CONSTRUCTION LAW INTERNATIONAL

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

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INTERNATIONAL BAR ASSOCIATION

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Construction arbitration in the CEE region: a comment on the Polish Chamber of Commerce Arbitration Rules 2025

Prolongation costs – an issue with causation

Coercion or commercial necessity? The fragile validity of supplementary agreements in construction contracts

International Bar Association
Events 2026

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12th Annual IBA World Life Sciences Conference
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10–12 June, Grand Hyatt, São Paulo, Brazil

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

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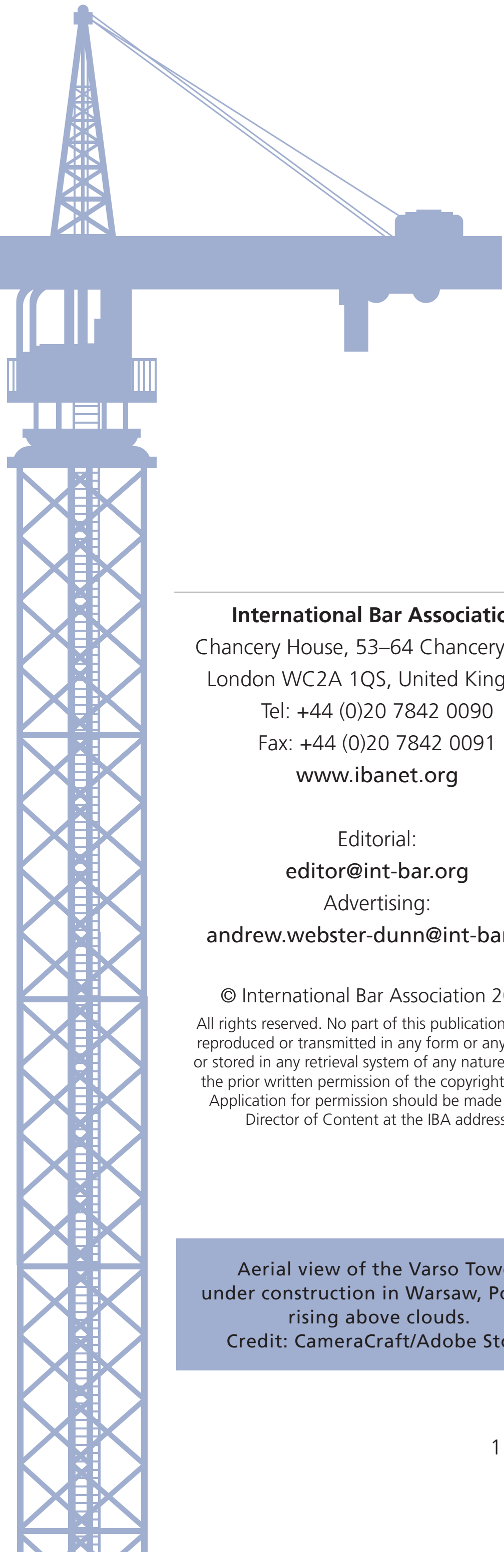

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Aerial view of the Varso Tower under construction in Warsaw, Poland, rising above clouds.
Credit: CameraCraft/Adobe Stock

FROM THE EDITORS

Dear readers,

We are delighted to introduce the July 2026 issue of *Construction Law International* (CLInt). As we continue our tenure as Committee Editor and Deputy Committee Editor, we remain privileged to collaborate with an editorial board of exceptional calibre: Thayananthan Baskaran (Chair), Ibrahim Abdullah Al-Hammad, Paula Sanchez, Anamaria Popescu, Basil Thevignot, Naoki Iguchi, Khalifah Al-Yaqout, Engy Serag, Sung Hyun Hwang, Jacob Henriquez and Ngo-Martins Okonmah.

Our mission remains to provide a global forum for the most pressing developments in construction law. This issue is particularly diverse, reflecting the rapid legislative and judicial evolution across multiple jurisdictions. We have an in-depth analysis of the United Arab Emirates' new Civil Code, which entered into force in June 2026, introducing fundamental reforms to pre-contractual duties, limitation of liability, and the regulation of *muqawala* contracts. From the United Kingdom, an analysis of the Supreme Court's ruling in *Providence v Hexagon* on termination for repeated defaults under Joint Contract Tribunal (JCT) forms.

Further afield, our 'FIDIC Around the World' series focuses on Ghana. From India, we feature an analysis of the validity of supplementary agreements and the judicial treatment of economic duress in construction disputes. We also look at the Central and Eastern Europe (CEE) region, specifically commenting on the 2025 Polish Chamber of Commerce Arbitration Rules and their impact on regional efficiency.

We include a provocative piece on the 'evidentiary inflation' crisis in arbitration, arguing that tribunals should take greater institutional responsibility for curating the record. Complementing this is a technical article on the complexities of causation in claims for prolongation costs.

This edition is rounded off by the review of the comprehensive book *Major Issues in International Construction Law*.

We thank our contributors for their invaluable insights. As always, we invite all members of the international construction community to submit material for future consideration.

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FROM THE CO-CHAIRS

There are weekends that feel transactional, and then there are those rare gatherings that remind you why a profession can also be a community. The International Construction Projects Committee (ICP) Working Weekend, held this past March against the quietly cinematic backdrop of Genoa and Portofino, was very much the latter.

It was far from a standard conference in a conventional business hotel. Instead, around sixty practitioners (lawyers, experts and arbitrators) came together in a UNESCO World Heritage Site palace where everyone was encouraged to join the conversation on contemporary construction law issues. Ideas could be tested, challenged and refined in real time. The tone was open, engaged and refreshingly honest.

The format itself reflected a recognition that the future of construction disputes will not be shaped in silos. Discussions moved fluidly from legal frameworks to project realities, from dispute avoidance to the growing role of expert evidence. There was a shared understanding that progress will cross disciplinary lines, accelerated by rapidly changing AI technology.

Of course, no such weekend would be complete without its social dimension. Evenings overlooking the Ligurian coast, informal dinners and unstructured moments between sessions proved just as valuable as the formal programme. Longstanding relationships were strengthened, and new younger voices were welcomed. In many ways, the greatest success of the weekend lay in these quieter exchanges.

In May, our ICP participated in the SEERIL Biennial Conference in Brussels. There, the ICP Council members played a key role in planning and presenting educational programmes. Other SEERIL committees are discovering that much of their practice involves issues of design and construction that have much in common with the ICP.

Looking ahead, the ICP is now turning its attention to the IBA Annual Conference in Copenhagen this October, a flagship event where the Committee will deliver a series of six panels tackling some of the most pressing issues in construction law today. The programme reflects both continuity and evolution: from insuring risk on construction projects and cross-border risk management, to long-term liability for defects and disputes in energy infrastructure. Notably, the agenda also embraces forward-looking themes, including innovation in construction lawyering and the drive to make expert evidence more efficient, cost-effective and tribunal-focused.

It is, in many respects, a natural progression. The conversations that began in Genoa will now take centre stage in a global forum. The expectation is not only to inform, but to shape thinking, bringing together perspectives that reflect the complexity and ambition of modern construction practice.

For those who were in Genoa, Copenhagen represents the next chapter. For those who were not, it offers an opportunity to step into a community that is increasingly defining the direction of the field.

And if the spirit of the Working Weekend is anything to go by, Copenhagen will be worth the journey.

Aarta Alkarimi and Douglas Oles
Co-Chairs, IBA International Construction Projects Committee

COUNTRY UPDATE: GHANA

FIDIC around the world – Ghana

Isaac Aburam Lartey
Sam Okudzeto & Associates, Accra

What is your jurisdiction?

Ghana

Are the FIDIC forms of contract used for projects constructed in your jurisdiction? If yes, which of the FIDIC forms are used, and for what types of projects?

Yes, FIDIC forms of contract are commonly used in Ghana. They are particularly used for large-scale international infrastructure and engineering projects funded by development finance institutions such as the World Bank, the International Finance Corporation (IFC) and the African Development Bank (AfDB). Some domestic projects adopt the FIDIC forms of contract as well.

The type of FIDIC forms adopted on a project in Ghana depends on the nature of the project and the intended model of risk allocation.

The Red Book is typically used for traditional procurement projects, particularly building and civil engineering works such as roads, where the Employer assumes responsibility for the design and the Contractor's obligation is primarily to construct the works in accordance with that design.

