure that the particular conditions part B clearly reflect the mutual agreement to deviate from Clause 11 of the General Conditions.

## Conclusion

The cautionary tale referenced in the title of this article is the change in contractor's liability for construction works that was enacted through the Act. It is a major change, as it is a 180-degree shift from the liability regime that was previously in place for construction works, and that is still in place for other types of Contracting of Work (title 7.12 DCC). It is important for contracting parties to a FIDIC contract to remember that if and when a deviation from this new liability regime is negotiated, it must be done specifically and via mutual agreement. A mere reference to general terms and conditions that contain a deviation from this new liability rule would not suffice. It is therefore advised to maintain a record of all relevant documents pertaining to the negotiations on the subject of liability, and make sure that the agreement concluded clearly reflects the deviation.

**Notes**

1 In Dutch: 'Wet Kwaliteitsborging voor het Bouwen'.

2 Explanatory memorandum accompanying the Act (*Kamerstukken II*, 2015/16, 34 453, No 3), p 2.

3 Explanatory memorandum accompanying the Act (*Kamerstukken II*, 2015/16, 34 453, No 3), p 91.

4 Not including the updated version of the UAV-GC, which is the UAV-GC 2025, and which incorporates the amendments introduced by the Act.

5 If the Defects Notification Period is not stated in the Particular Conditions part A, it is one year (sub-clause 1.1.26 FIDIC Red Book 2017; sub-clause 1.1.27 FIDIC Yellow Book 2017; and sub-clause 1.1.24 FIDIC Silver Book 2017).

6 Sub-clauses 11.2 FIDIC Red Book, Yellow Book and Silver Book 2017.

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# Dispute resolution fit for a queen: bringing sovereigns to the table – and keeping them there – to resolve infrastructure disputes consensually

Despite widespread recognition of the benefits of alternative dispute resolution (ADR) in resolving infrastructure disputes, projects involving state entities have proved remarkably resistant to the possibilities that ADR brings. This article explores obstacles to obtaining negotiated or mediated resolutions with sovereigns and thoughts for overcoming them, including: the involvement of independent experts, building capacity within governments and the community of neutrals capable of

handling these disputes, as well as other recommendations to facilitate the resolution of disputes involving sovereigns.

## Obstacles to sovereign settlements

There are several reasons why governments may be hesitant to settle disputes, ranging from legal restrictions to political considerations. In addition to legal constraints on government entities engaging in settlements, obstacles arising out of political and public perception as well as jeopardy for civil servants responsible for committing to settlements can pose challenges, particularly where a settlement may be viewed as a sign of mismanagement or could otherwise attract criminal or civil liability for government employees and officials.

### *Perceptions (and misperceptions) about legal impediments to settlements*

There is a commonly held perception among practitioners that sovereigns are constrained in reaching compromise agreements by a host of legal requirements which prevent even an attempt at negotiated settlement. However, in the experience of this group at least, the legal requirements surrounding sovereigns' ability to pursue ADR are neither as extensive as some believe nor the primary impediment to resolving infrastructure disputes.

Some of the misperceptions surrounding limits on sovereigns participating in ADR may arise from historic doubts around the arbitrability of disputes with state-owned entities (SOEs). However, this has largely been resolved through legislation and judicial determination. For example, in Brazil, there was uncertainty as to whether the federal, state and city governments and their entities/bodies – whether government-owned, government-controlled, semi-public or mixed public-private ownership – could submit disputes to arbitration, but this was clarified in the Brazilian Arbitration Act (the BAA).[1] The BAA provides that parties can use arbitration as a means of resolving disputes regarding 'freely transferable property rights'. Article 1, section 1 of the law that amended the BAA,[2] eliminated any remaining confusion by specifically amending the BAA to provide that direct and indirect public administration entities may use arbitration to resolve conflicts regarding freely transferable property rights.

Similarly, although some disputes, including 'administrative disputes falling within the jurisdiction of the relevant administrative organs' are not arbitrable,[3] there are no specific legal restrictions preventing the state or SOEs of the People's Republic of China from entering into arbitration agreements. While the scope of what constitutes such an administrative dispute is not clear-cut, disputes arising out of public-private partnership (PPP) agreements between SOEs and private entities have generally been found to be civil and not administrative. Indeed, legal impediments to SOEs arbitrating their disputes may be more a matter of perception than reality.