The Silver Book is also used in Ghana for EPC/turnkey projects involving large-scale infrastructure, where employers pass down design responsibility and execution of the project to the contractor based on a single point of responsibility for the project outcome.

There is also an increasing resort to the White Book for various consultancy services in the construction industry in Ghana. The White Book is used in Ghana for projects requiring the services of architects and consultants for both design and supervision of projects.

Do FIDIC produce their forms of contract in the language of your jurisdiction? If they do not, what language do you use?

FIDIC contracts are produced in the English language, which is the official language used in Ghana.

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

Yes. For projects involving the Government of Ghana, Sub-Clause 14.8 of the 2017 suite of FIDIC Contracts must be amended before they can be operative in Ghana. Under the Contracts (Amendment) Act 2023, a person shall not enter a contract or transaction on behalf of the Republic of Ghana where the payment of interest on a sum due to a counterparty in the contract or transaction is calculated on a compound interest basis.[1] Any such contract would be null and void.[2]

In view of the provision in Sub-Clause 14.8 of the 2017 suite of FIDIC Contracts and Sub-Clause 7.2 of the White Book, which stipulates the payment of financial charges compounded monthly on any delayed payment, these provisions would need to be amended to reflect simple interest for delayed payment before they can be operative in a project involving the Government of Ghana.

Are any amendments common in your jurisdiction, albeit not required in order for the FIDIC Conditions of Contract to be operative in your jurisdiction? If yes, what (non-essential) amendments are common in your jurisdiction?

Yes. In addition to legally required amendments, some commercially driven modifications are commonly introduced in Ghanaian projects, typically through the Particular Conditions while preserving the overall structure of the 2017 FIDIC suite.

In relation to dispute resolution under Clause 21, the multi-tiered framework is generally maintained, including the role of the dispute board and the requirement for amicable settlement. In practice, however, the process is often streamlined. The amicable settlement period is frequently shortened, and formal mediation is rarely adopted as a separate step, with parties preferring to proceed more directly to the dispute board or arbitration where early resolution is not achieved.

Risk allocation is also addressed through targeted amendments, particularly in relation to unforeseeable physical conditions, access to the site and compliance with laws. These amendments typically clarify or redistribute responsibility for ground conditions, land access and regulatory approvals in a manner that reflects local conditions and commercial expectations.

Security provisions remain a key area of negotiation. Advance payment and performance security mechanisms are frequently refined to address the form, duration and release of guarantees, particularly in projects involving lender oversight or heightened performance requirements.

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

There is currently no definitive judicial authority in Ghana directly addressing whether Sub-Clause 20.2.1 of the 2017 suite of FIDIC contracts constitutes a strict condition precedent.

However, as a matter of contractual interpretation, Ghanaian courts generally uphold freely agreed contractual provisions, including notice requirements, provided they are clear and unambiguous. This is based on the principle of freedom of contract and the sanctity of contract. The language of Sub-Clause 20.2.1 is clear and mandatory: a claiming party must give notice within 28 days of becoming aware (or when it ought reasonably to have become aware) of the relevant event, failing which it 'shall not be entitled' to additional payment or extension of time, and the other party is discharged from liability. This type of wording is generally recognised within the contract law jurisprudence of Ghana as creating a condition precedent, particularly where non-compliance is expressly linked to the loss of substantive entitlement.

Accordingly, Sub-Clause 20.2.1 of the 2017 FIDIC suite would, in principle, be treated as a condition precedent to both Employer and Contractor claims, subject to the precise wording of the contract.

Are dispute boards used as an interim dispute resolution mechanism in your jurisdiction? If yes, how are dispute board decisions enforced in your jurisdiction?

Dispute boards are used in Ghana, particularly on internationally financed projects. However, in practice, their use remains relatively limited and inconsistent.

A key challenge lies in the enforcement of dispute board decisions. There is currently no existing legal framework in Ghana which expressly recognises adjudication decisions as immediately enforceable in the same manner as arbitral awards. This is coupled with a recent Supreme Court decision which failed to recognise and enforce the decision of a dispute board merely based on the issuance of a notice of dissatisfaction of an engineer's determination by the counterparty. As a result, parties seeking to enforce dispute board decisions may need to pursue arbitration or initiate a fresh action in court to enforce dispute board decisions as a contractual obligation. This undermines the intended interim-binding nature of such decisions under FIDIC.

This enforcement gap has created a degree of uncertainty and has, in some instances, reduced the effectiveness of dispute boards as a dispute avoidance mechanism within the Ghanaian construction sector.

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

Yes. Arbitration is widely used as the final dispute resolution mechanism for construction projects in Ghana. Both institutional and ad hoc arbitration are commonly adopted by parties. Domestic disputes are frequently administered under the rules of the Ghana Arbitration Centre or conducted as ad hoc arbitrations under the ADR Act 2010 (Act 798) and UNCITRAL Arbitration Rules. For international projects, parties often adopt institutional rules such as the rules of the International Chamber of Commerce (ICC) Court of Arbitration.

The seat of arbitration is usually Accra, although international contracts may designate foreign seats such as London or Paris.

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

In *Tieso Ghana Ltd v Euroget De-Investa SA*,[3] the Ghanaian courts considered the effect of a Dispute Adjudication Board (DAB) decision under Clause 20 of the FIDIC Conditions (1999). Following a DAB award in favour of the contractor, the employer issued a Notice of Dissatisfaction within 21 days and resisted enforcement.

The High Court, Court of Appeal and Supreme Court consistently held that a DAB decision is not enforceable unless it has become 'final and binding'. According to the courts, where a Notice of Dissatisfaction is issued within time, the decision has no binding effect capable of enforcement and the dispute must proceed to arbitration. The courts further emphasised that the DAB is not an arbitral tribunal and its decisions do not constitute arbitral awards.

This approach departs from the orthodox FIDIC position. The Ghanaian courts did not recognise the 'binding but not final' nature of DAB decisions and therefore rejected the 'pay now, argue later' principle.

The result is that DAB decisions in Ghana are not immediately enforceable, undermining their intended role in preserving cash flow and project continuity pending arbitration.

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

Yes. A key practical issue affecting the use of FIDIC contracts in Ghana is not the form of the contracts themselves but the level of familiarity with their administration among project participants. While FIDIC forms are widely used (particularly on donor-funded infrastructure projects), their mechanisms are not always properly implemented in practice.

Recent capacity-building initiatives are beginning to address this gap. For example, the World Bank, in collaboration with the Ghana Consulting Engineers Association, has organised targeted training on FIDIC contract management in Accra. These programmes focus on the practical application of core FIDIC mechanisms, including claims procedures, risk allocation and dispute avoidance.

This development is directly relevant to the use of FIDIC in Ghana. Many disputes arise not from deficiencies in the contract forms but from failures in contract administration – such as non-compliance with notice requirements, poor record-keeping and underutilisation of dispute avoidance mechanisms. Improving capacity in this area is therefore likely to enhance the effectiveness of FIDIC contracts in practice and reduce the frequency of formal disputes.

Notes

1 Section 17 (4) of the Contracts (Amendment) Act 2023 (Act 1114).

2 Section 17 (5) of the Contracts (Amendment) Act 2023 (Act 1114).

3 Civil Appeal No. J4/34/2019 24 July 2019.

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COUNTRY UPDATE: UAE

The UAE's New Civil Code: implications for construction projects

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The United Arab Emirates overhauled its general contract law in January 2026, replacing a statutory framework that had been in place for four decades. Federal Decree-Law No 25 of 2025, the new Civil Transactions Law (the 'New Civil Code'), introduces significant reforms spanning rules regarding the applicable governing law, pre-contractual obligations, limitation of liability, *muqawala* provisions (which deal specifically with building contracts) and guarantees. All translations of the provisions of the New Civil Code referenced in this article are unofficial, as no official English translation exists at the time of publication. The New Civil Code came into force on 1 June 2026, replacing Federal Decree-Law No 5 of 1985 (the 'Current Civil Code'). This article examines a number of the key reforms and their practical implications, with a particular focus on construction projects.

Scope of application

Article 4(1) establishes a general principle of non-retroactivity: the New Civil Code has no application to facts or transactions that predate its commencement, save where an express statutory provision provides otherwise.