> *the legal requirements surrounding sovereigns' ability to pursue ADR are neither as extensive as some believe nor the primary impediment to resolving infrastructure disputes*

Even where specific laws prevent SOEs from arbitrating disputes, there are often exceptions for construction contracts and PPPs. For example, in the United Arab Emirates, a federal law bans the adoption of arbitration,[4] and disputes arising out of government procurement *must* be submitted to UAE courts.[5] This restriction can only be lifted by a decision of the Cabinet based on a request from the relevant federal entity.[6] However, the UAE has specifically excepted construction and PPP contracts from application of this restriction.[7] Cabinet Decision 4/2019 allows Federal Entities to agree to arbitrate,[8] but mandates that: (1) the arbitration must be seated in the UAE; and (2) the substantive law of the contract and the laws relating to the procedures of the dispute shall be those of the UAE Federal Law No 12 of 2023[9] which allows for parties' choice of 'alternative dispute resolution methods applicable in the state, including mediation, *arbitration*, and resorting to an expert' (emphasis added).[10] Nevertheless, the UAE Public Private Partnership Provisions and Procedure Manual indicates that only arbitration seated in the UAE is permitted.[11]

The availability of ADR for resolving sovereign disputes has been further clarified by the Singapore Convention on

Mediation (the Singapore Convention),[12] which aims to facilitate the enforcement of international mediated settlement agreements. Fifty-eight countries are currently parties to the Convention, many of which are in the Middle East, Africa, and Latin America.[13]

Under the Singapore Convention, sovereign signatories endorse the use of mediation to resolve commercial disputes involving SOEs. There are exceptions to its application.[14] A state party can 'make reservations for settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party [...]'[15] However, only seven sovereigns have declared exclusions to the mediation of disputes,[16] and most exclusions are quite limited.[17] Indeed, there are no exclusions by Saudi Arabia for disputes between SOEs and others for infrastructure or other construction projects.

In short, while legal and regulatory requirements for ADR do apply to SOEs, they are often not the obstacle to sovereign participation in ADR – or especially to achieving a settlement – that they are often perceived to be.

### *Assuring public confidence in the result*

When considering the true impediments to achieving settlements with sovereigns, it is important to bear in mind that projects that involve SOEs are likely to be mega- or giga-projects that attract a high level of public attention or political interest. Given the impact on the public fiscal resources, there will be greater scrutiny, particularly when things go wrong and disputes arise; and given the impact on the surrounding environment and communities, such projects are already very much in the public eye. And some projects may be the darling of one political party and the target of condemnation by another, raising the stakes for those involved when disputes arise and the public is watching for an appropriate outcome for the state.

The dispute resolution process involving sovereign parties must be demonstrably fair and reasonable and defensible to the public. This is doubly so for disputes that are settled by agreement rather than by arbitrators or courts.

## Bridging the gap: building confidence on the part of government officials as to suitability of the process and result

Is it therefore possible to encourage SOEs to come to the table in order to resolve their disputes? Yes. Government officials often *want* to settle disputes quickly and efficiently, but they – and the civil servants responsible for signing off on the compromise – need assurance that the ADR process will be reliable and fair. Most of all, the process must produce a defensible result that will not lead to retribution for those involved in approving it.

Public officials fear accountability when a decision goes against them, possibly resulting in fines, sanctions, debarment from office. Where a SOE is involved in a dispute, there is typically intense bureaucratic scrutiny from auditors, oversight bodies and regulators, causing officials to be hesitant in their decision making. There is a lack of trust in a decision maker who is not a judge, or an arbitrator, and a decision-making process that does not have a win/lose outcome. Building trust in the process of negotiation and the credibility of mediators and conciliators is part of this journey to increasing the use of ADR by SOEs.

There is no single solution that fits the needs of every unique sovereign, but there are several ADR tools which have proved effective in amicably resolving disputes involving SOEs.

### *Using reliable, government-approved ADR processes*

Government officials are more likely to be confident in a system that they know and understand or – better still – a process endorsed by their government. The broad acceptance of arbitration to adjudicate offers an encouraging model. Governments routinely place their trust in well-established arbitral institutions such as: the International Court of Arbitration (ICC), Singapore International Arbitration Centre (SIAC), London Court of International Arbitration (LCIA), and others.[18] This suggests an openness to other forms of ADR, such as mediation and conciliation, particularly if administered by an established institution.

Mediation, wherein the parties meet with a mutually selected neutral who assists them in the negotiation of their differences, is among the most common forms of ADR and is offered by some of the leading arbitral institutions.[19] Some sovereigns are now including mediation as a pre-arbitral step in the dispute resolution process. For example, while the effectiveness of the 2023 Indian Mediation Act are to be tested in June 2024,[20] guidelines have been issued to limit arbitration to lower-value disputes,[21] and encourage parties to public sector contracts instead to resolve disputes via mediation or negotiated settlements.[22] For higher-value disputes, India's government bodies are empowered to constitute high-level committees, consisting of retired judges or other high-ranking officers or technical experts, to conduct mediations and reviews of proposed settlement terms.[23] India's new law then goes one step further: mediated settlement agreements endorsed by the mediator are final and binding on the parties and have the same enforceability as a judgment.[24]

Conciliation is another route to a compromise which can demonstrate that an objectively fair process has been pursued and result achieved. Conciliation is a form of ADR in which disputes are evaluated by an independent third party – a 'conciliator', who is often a judge. The conciliator can provide suggestions and develop proposals to help parties reach agreement, and unlike a mediator, a conciliator typically provides a non-binding settlement proposal for the parties to consider.[25] Like mediation, however, conciliation is gaining the trust of sovereigns, with more countries enacting a legal framework for conciliation of disputes, including the United Kingdom, Singapore, and India, among others.[26]

Despite the increasing prevalence of legislation, the uptake of ADR is strikingly limited. Mexico offers a rare example of how to encourage SOEs to adopt ADR, even for complex disputes concerning major infrastructure projects. In 2016, Mexico issued a Decree allowing SOEs to conduct an analysis of the risk, feasibility and appropriateness of conciliating a dispute. That same year, PEMEX, Mexico's state-owned petroleum corporation, issued *Guidelines for Implementing Alternative Dispute Resolution Mechanisms for PEMEX and its State-Owned Subsidiaries*.[27] When a dispute concerning the Etileno XXI petrochemical plant arose, an infrastructure project for which the EPC contract alone was worth more than US$2.7bn,[28] PEMEX was empowered to use ADR to resolve it in a process which took months, rather than years. Under this framework, conciliation, or settlements provided by law as alternative means of dispute resolution are justified in cases where objective evaluative elements forecast an adverse outcome in litigation or dispute. These objective elements include:

- a legal technical report – a feasibility study by internal lawyers on whether ADR can generate savings versus litigation or arbitration. This report is reviewed by the Ministry of Public Administration. If the use of ADR would not confer liability on public officials, the use of ADR is approved;
- a budgetary report – prepared by the Corporate Finance Department. If there is insufficient budget, ADR is refused;
- authorisation by the Legal Department – an official will submit the authorisation to the head of PEMEX; and
- execution – conciliations or settlements are resolved once the agreement is signed.

Ecuador is an extraordinary example of how, by introducing a more robust legal framework and specialised mediators to assist with ADR, a nation can boost negotiations and mediation when appropriate. In this regard, Ecuador updated its Arbitration and Mediation Law in 2021.[29] There is now precedent for a codified set of guidelines which establishes accountability that has been tried and tested. Whether other nations follow Mexico's and Ecuador's lead remains to be seen.

### *Building ADR into government contracts*

Dispute resolution clauses are often poorly negotiated and drafted, but a good ADR provision can give government officials the authority to participate in amicable dispute resolution and achieve an effective settlement.

Multi-tiered dispute resolution clauses can take many forms, but typically they feature progressively formalised steps involving increasingly senior party representatives, to promote a quick and efficient resolution where possible. Example steps may include a meeting between project-level management, followed by an executive level meeting, then mediation or conciliation, and finally arbitration or litigation. The clause may

specify particular institutions, rules, jurisdictions, and other details that govern the dispute resolution processes.