The only exception concerns limitation periods, for which Articles 6 and 7 prescribe specific transitional rules, but this is of no consequence for contractors' or employers' claims: the only change to limitation periods is effected by Article 431, which reduces the period for unpaid fee claims by certain professionals (eg, lawyers and architects) – from five to three years.

Governing law of contractual obligations

A noteworthy codification in the New Civil Code is its treatment of party autonomy in the selection of governing law.

Article 19 expressly provides that contractual obligations shall be governed by the law selected by the contracting parties. Where the parties have not expressly designated a governing law, the New Civil Code stipulates that the applicable law is that of the state in which the parties share a common domicile or, in the absence of such a common domicile, the law of the state in which the 'principal' contractual obligation is to be performed, unless the circumstances indicate that the parties intended another law to apply. This represents a departure from the former default rule, which pointed to the law of the place where the contract was concluded.

Article 19 places the parties' choice of governing law on an express statutory footing. It remains to be seen, however, whether this codification will alter the established judicial practice under which the party invoking a foreign governing law bears the burden of proving its contents and effects. UAE courts have repeatedly held – including in cases involving English law – that where a party fails to discharge that burden of proof, the court may disregard the parties' choice and apply UAE law to the merits. Whether Article 19 alters that approach remains unclear.

For UAE-based construction projects, in practice, the absence of an express governing law clause – which is uncommon – is unlikely to displace the application of UAE law. International parties frequently contract through local subsidiaries, bringing them within the common-domicile rule; and even where that is not the case, the principal contractual obligation will almost invariably be performed in the UAE, producing the same result under the default rules.

Lastly, Article 19 is unlikely to have a material impact on international arbitrations seated in the UAE. The applicable substantive law in such proceedings is determined under Article 38 of the Arbitration Law (Federal Law No 6 of 2018, as amended), which empowers the tribunal, in the absence of party agreement, to apply the law with the closest connection to the dispute. Arbitral tribunals are therefore not bound by the default mechanism in Article 19.

Contractual interpretation

Article 120 sets out the principles governing the interpretation of contracts. While the framework broadly restates the approach under the Current Civil Code, the following changes are likely to be relevant, particularly in the construction context.

First, Article 120(11) directs that contracts be interpreted in a manner consistent with 'justice' and 'good faith'. Good faith has long been a foundational principle of UAE contract law, but the inclusion of 'justice' as a separate interpretative criterion is new, and it remains to be seen whether this will expand the scope of judicial discretion in contractual interpretation.

Second, Article 120(12) requires the court or tribunal to assess the parties' obligations by reference to the factual circumstances prevailing at the time the contract was concluded. This aligns with the principle that the mutual intention of the parties should be ascertained not solely from the contractual text but also from objective evidence available at the point of formation. This approach may frequently necessitate recourse to the pre-contractual factual matrix, particularly in construction disputes where there are ambiguities in the parties' obligations and risk allocation.

Third, Article 120(13) provides that ambiguous contractual terms are to be construed in favour of the obligor or, where relevant, the 'weaker party'. While the rule in favour of the obligor already forms part of the Current Civil Code, reference to the weaker party is new. Its application in the construction sector is uncertain: major construction contracts are frequently entered into between well-resourced corporate or governmental counterparties, making it difficult to identify a 'weaker' party in any meaningful sense. It is possible that the legislator intended the concept to be confined to cases involving, for instance, a manifest financial imbalance between the parties, but this remains to be tested.

Pre-contractual duties of good faith and disclosure

Articles 121 and 122 introduce a comprehensive statutory regime governing pre-contractual conduct, representing a fundamental innovation of the New Civil Code.

Conduct of negotiations

Article 121 enshrines the principle of good faith, which under the Current Civil Code only applies to performance of the contract, across all stages of contract negotiation – from proposal to termination. Article 121(4) specifies that the deliberate non-disclosure of a material statement affecting the contract's validity is a breach of that duty, although the provision does not purport to be exhaustive, leaving scope for the courts to develop the obligation's content over time. Recoverable damages are confined to actual loss and do not extend to profit or loss of opportunity, save where the parties have agreed otherwise (Article 121(3)).

Disclosure obligations

Article 122(1) imposes a duty on a party who possesses information 'of decisive importance' to the other party's consent to disclose that information, provided the other party could not reasonably have been expected to obtain it independently or placed its trust in the disclosing party. It additionally defines the threshold for disclosure by reference to information bearing a 'direct and necessary connection' to the 'content of the contract' or 'the status of the parties'.

The scope of the obligation appears to be broad. Article 122(2) imposes such disclosure obligations on both parties, requiring them to exercise 'due diligence' to provide the other party with 'data related to the negotiations, the contract to be concluded, and the circumstances and conditions surrounding the contractual process'.

The party alleging concealment bears the onus of establishing that disclosure was not made, while the party asserting compliance must demonstrate that disclosure occurred (Article 122(3)). The disclosure obligations are mandatory and any contractual provision seeking to limit or exclude them is void (Article 122(4)). A party aggrieved by a breach of this obligation may seek annulment of the contract (Article 122(4)).

Implications for construction contracts

The consequences of these provisions for construction contracts, though yet to be tested, may prove significant. The mandatory disclosure regime is broad in scope and potentially burdensome and parties cannot contract out of it. Employers in particular would be well advised to establish robust processes for the identification and disclosure of relevant and material information, particularly during the tender phase, so as to minimise exposure to subsequent claims by contractors. How the courts and tribunals calibrate the threshold for disclosure – and guard against its abuse – will be an important area to watch.

Limitation of liability and pre-agreed compensation

Exclusion and limitation of tortious liability

The New Civil Code effects significant changes to the rules governing the exclusion and limitation of liability, as well as pre-agreed compensation, with direct implications for construction contracts.

Article 257 prohibits any clause seeking to exempt a party from – or limit – liability arising from a harmful act. Article 296 of the Current Civil Code renders void any clause exempting a party from liability for a harmful act but is silent on clauses that merely 'limit' such liability.

The express inclusion of the word 'limitation' in Article 257 of the New Civil Code raises a material question: whether contractual liability caps – a ubiquitous feature of construction contracts in the UAE and elsewhere – are now unenforceable insofar as they relate to tortious acts. If they are, this would mark a significant change from the existing position.

Article 257 also expressly permits the parties to agree to increase liability for tortious acts beyond the level that would otherwise be recoverable, unless the law provides otherwise. It appears to permit parties to agree contractually to enhanced or punitive damages for harmful acts – a significant departure from UAE civil law, which has traditionally limited recovery to compensatory damages reflecting actual loss.

Pre-agreed compensation (liquidated damages)

Article 340 replaces the broad judicial discretion under Article 390 of the Current Civil Code – which permits courts to adjust agreed compensation to reflect actual loss – with a defined set of grounds for judicial intervention.

Liquidated damages may be reduced where the agreed sum is excessive or the obligation partly performed (Article 340(2)) and may be reduced or denied entirely where the creditor's own fault contributed to or absorbed the harm (Article 340(3)).

A claim exceeding the agreed amount remains available to the innocent party where fraud or gross fault is proved (Article 340(4)).

Such factors would likely have guided a court's exercise of discretion under Article 390 of the Current Civil Code but their express codification now provides clearer parameters for judicial intervention.

A novel feature is the introduction of partial performance as a ground for reducing liquidated damages under Article 340(2), as highlighted above. In a general commercial context this is unremarkable but it is potentially problematic in the context of delay liquidated damages, which are invariably used in construction contracts: a delayed contractor will almost invariably have completed part of the works and may seek to characterise this as 'partial performance' warranting a reduction. We consider that, on balance, this is unlikely to have been the legislator's intent, absent more express wording, but judicial interpretation ought to clarify the position.

Provisions specific to *muqawala* contracts (construction and work contracts)

Defects in materials

Article 816(3) imposes an express obligation on the contractor to notify the employer 'immediately' of any defects discovered in materials provided by the employer or of any other circumstances that would prevent the works from being carried out under 'suitable conditions'. A failure to provide such notice renders the contractor liable for the consequences of that omission. Contractors should therefore ensure they have processes in place for the prompt identification and reporting of defects in employer-supplied materials.

Gap-filling provisions

Article 818(1) requires the contractor to execute the works in accordance with the contractual terms and within the agreed time frame. Where the contract is silent on either the standard or the timing of performance, the provision stipulates that performance shall be governed by 'customary principles' – which likely refers to 'accepted industry practice' – and that completion must occur within a period that is reasonable having regard to the nature of the works. Article 818(1) thus operates as a gap-filler, ensuring that *muqawala* contracts remain valid and operable notwithstanding the absence of express terms on standards or programme.

Rescission by the employer

Article 818(3) identifies specific grounds upon which the employer may seek immediate rescission of the contract without first granting the contractor an opportunity to cure. While the Current Civil Code affords the employer such a remedy only where remedial works are impossible, Article 818(3) broadens the available grounds to include circumstances where correcting defects would be contrary to the contractual terms, where the contractor's delay renders timely completion 'absolutely unlikely' or where the contractor's conduct manifests an intention not to perform.

These expanded grounds will be welcomed by employers on construction projects, particularly the recognition of anticipatory non-performance and severe delay as standalone bases for rescission, although any decision to invoke them should be approached with caution given the consequences of a wrongful (or lawful) termination.

Separately, Article 836(1) entitles the employer to terminate for convenience at any time prior to completion, provided it compensates the contractor for all expenditure incurred, work completed and the profit the contractor would have earned had it been permitted to complete the works. Article 836(2) grants the court discretion to reduce the contractor's lost-profit entitlement on equitable grounds, deducting any savings resulting from the employer's termination and any income the contractor derived from deploying its resources elsewhere.

For construction contracts, this provision broadly mirrors the termination-for-convenience mechanisms commonly found in standard contract forms, but the statutory right to an equitable reduction of lost profits introduces a degree of judicial oversight that parties should factor into their risk assessments.

Decennial liability

In broad terms, the decennial liability regime provides for the contractor and the architect to be strictly liable for any defects which cause a building to collapse or which threaten its structural integrity.

The decennial liability regime, now set out in Article 821, is substantively unchanged from the Current Civil Code, although additional clarity has been provided. In particular, it is now expressly stated that such strict liability does not apply to any right of recourse a contractor may have against its subcontractors. Thus, a contractor seeking relief in respect of a decennial liability event must demonstrate fault or breach on the part of the subcontractor (Article 821(4)).

This is a sensible clarification, particularly in the context of large-scale projects where numerous subcontractors are engaged across different disciplines: on major projects involving multiple subcontractors with distinct scopes of work, it is appropriate that a contractor be required to identify the subcontractor whose scope is relevant to the defect, rather than holding all subcontractors liable irrespective of their involvement.

Article 822(2) further provides that where an engineer's role is confined to the supervision of execution (or any part thereof), that engineer is jointly and severally liable with the contractor for any defects arising under its supervision. The Current Civil Code addresses the liability of an architect whose role is limited to preparing plans but does not deal expressly with the supervision-only scenario.

Lump-sum contracts and rebalancing of contractual obligations

Article 829(1) provides that a contractor under a lump-sum *muqawala* contract for a specified design may not claim an increase in the contract price by reason of increases in material prices, wages or other costs.

Article 829(2) confirms that the contractor is likewise not entitled to additional consideration where the design is modified or supplemented, unless the modification or increase results from an error attributable to the employer or the parties have agreed to an increase.

Notwithstanding these provisions, Article 829(3) permits a contractor to apply to the court for an order restoring the contractual equilibrium where unforeseeable 'exceptional general circumstances' undermine the financial basis on which the lump-sum price was established. This constitutes a specific statutory ground for relief, in addition to the general 'exceptional circumstances' doctrine codified in Article 224 of the New Civil Code (equivalent to Article 249 of the Current Civil Code). Unlike the general doctrine, which permits the court only to reduce an oppressive obligation to a reasonable level, Article 829(3) authorises a more comprehensive rebalancing, including adjustments to the contract price, the time for completion or termination of the contract altogether. Accordingly, contractors now have a statutory basis on which to seek not only price relief but also extensions of time in response to exceptional and unforeseeable events.

Causes of action against guarantors

Article 1009 effects a material change to the law governing claims against guarantors. Under the new provision, a creditor may not proceed directly against a guarantor until it has first taken action against the principal debtor. Furthermore, the creditor may not execute against the guarantor's assets until those of the debtor have been exhausted, unless the guarantor is jointly and severally liable or the law or the agreement provides otherwise. The guarantor must expressly invoke this defence before the court.

This clearly departs from the former regime, where a creditor could proceed directly against the guarantor, provided the guarantor had not required the creditor to pursue the debtor first.

For large construction projects – where parent company guarantees are a standard component of the employer's security package – the practical consequences are immediate. Employers would be well advised to guard against the effect of Article 1009 by drafting guarantees that expressly impose joint and several liability on the guarantor or that otherwise disapply the requirement to exhaust remedies against the principal debtor. A further option is to govern the guarantee under a separate law – such as DIFC law or ADGM law (DIFC and ADGM are common law jurisdictions within Dubai and Abu Dhabi, respectively) – thereby insulating the guarantee from the operation of Article 1009.

Conclusion

The New Civil Code represents the most significant reform of the UAE's general contract law since 1985. For parties to construction contracts and dispute resolution practitioners, the changes examined in this article are of immediate practical relevance. While the new legislation brings welcome clarity to a number of areas, several provisions – particularly those governing pre-contractual conduct, the limitation of tortious liability and pre-agreed compensation – will need to be tested before the courts and tribunals before their scope and effect can be fully assessed. Parties entering into contracts governed by UAE law ought to acquaint themselves with the new framework which came into force on 1 June 2026.

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Varso Tower under construction rising above clouds, Warsaw, Poland. Credit: CameraCraft/Adobe Stock

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Construction arbitration in the CEE region: a comment on the Polish Chamber of Commerce Arbitration Rules 2025

Introduction

The Central and Eastern Europe ('CEE') region has one of the most valuable construction sectors in the world.[1] It accounts for a considerable share of the GDP of its constituent economies, comfortably exceeding the European Union average of 5.4 per cent.[2]

At the same time, the region has been relatively slow to adopt arbitration and alternative dispute resolution mechanisms to resolve construction disputes. On the available data, most cases are decided in litigation by the courts.[3] This might come as a surprise given the broad international support for using arbitration as the final and binding method for resolving construction disputes, possibly alongside other dispute settlement mechanisms. After all, construction disputes have several endemic features that elevate arbitration into the preferred dispute resolution method.[4] Construction disputes are common and numerous throughout the lifecycle of projects. There are many reasons for this contentious environment, ranging from *force majeure* events to the fact that every construction project is unique and its participants cannot foresee all its risks in advance. Evidence tends to be voluminous and factually complex, meaning that speed and efficiency are at a premium.[5]

However, despite the general use of litigation, construction arbitration is certainly gaining momentum in the CEE region. This is evident from the widespread adoption of the UNCITRAL Model Law,[6] the proliferation of robust arbitral institutions[7] and other initiatives promoting arbitration in the region.[8] CEE jurisdictions are also all members of the New York Convention 1958, ensuring the international enforceability of arbitral awards.[9] From a construction perspective too, the CEE region is notable for its use of FIDIC forms, particularly in the context of EU-funded infrastructure projects. These contracts tend to contain modified Particular Conditions of Contract but typically retain the enclosed arbitration agreement, which forms part of a multi-tier dispute settlement mechanism involving a dispute board.[10]

Against this background, the Court of Arbitration at the Polish Chamber of Commerce ('PCC'), a leading Warsaw-based arbitral institution, adopted its latest arbitration rules that came into force on 1 January 2025 ('PCC Rules'). Construction disputes are already its third-most represented sector, accounting for over 16 per cent of its impressive caseload of 183 new cases commenced in 2024. Twenty-eight per cent of PCC cases also had an international character.[11]

This article comments on the new PCC Rules from the angle of construction dispute resolution. Where appropriate, the article will compare the revised PCC Rules with the ICC Arbitration Rules 2021 ('ICC Rules'), the LCIA Arbitration Rules 2020 ('LCIA Rules'), the SIAC Arbitration Rules 2025 ('SIAC Rules') and others.[12]