A well-drafted dispute resolution clause may not only encourage, but *require*, active participation by a sovereign in ADR. Multi-tiered dispute resolution clauses, by mandating a series of steps before either party can resort to arbitration or litigation, can build in the time required to consult with decision-making authorities within governments – and even mandate the involvement of such authorities – which can empower project-level leadership with a contractual basis to pull government officials into the resolution process when they might otherwise be less available or inclined to participate.

*sovereigns often require some assurance that any settlement outcome is fair such that it reasonably can be accepted on behalf of the government and public*

However, these pre-arbitral steps must be proportionate to the scale and cost of the project and the dispute, and be appropriate for the particular sovereign. For example, a robust multi-step process is likely to be appropriate for resolving disputes arising on a billion-dollar megaproject, but the time and expense of that process may not be justified for the presumably smaller scale disputes arising on a US$10m project.

### Deploying independent experts to promote fair outcomes

In addition to having trust in the ADR processes and institutions that administer them, sovereigns often require some assurance that any settlement outcome is fair such that it reasonably can be accepted on behalf of the government and public. Involving independent industry experts in the process can add a layer of protection that promotes the actual and perceived fairness of ADR proceedings. Independent experts help steer discussions towards the most critical issues and offer objective assessments of the relative strengths and weaknesses of the parties' positions on these issues. In this role, experts help sovereigns assess their claims or exposure and aid government officials in explaining the justification for a negotiated settlement.

The *independence* of these experts is paramount. As opposed to 'hired gun' experts, a truly objective and independent expert helps to ensure that the evidence a government presents represents an objective view of the merits of its position.[30] An independent assessment of claims is ultimately a strength in any dispute. A partisan expert's take on the technical, delay, and quantum issues is generally less helpful in addressing the ultimate needs and concerns of a sovereign than an independent expert capable of saying, for example, 'the position your Engineer has been taking on the causes of delay during those six months is not defensible'. That candid analysis allows the sovereign and its legal team to take a hard look at that claim.

Independent experts may present their analysis in many forms in addition to the submission of formal expert reports – for example, by way of pre-mediation conference workshops, presentations, preliminary expert reports, and/or during expert 'hot-tubbing' at a mediation conference.[31] This involvement by independent experts at all stages of a dispute resolution process helps to build the case for fairness of a compromise resolution.

Not only does independent, objective analysis help support a defensible outcome, it also is more likely to save the sovereign expense in the long run. If the sovereign receives honest feedback early in the dispute resolution process that a claim or defence is unsupportable, it can decide to drop that claim or defence before further resources are expended and, in turn, focus remaining resources on developing its strongest arguments.

### Soliciting mediator 'fairness statements'

Another way to promote confidence among sovereigns in the fairness of settlement outcomes is to ask the mediator to issue a 'fairness statement' at the conclusion of the proceedings. While some mediators may not want to express a formal opinion on the merits of the dispute, they are often willing to offer a written statement that the proceedings were conducted in a neutral and fair manner that allowed both parties (including the sovereign) a fair opportunity to present their positions and engage in discussions leading to a mutually agreed upon settlement. This fairness statement provides government

authorities a more formalised assurance that the process leading to the settlement was fair such that the settlement itself is fair and reasonable under the circumstances.

A mediator's fairness statement can carry significant weight among government authorities because mediators themselves are required to demonstrate their impartiality and neutrality. The rules published by various arbitral organisations typically require that the mediator provide some form of statement of impartiality and independence prior to their appointment. For example, the ICC Mediation Rules mandate that:

> '[b]efore appointment or confirmation, a prospective Mediator shall sign a statement of acceptance, availability, impartiality and independence. The prospective Mediator shall disclose in writing to the Centre any facts or circumstances which might be of such a nature as to call into question the Mediator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the Mediator's impartiality.'[32]

A fairness statement issued by such a demonstrably impartial mediator can offer a sovereign the assurances it needs that a negotiated settlement is fair.

## *The road ahead: capacity building for state-specific solutions*

Sovereigns are willing to participate in alternative dispute resolution. Bringing governments to the negotiating table (and keeping them there through an amicable resolution) is most certainly possible, but requires careful planning – including at the beginning of projects – and investments in developing an ADR infrastructure that meets the needs of sovereigns.

Every sovereign is unique, and ultimately a state-by-state approach will be required to promote understanding of ADR and building confidence in it. Some states will want greater public accountability, and others will want confidentiality to avoid public admissions of liability. Some will want a speedy resolution, and others will want more thorough proceedings. Certain governments may favour informal commercial diplomacy as a precursor to mediation and other ADR steps. Each state's requirements will vary, and developing appropriate ADR processes will require the close involvement of the local bar, who will offer a more nuanced understanding of local practice and industry standards, including local law and regulations as well as unwritten practical and political considerations.

Just as sovereigns are educated on the benefits of ADR, so too must mediators and conciliators be educated on the dispute resolution requirements of sovereigns. To this end, there is ample opportunity for capacity building to establish a corps of mediators and conciliators capable of serving in disputes involving governments and state-owned entities.

With continued investment in ADR processes designed to meet the needs of sovereigns, and thoughtful planning and execution, alternative dispute resolution truly can be fit for a queen.

**Notes**

1 Brazilian Federal Law No 9,307/1996.
2 Brazilian Federal Law No 13,129/2015.
3 Art 3 of the Arbitration Law of the PRC.
4 Federal Law No 11 of 2023 on Procurement in the Federal Government.
5 Art 52(1) of the Cabinet Resolution No (122) of 2024 On Executive Regulation of Federal Law No (11) of 2023 on Procurement in the Federal Government.
6 Art 52(5) of the Cabinet Resolution No (122) of 2024 On Executive Regulation of Federal Law No (11) of 2023 on Procurement in the Federal Government.
7 Cabinet Decision No (2) of 2017, UAE Finance Ministry Federal Government Public-Private Partnership Provisions and Procedure Manual.
8 On Procurement and Warehouse Management Regulation in the Federal Government.
9 On Regulating the Federal Public-Private Partnerships (PPP).
10 Art 31 of the Federal Law No (12) of 2023 On the Regulation of the Partnership Between the Public and Private Sectors.
11 Para 9.6 of Cabinet Decision No (2) of 2017 UAE Finance Ministry Federal Government Public-Private Partnership Provisions and Procedure Manual.
12 Formally known as the UN Convention on International Settlement Agreements Resulting from Mediation.
13 UN Treaty Collection, Ch XXII, 4 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en accessed 6 February 2025.
14 The Singapore Convention does not apply to settlement agreements arising out of transactions engaged in by a party for personal, family, or household purposes, or in relation to family, inheritance or employment law (Art 2, Singapore Convention). The Singapore Convention does not apply to settlements approved by a court which are enforceable in the state of that court. (Art 3, Singapore Convention.)