Tribunal appointment and composition

Unlike many arbitration rules, which provide for a dispute to be heard by a sole arbitrator by default,[13] the PCC Rules provide, by default, for a panel of three, with a sole arbitrator applying where the amount in dispute does not exceed PLN100,000,[14] subject to party agreement to the contrary.[15] In three-arbitrator cases, each party appoints one arbitrator and the arbitrators together appoint the president, with the PCC Arbitral Council stepping in if appointments are not made on time. In international cases, the Arbitral Council takes into account the arbitrators' nationality, place of residence and relationships with the parties' countries of origin when making an appointment, but the parties may agree to other selection criteria.[16]

In its 2025 Rules, the PCC also removed the requirement for its Arbitral Council to appoint arbitrators only from its recommended arbitrators list,[17] bringing its practices in line with those of other leading arbitral institutions. This development is critical to construction arbitrations, which are often technically complex and require arbitrators with niche industry expertise.[18]

despite the general use of litigation, construction arbitration is certainly gaining momentum in the CEE region

Arbitrator challenges

Arbitrators may be challenged and removed by the Arbitral Council under the PCC Rules at the request of a party on grounds of the existence of circumstances giving rise to reasonable doubts concerning arbitrators' impartiality or independence or the absence of party-agreed qualifications.[19] However, the Rules prevent parties from bringing such challenges opportunistically. If a party took part in the appointment of the arbitrator that it now seeks to challenge, the challenge can be brought only in relation to reasons of which the party became aware after the appointment had been made.[20] Further, the challenge may only be brought within 14 days of the party becoming aware of the grounds for removal.[21]

The arbitrators and the other party may provide comments on the challenge within 14 days of the date on which a copy of the challenge was delivered to them.[22] The challenge also does not affect the course of proceedings unless the tribunal decides otherwise.[23]

The 14-day deadline under the PCC Rules from the date that the party becomes aware of the grounds for removal is shorter than the 30-day deadline under the ICC Rules,[24] slightly shorter than the 15 days under the SIAC Rules[25] and identical to the deadline under the LCIA Rules.[26] A failure to comply with the deadlines for raising challenges should be deemed as a waiver of the objection. As a consequence, an objecting party may be unable to challenge the arbitral award on the same grounds.[27]

Emergency arbitration

Emergency arbitration has become an increasingly common feature of the modern practice of international construction arbitration.[28] Emergency arbitration is available under many leading arbitration rules.[29] It is particularly valuable in bond call scenarios and for preserving the status quo, evidence or ordering security and mandatory injunctions.

The 2025 amendment to the PCC Rules introduced the emergency arbitration mechanism for the first time. Before the tribunal constitution, a PCC emergency arbitrator may order interim measures to secure a claim or preserve evidence. The emergency arbitrator must be appointed within three business days of the application. The application may be made before the request for arbitration is filed and the emergency arbitrator must issue the order within 21 days. Emergency orders are non-binding on the later tribunal, lapse automatically if arbitration proceedings are not commenced within 30 days, and the emergency arbitrator's mandate expires upon constitution of the main tribunal.[30]

A distinctive feature of the PCC mechanism is its clear interaction with the main arbitration: the order on interim measures to secure a claim or preserve evidence lapses automatically if a main arbitration is not commenced within 30 days of the order,[31] providing a degree of procedural discipline that may suit construction disputes where emergency measures are often sought in the context of an imminent main dispute.

The PCC emergency arbitration procedure also lasts longer than at many other institutions. SIAC is the fastest, with an appointment within 24 hours, followed by ICC (two days), and PCC and LCIA (three business days and three days, respectively). The ICC's 15-day order deadline is more compressed than the PCC's 21-day period. Nonetheless, while the emergency arbitration procedures may, in principle, be faster when conducted at other institutions, the deadlines therein tend to be subject to extensions. However, practitioners should note that across all institutions, enforceability of emergency arbitrator orders can be uncertain because they may fall outside the New York Convention's scope, which covers awards, and their interaction with multi-tier clauses in particular can raise jurisdictional issues.[32]

Early determination

The PCC Rules contain a new early determination procedure, also referred to as 'summary disposal'. Section 29(1) provides:

> 'A party may apply for early determination of each of the claims made by the parties, or early determination of a defence or an issue in dispute if:
> 1) its claim, defence or position on the issue in dispute is manifestly meritorious, or
> 2) a claim, defence or position of the other party on the issue in dispute is manifestly without merit.'

The provision can be contrasted with the LCIA Rules which provide in Article 22.1(viii) the power of the tribunal:

> '[T]o determine that any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim is manifestly outside the jurisdiction of the Arbitral Tribunal, or is inadmissible or manifestly without merit; and where appropriate to issue an order or award to that effect (an "Early Determination").'

The PCC Rules are hence innovative in permitting early determination not only in circumstances where a claim, defence or position is unmeritorious, as is the typical wording appearing in arbitration rules,[33] but also where it is meritorious.[34] This, in turn, allows the tribunal, for example, to refuse to hold a hearing even despite an application from a party.[35] Reading the procedure consistently with the remainder of the PCC Rules, the tribunal must also be able to issue an order or an award on the issue subject to the early determination procedure, even though this power is not expressly mentioned in section 29 itself.

An early determination procedure is important for construction disputes which are numerous in number and require prompt resolution.[36] From a practical perspective, tribunals must maintain due process and give the parties a reasonable opportunity to put their case, even despite adopting an early determination procedure. This is precisely the reason why, for example, the English Arbitration Act 1996, following the 2025 amendments, expressly empowers tribunals to dispose of claims and defences in an award on a summary basis.[37]

Consolidation and joinders

Construction disputes often involve multiple parties, including the employer, the main contractor and a range of subcontractors. These disputes may relate to the same subject-matter, the same contract or the same project.[38] For this reason, clear procedures for consolidating arbitrations and for joinders of third parties are essential to the attractiveness of arbitration rules.

The PCC Rules contain robust consolidation procedures. Following an application by a party, a tribunal may consolidate two or more proceedings as long as they are: between the same parties; the tribunal is the same; and the dispute is brought under identical arbitration agreements or the parties' claims are related.[39] Consolidation can also be ordered if the parties are not identical, if the other conditions are satisfied and the parties consent.[40]

Separately, parties may also consent to the joinder of a third party in the arbitration as long as, pursuant to the arbitration agreement: the third party can assert a claim against a party to the proceedings; or a party to the proceedings can assert a claim against the third party.[41]

A significant difference between the consolidation procedures under the PCC Rules is the tribunal's role in determining the two issues. Under many arbitration rules, consolidations can be determined by the institution itself in the first place.[42] Institutions may also play a role in determining joinder applications.[43] In contrast, the PCC procedure is more streamlined, allowing the tribunal to decide on such applications directly.

Third-party funding disclosures

Under the revised PCC Rules, parties must now disclose the identity of a third-party funder in the request for arbitration and answer.[44] If either party enters into such an agreement in the course of the arbitration, the arbitral tribunal must be notified as well.[45] This is an innovative provision in line with the most recent arbitration rules, such as the SIAC Rules[46] or the 2024 Stockholm Chamber of Commerce Arbitration Institute policy.[47]

However, the PCC Rules are more relaxed when it comes to the consequences of a party having third-party funding arrangements in place. The Rules do not explicitly specify the tribunals' powers in relation to third-party funding and their primary aim appears to be transparency. SIAC rules, in contrast, provide that the tribunal may request additional disclosures regarding the funding, such as presumably disclosures on the funding amounts and terms of the funding. SIAC tribunals may also give weight to third-party funding in apportioning costs.[48]

> *the default duration of a PCC arbitration is the same as an expedited arbitration under many other arbitration rules*

Deadlines for rendering an award

One of the most significant new provisions in the PCC Rules relates to the deadline for rendering the arbitral award. Section 41(3) provides:

> 'The award shall be rendered within six months from the date on which the file was transmitted to the Arbitral Tribunal, but no later than two months from the last day of the hearing or the date of the last written submission by a party.'

The provision should be read consistently with section 11(3), which states that the PCC Director General may, for good cause, extend the time limits provided in the PCC Rules.

This is a highly attractive provision of the PCC Rules. It means that the default duration of a PCC arbitration is the same as an expedited arbitration under many other arbitration rules, such as the SIAC[49] and ICC Rules.[50] It also explains why the PCC Rules do not contain a standalone expedited arbitration procedure; the default procedure is already incredibly efficient. Given that parties in construction arbitrations typically need a quick and binding resolution of their dispute, the expediency of PCC arbitrations is a considerable advantage. This is particularly the case when the said expediency is contrasted with the slow pace of construction litigation in many jurisdictions.[51]

Light-touch award scrutiny

The revised PCC Rules provide that a draft of the arbitral award shall be submitted to the PCC Arbitral Council. The Council may then submit comments to the tribunal on non-substantive aspects of the award.[52] This is an impressive procedure, particularly given the short timelines of a PCC arbitration. It follows best practices adopted by some institutions such as the Dubai International Arbitration Centre ('DIAC') Arbitration Rules.[53] Such a light-touch process may help tribunals avoid non-substantive obvious errors in the award and also help the institution fix the tribunals' final fees and expenses.

Appeals on points of law under *leges arbitri*?

Finally, the PCC Rules do not explicitly state that the award is final and binding on the parties, although the model arbitration clause does state that the dispute shall be 'finally decided' by a PCC arbitral tribunal. Nonetheless, the absence of a clear statement on the final and binding effect of awards in the PCC Rules may lead to the unintended result that the opt-out appeal mechanisms found in some *leges arbitri* may apply. For example, if the seat is in England, Wales or Northern Ireland, it may mean that section 69 of the Arbitration Act 1996, which allows appeals on points of English law, has not been excluded.[54] This interpretation is particularly significant since English courts have been clear that the default position under the Act is that section 69 *does* apply and that parties must opt out of it explicitly. The inclusion of wording in the arbitration clause that a dispute shall be 'finally settled' in arbitration did not prevent that conclusion.[55] Many arbitration rules hence contain provisions similar to the SIAC Rules which provide in Rule 51.7:

> 'Unless otherwise agreed by the parties, and insofar as not prohibited by any applicable law, every award shall be final and binding between the parties in respect of the claims, counterclaims, cross-claims, and set-offs determined and, where appropriate, the issues of fact and law that it determines in order to rule on the parties' claims, counterclaims, crossclaims, and set-offs.'[56]

To avoid any difficult arguments at the post-award stage, the parties may be advised to expressly exclude any appeal or review rights that may exist under the applicable arbitration laws. However, the issue is likely to be moot as the number of arbitration laws providing for appeals is small and limited to select common law jurisdictions. Section 69 of the Arbitration Act 1996 also only applies to appeals on points of English law.

Other recent improvements

The revised PCC Rules also made other changes to the arbitration procedure that they provide for, simplifying and streamlining the process. This includes:

- permitting tribunals to allow party submissions to be made electronically only;[57]
- stating that counterclaims must be filed in the response to the request for arbitration or later, if the tribunal agrees;[58]
- no longer providing for a mandatory hearing. Instead, the PCC Rules envisage a hearing only following a party request or a tribunal decision;[59]
- providing for a case management conference within 14 days of the transmission of the file. In the absence of a case management conference, Procedural Order No 1 must be issued within 21 days of the transmission of the file;[60] and
- providing that tribunals may appoint tribunal-appointed experts if the parties are consulted.[61]

As further evidence for the PCC's internationalisation, the PCC Rules permit the arbitration to be conducted in English or another language as long as the parties provide for it in their arbitration agreement or, in the absence of such an agreement, the tribunal determines that a specific language shall be the language of proceedings.[62] Separately, the tribunal has the power to order specific activities to be performed in a language other than the language of the proceedings.[63] Such a procedure makes a PCC arbitration attractive from the standpoint of international disputes which may involve a range of relevant languages.

Conclusions

The CEE region is home to several impressive construction projects with an international or even global reach. This includes the construction of the first nuclear power plant in Poland[64] or the Rail Baltica connecting the Baltic States with the European transport networks.[65] Once the war in Ukraine ends, the country will be subject to one of the largest reconstruction projects in modern history – a process that is already being drawn up.[66] Since regional and international parties are poised to play a significant role in these ventures, the need for dispute resolution mechanisms other than litigation is likely to increase. In an environment where parties likely have a strong preference for resolving disputes in arbitration but wish to rely on institutional support that is more local and cost-effective, the inclusion of a PCC model arbitration clause is an attractive option, even more so with its revised Arbitration Rules that are in line with international best practices and offer advantages to parties in the construction sector.

The PCC Rules have clearly set efficiency as their primary objective. This is evident from the short timelines for rendering awards, the concentration of powers – such as in relation to consolidation and joinders – in the hands of tribunals or the innovative provisions on light-touch award scrutiny, emergency arbitration and early determination. Finally, considering its cost calculator,[67] a PCC arbitration offers a highly cost-effective arbitration at a recognised institution.

Notes

1 The value of the construction sector in Central Europe and the Baltics was estimated at over US$641 billion in 2024, see https://data.worldbank.org/indicator/NV.IND.TOTL.CD?end=2024&start=1960&view=chart accessed 22 May 2026.

2 See statistics as of 2021 https://ec.europa.eu/eurostat/cache/digpub/housing/bloc-3a.html?lang=en accessed 22 May 2026.

3 For example, in Poland, arbitration is reportedly used to resolve only five per cent of construction disputes: Contract Advisory Services, *Raport o sporach budowlanych w Polsce 2025* (‘Report on Construction Disputes in Poland 2025’) (CAS 2025) 26; see generally Monika Chao-Duivis *et al* (eds), *Studies in European Construction Law* (European Society of Construction Law 2015); Eugen Salpius and Marina Pavlović, ‘International Commercial Arbitration in Eastern and Central Europe’ in Andrew Berkeley and Jacqueline Mimms (eds), *International Commercial Arbitration: Practical Perspectives* (King’s College London 2001) pp 323–324.

4 Philip Bruner, ‘International Construction Arbitration’ in Wolfgang Breyer (ed), *International Construction Law: An Overview* (Routledge 2025) pp 587–593.

5 Renato Nazzini and Aleksander Godhe, ‘Adapting Arbitration to the Construction Sector: Ensuring Efficiency Through Arbitration Avoidance and Case Management Techniques’ in Christian Klausegger (ed) *Austrian Yearbook on International Arbitration* (CH Beck, 1 June 2024) 3.

6 Most CEE jurisdictions have adopted the UNCITRAL Model Law. See https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status accessed 22 May 2026.

7 Including the Court of Arbitration at the Polish Chamber of Commerce which this article focuses on. However, see also the Vienna International Arbitral Centre, the SCC Arbitration Institute or the Ukrainian International Commercial Arbitration Court.

8 For example, see the foundation of the Arbitration Association of Central and Eastern Europe or the success of several international arbitration events such as the Baltic Arbitration Days and the Dispute Resolution in M&A Transactions to name a few.

9 See https://www.newyorkconvention.org/contracting-states accessed 22 May 2026.

10 See generally Lucas Klee *et al*, ‘The Use and Misuse of FIDIC Forms in Poland’ (2014) International Construction Law Review 281; Donald Charrett, *FIDIC Contracts in Europe* (Routledge 2023) 61.

11 Court of Arbitration at the Polish Chamber of Commerce, ‘Sąd Arbitrażowy przy Krajowej Izbie Gospodarczej – najważniejsze dane za rok 2024’ (‘Court of Arbitration at the Chamber of Commerce – key data for 2024’) (SAKIG 29 April 2025) https://sakig.pl/o-arbitrazu/sprawozdanie-z-dzialalnosci-sadu-w-2024-roku-kluczowe-dane-i-analizy accessed 1 April 2026.

12 Note that the ICC and LCIA Rules are due to be revised in 2026.

13 ICC Rules, Art 12(2); LCIA Rules, Art 5.8; SIAC Rules, Rule 19.1.

14 Around EUR23,000 as of 2 April 2026.

15 PCC Rules section15.

16 *Ibid* section16.

17 Court of Arbitration at the Polish Chamber of Commerce, ‘New Arbitration Rules’ (SAKIG 2025) https://sakig.pl/en/regulations-and-costs/new-arbitration-rules accessed 2 April 2026.

18 Troy L Harris, *International Construction Arbitration Handbook* (Thomson Reuters 2022) pp 111–113.

19 PCC Rules, section 17(1).

20 *Ibid.*

21 *Ibid* section 17(2).

22 *Ibid* section 17(3).

23 *Ibid* section 17(4).