15 Art 8.1 of the Singapore Convention.
16 Belarus, Georgia, Iran, Israel, Japan, Kazakhstan and Saudi Arabia, UN Treaty Collection, Ch XXII, 4 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en accessed 6 February 2025.
17 Belarus, Georgia, Iran, Kazakhstan and Saudi Arabia. United Nations Treaty Collection, Ch XXII, 4 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en accessed 6 February 2025.
18 Eg, *BCB Holdings Ltd;* and *The Belize Bank Ltd v The Attorney-General of Belize (on behalf of the Government of Belize)*, LCIA Case No 81169, Award, 20 August 2009; *Instrubel, N V v 1. The Ministry of Industry, Research and Development, 2. The Ministry of Defence and 3. Salah Aldin State Establishment*, ICC Case No 7472 CK/AER/ACS, Final Award, 12 March 2003; *Platinum Blackstone PTY LTD (formerly known as Nexbis Pty Ltd) v Republic of Maldives*, SIAC Case No ARB003 of 2014, Award (No 132 of 2016), 24 November 2016.
19 Such as the ICC, the Swiss Chambers' Arbitration Institution, the Permanent Court of Arbitration and the Centre for Effective Dispute Resolution.
20 Indian Ministry of Law and Justice, Legislative Department, The Mediation Act 2023, dated 15 September 2023, available at https://legalaffairs.gov.in/sites/default/files/MediationAct2023.pdf accessed 29 October 2025.
21 Less than INR10 crore, or approximately US$1m. See Government of India, Ministry of Finance, Department of Expenditure, Procurement Policy Division, No F.1/2/2024-PPD, *Guidelines for Arbitration and Mediation in Contracts of Domestic Public Procurement*, dated 3 June 2024, at para 7(ii).
22 *Ibid*, at para 7(vii).
23 *Ibid*, at para 7(vii)(a)-(b).
24 See The Mediation Act 2023, at Ch VI (Enforcement of Mediated Settlement Agreement), ss 27-28.
25 See Dispute Resolution Hamburg, 'What is conciliation?' available at https://www.dispute-resolution-hamburg.com/information/conciliation accessed 30 October 2025.
26 See, eg, India, The Arbitration and Conciliation Act 1996, dated 22 August 1996, https://indiankanoon.org/doc/1306164; Local Court New South Wales, Conciliation, updated 10 September 2025, https://localcourt.nsw.gov.au/about-us/jurisdictions0/civil-jurisdiction/alternative-dispute-resolution/types-of-alternative-dispute-resolution/conciliation.html; Singapore Courts, Conciliation, https://www.judiciary.gov.sg/alternatives-to-trial/conciliation/what-is-conciliation; see also UN Commission On International Trade Law (UNCITRAL), UNCITRAL Conciliation Rules, dated 23 July 1980, https://uncitral.un.org/en/texts/mediation/contractualtexts/conciliation all accessed 30 October 2025.
27 'Decree establishing the administrative actions to be implemented by the Federal Public Administration to carry out conciliation or the conclusion of agreements provided for in the respective laws as alternative means of dispute resolution', *Official Gazette of the Federation*, 29 April 2016 (Mexico). (https://www.dof.gob.mx/index.php?year=2016&month=04&day=29#gsc.tab=0), accessed 3 October 2025.
28 'Braskem Idesa Awarded the EPC Contract for Etileno XXI Project in Mexico', *Braskem Europe*, 5 October 2012 https://www.braskem.com.br/europe/news-detail/Braskem-Idesa-awarded-the-EPC-contract-for-Etileno-XXI-project-in-Mexico, accessed 2 April 2024.
29 On 18 August 2021, President Guillermo Lasso issued Executive Decree No 165 containing the regulations to the Arbitration and Mediation Law.
30 The IBA Rules on the Taking of Evidence in International Arbitration, for example, provides a checklist of disclosures that a party-appointed expert must include in their expert report. The checklist includes, inter alia, 'a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal', and relatedly, 'a statement regarding his or her present and past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal'. These provide the opposing party an opportunity to test during disclosure periods or cross-examination any assertions of independence. IBA Rules on the Taking of Evidence in International Arbitration, Art 5(2)(a) and (c) Part-Appointed Experts, dated 17 December 2020.
31 Expert 'hot-tubbing', also known as concurrent evidence or expert conferencing, describes the process by which two or more experts of like disciplines provide evidence in the witness box simultaneously and/or engage in debate about the merits of an issue before a panel. See CIArb Guidelines on Witness Conferencing in International Arbitration 2019, dated 23 April 2019 (providing guidelines for tribunals, parties, and experts to consider to achieve effective and efficient witness conferencing).
32 International Chamber of Commerce Mediation Rules 2014, Selection of the Mediator, Art 5(3), dated 1 January 2014. See also: IBA Guidelines on Conflicts of Interest in International Arbitration, dated 25 May 2024; Saudi Center for Commercial Arbitration and Mediation Rules 2016, Art 13 Disclosure, dated July 2016; Cairo Regional Centre for International Commercial Arbitration Mediation Rules 2013, Art 7 Impartiality and Independence of the Mediator, dated 1 January 2013; Vienna International Arbitral Centre Rules of Mediation 2021, Appointment of the Mediator, Art 7(3), dated 1 July 2021.

**Meagan Bachman**, Crowell & Moring; **Angus Rankin**, Vinson & Elkins; and **Christa Mueller García**, Mueller Arbitration.

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The panel addressed challenges to and solutions for bringing sovereigns to the table to resolve infrastructure disputes consensually. Special thanks also go to **Joshua Lindsay**, **Edmund Northcott** and **Lily Geyer** of Crowell & Moring for their contributions to this article.

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