24 ICC Rules, Art 14(2).

25 SIAC Rules, Rule 27.1.

26 LCIA Rules, Art 10.3.

27 For example, see English Arbitration Act 1996, section 73.

28 Patricia Shaughnessy, ‘Emergency Arbitration and the Interplay with Other Pre-Arbitral Mechanisms’

in Renato Nazzini (ed), *Transnational Construction Arbitration* (Routledge 2018) pp 249–251.
29 ICC Rules, Art 29; LCIA Rules, Art 9; SIAC Rules, Rule 12.
30 PCC Rules, section 31.
31 *Ibid* section 31(13).
32 See generally Cameron Sim, *Emergency Arbitration* (OUP 2021) pp 318–344.
33 See also SIAC Rules, Rule 47.
34 See the more flexible wording in SCC Rules, Art 39.
35 PCC Rules, section 34(1).
36 ICC Commission, *Report: Financial Institutions and International Arbitration* (2016) para 59; Pinsent Masons and Queen Mary University of London, 'International Arbitration Survey: Driving Efficiency in International Construction Disputes' (QMUL 2019) https://www.qmul.ac.uk/arbitration/research/2019/ accessed 2 April 2026.
37 Arbitration Act 1996, section 39A.
38 Renato Nazzini and Aleksander Godhe, 'Adapting Arbitration to the Construction Sector: Ensuring Efficiency Through Arbitration Avoidance and Case Management Techniques' in Christian Klausegger (ed), *Austrian Yearbook on International Arbitration* (CH Beck 2024).
39 PCC Rules, section 27(1).
40 *Ibid* section 27(2).
41 *Ibid* section 28(1).
42 LCIA Rules, Art 22A; ICC Rules, Art 10; SIAC Rule 16.
43 ICC Rules, Art 7; SIAC Rules, Rule 18.
44 PCC Rules, section 21(1)(7), section 23(2)(7).
45 *Ibid* section 24.
46 SIAC Rules, Rule 38.
47 SCC Arbitration Institute, 'SCC Policy: Disclosure of third parties with an interest in the outcome of the dispute' (SCC Arbitration Institute 16 October 2024) https://sccarbitrationinstitute.se/wp-content/uploads/2025/01/scc_policy_disclosure_third_parties_2024_0.pdf accessed 4 April 2026.
48 SIAC Rules, Rules 38.4 and 38.6.
49 *Ibid* Rule 14 and Schedule 3, para 6.
50 ICC Rules, Art 30 and Appendix VI, Art 4.
51 Thomas Frad and Emily Leonard, 'Litigation (National)' in Andreas J Roquette and Tom Christopher Pröstler, *International Construction Disputes* (Beck 2022) p 152.
52 PCC Rules, section 42(2).
53 DIAC Rules, Art 34.5.
54 See also New Zealand Arbitration Act 1996, Schedule 2, Art 5; Ontario Arbitration Act 1991, section 45.
55 *National Iranian Oil Company v Crescent Petroleum* [2022] EWHC 1645 (Comm).
56 See also LCIA Rules, Art 26(7).
57 PCC Rules, section 10(2).
58 *Ibid* section 25.
59 *Ibid* section 34; note that the tribunal need not arrange a hearing following a party request in relation to an early determination procedure.
60 *Ibid* section 32.
61 *Ibid* section 37(2).
62 *Ibid* section 8(1).
63 *Ibid* section 8(2).
64 The Chancellery of the Prime Minister, Republic of Poland, 'Poland and US Sign Bridge Agreement for First Nuclear Power Plant' (The Chancellery of the Prime Minister, Republic of Poland 28 April 2025) https://www.gov.pl/web/primeminister/poland-and-us-sign-bridge-agreement-for-first-nuclear-power-plant accessed 4 April 2026.
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66 World Bank Group, 'Updated Ukraine Recovery and Reconstruction Needs Assessment Released' (World Bank 23 February 2026) https://www.worldbank.org/en/news/press-release/2026/02/23/updated-ukraine-recovery-and-reconstruction-needs-assessment-released#:~:text=Findings%20highlight%20the%20expanding%20footprint,totaling%20more%20than%20$15%20billion accessed 1 April 2026.
67 See https://sakig.pl/en/arbitration/costs-calculator accessed 22 May 2026.

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FEATURE ARTICLE

Prolongation costs – an issue with causation

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Construction contract disputes often involve a decision on delay responsibility and the costs that ensue, usually claimed as 'prolongation costs' by the contractor. These costs are, however, scrutinised closely by counsel and arbitrators alike to assess whether they represent a material prejudice that may require (or not) to be compensated. This involves a review that can be quite complex, and for which the test for validity requires more details and questioning than usually put forward in a very 'simple' way by contractors. This may often be misleading – that is, by skipping or omitting details that would impact their assessment, amounting to a global cost claim. The underlying issue is always causation, as the costs and records attached need to demonstrate an adequate causal link with the delay generating them. This article explains the different tests that should be performed to ensure the prolongation costs ultimately awarded come as close as possible to the actual prejudice incurred and which shall be compensated, as per the contractual and legal considerations.

Introduction

Counsel and arbitrators often have a challenging time resolving construction disputes due to the technicalities involved with delay analyses and quantum assessments. Parties in dispute present claims and expert evidence, often making use of differing concepts, methodologies and analysis. They may present asymmetric supporting evidence and inherently dissenting conclusions.

This is particularly the case when presenting prolongation claims, for which the quantum assessment relies on specific proof of the prejudice incurred, mixing both liability and causality in intricate ways.

In the worst-case scenario, these types of claims are brought forward as global cost claims, for simplicity presenting all loss incurred compared to the budget (or a simple proportionality of it) as caused by the underlying prolongation or disruption event.

However, this approach has proven to be very unconvincing, as well as departing from the actual prejudice for which a causal link can be established, preventing awards from following the same simplistic valuation principles.

The difficulty in reaching a legally acceptable decision is not in reperforming the analysis (which would be highly cost-ineffective or outright impossible) but in being able to question the assessment process, test the reasoning and opine on the supporting evidence. The causality between costs incurred and claimed events will be at the centre of this test of reasonability.

To reach a fair decision and navigate the scrutiny of prolongation costs effectively, a test dissecting the different elements of such a complex claim is drawn from experience, highlighting the usual factors hindering the analysis.

This article will solely address the quantum aspects; delay analysis and related disruption claims, driving the underlying entitlement, are not the subject of this article.

Standard practice

The standard practice and usual steps in presenting a prolongation cost claim is stated in the SCL[1] under four principles (clauses 20 and 22), as well as on the legal principle of 'full reparation'.[2]

- 'The objective is to put the Contractor in the same financial position it would have been if the Employer Risk Event had not occurred.'
- 'It is up to the Contractor to demonstrate that it has actually suffered loss and/or expense before it becomes entitled to compensation.'
- 'Compensation for prolongation resulting from Employer Risk Events will primarily comprise the Contractor's extended use of time-related resources.'
- 'The period to be evaluated is that in which the effect of the Employer Risk Event was felt.'

These principles, largely accepted and reiterated in a wealth of papers, written expert reports and publicised articles, are usually translated by contractors into a claim intended to showcase their indirect costs incurred as 'time-related', in proportion to the critical delays being claimed.

For example, in a base project which was planned for 20 months, the expense could be presented as follows. The focus for prolongation claims revolves around the extension of indirect costs (supervision and management, equipment, site facilities, securities and other running costs, etc).

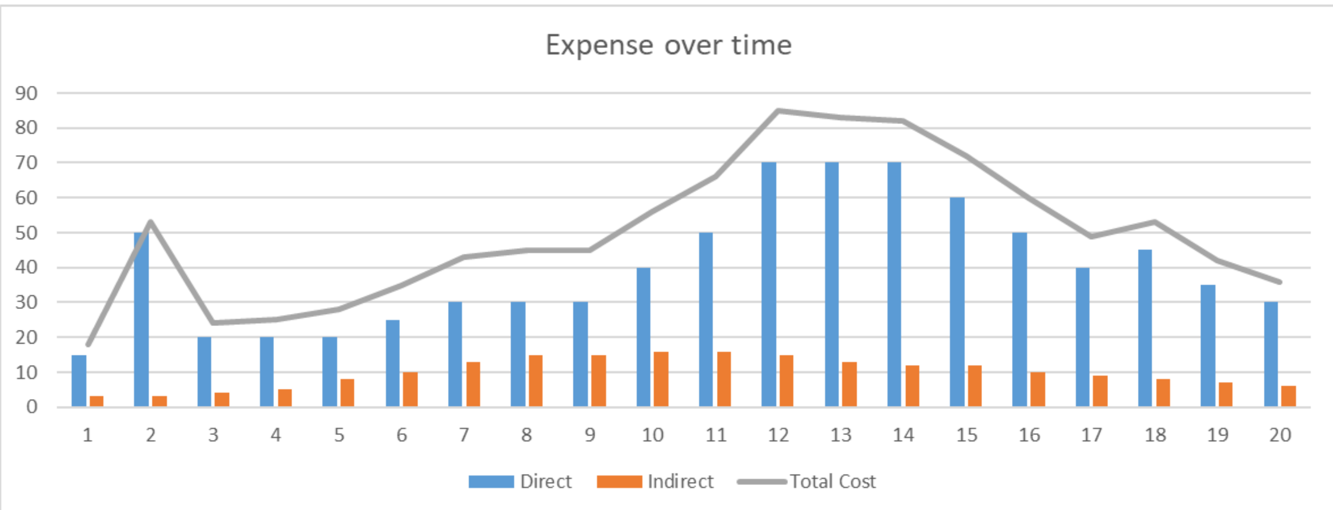

Figure 1

Considering the project was hindered by a rework on site installations delaying the actual start of works, for four months from month six onwards, all other things being equal, the actual expense incurred may present the shape shown in Figure 2.

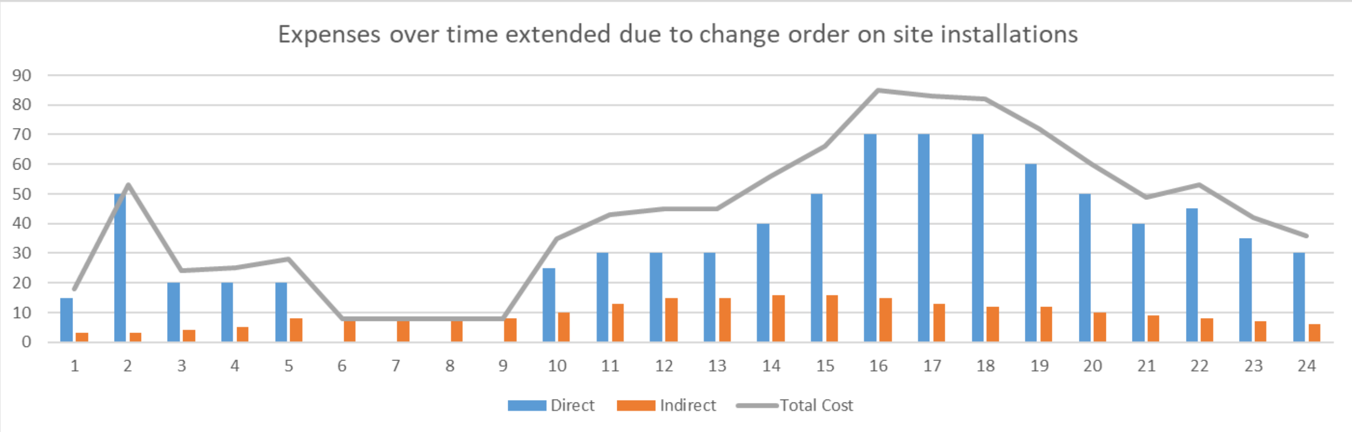

Figure 2

In this case, the contractor would look for recovery of its indirect costs for months six through to nine, as highlighted in Figure 2.

Usually, this is accomplished by calculating a daily average indirect costs rate (usually called a 'burn rate') and multiplying it for the duration of the extended period. Sometimes prolongation costs are even valued along the unit rates planned in the contract for additional or standby of resources, either by a defined unit rate or even by applying a *prorata temporis* calculation derived from the contract price.

Building on this concept, the contract includes a price breakdown that assigns a specific value to indirect costs or 'preliminaries'. This creates a straightforward method: if preliminaries are $200 for 20 months, then valuing prolongation costs at $10 per month seems reasonable.

While very tempting, this simple calculation, which is usually presented as a fair assessment of prolongation costs, is only reasonable in very simple and straightforward situations, such as live construction projects where the parties have to agree upfront on the prospective costs resulting from an agreed extension, but in more complex cases this could be a significant departure from a reasonable compensation award.

Principal tests of an assessment

Additional tests are necessary to ensure the compensation sought is really remedying the prejudice incurred.

To ensure that the causal link between the delay events and the costs incurred is well established, one must refine the criteria for evaluation and put through several tests, as explained below.

> *Typically, prolongation costs are brought forward as a claim for compensation [...] In some legal cases, prejudice can be considered a scope variation*

Questioning the principle

Is the prejudice assessed based on actual costs effectively incurred?

It is worth mentioning that the prejudice to be assessed is, first, dependant on the contractual and legal framework in which it is claimed.

Typically, prolongation costs are brought forward as a claim for compensation and would be assessed as per the actual costs expended in relation to the prolongation as per the recommendations of the SCL protocol.

In some legal cases, prejudice can be considered a scope variation and thus valued using contract unit rates or standard standby/monthly rates.

The difference between contract rates and actual costs can be significant, inclusive of provisions, overheads, profit and so on. This is critically important as claimants must be aware of its implications, but also to ensure coherency in the resulting calculations – that is, between the approach based on accountancy documents showing actual indirect, as well as overheads costs spent, versus the rate-based calculations (presumably inclusive of these two mark-ups).

There are two key considerations that influence valuation, both of which are determined by actual costs and contractual rates:

Actual costs that would have been incurred in the regular course of business

In particular, if the contractor has mobilised resources in excess of the volume initially anticipated for its own reasons ('thickening'), the period of prolongation would include actual costs on this thickened basis. The question is, should the claimed prolongation costs be limited to the initial volume of indirect costs or the thickened version? The question is in fact to be able to assess the delta between the actual costs incurred and the but-for scenario of the costs that it would have otherwise incurred, regardless of the delay event in question.

Any flexibility or risk allowance that would have been part of the scope of the contractor or included in the contract price

The indirect costs are typically reliant on an estimation, so the initial basis of costs represents the baseline against extensions of time and may not perfectly correspond to the actual prejudice. Allowances shall be taken into consideration (ie, exclude them from part of the compensation) and the question should be asked whether they shall be consumed first as pertaining to the project or whether they form part of the prejudice.

Is the burn rate a quick, accurate estimate?

The burn rate analysis needs to be assessed to accurately split windows (in line with delay analysis) for it to be sensible. This makes it possible to rely on a daily or even monthly rate but also ensures that this rate adapts to the costs of the period and is not a flat rate encompassing the entire project life cycle.

Period	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	Sum	Average
Direct	15	50	20	20	20	25	30	30	30	40	50	70	70	70	60	50	40	45	35	30	800	
Indirect	3	3	4	5	8	10	13	15	15	16	16	15	13	12	12	10	9	8	7	6	200	10
Total Cost	18	53	24	25	28	35	43	45	45	56	66	85	83	82	72	60	49	53	42	36	1000	

Table 1

Period	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	Sum	Average
Direct	15	50	20	20	20	0	0	0	0	25	30	30	30	40	50	70	70	70	60	50	40	45	35	30	800	
Indirect	3	3	4	5	8	8	8	8	8	10	13	15	15	16	16	15	13	12	12	10	9	8	7	6	232	9.666667
Total Cost	18	53	24	25	28	35	43	45	45	56	66	85	83	82	72	60	49	53	42	36	49	53	42	36	1180	

Table 2

Period	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
Direct	15	50	20	20	20	25	30	30	30	40	50	70	70	70	60	50	40	45	35	30
Indirect	3	3	4	5	8	10	13	15	15	16	16	15	13	12	12	10	9	8	7	6
Total Cost	18	53	24	25	28	35	43	45	45	56	66	85	83	82	72	60	49	53	42	36
Window	Pre-construction						Site works									Startup				
Average	5.5						14.1									8				

Table 3

In the example in Table 1, indirect costs represent an average of $10 per month over the 20 months of the project. This is, however, not a linear expense, given that the mobilisation and expense of indirect costs is related to the project execution phase and usually would tend to be shaped as a bell curve.

The prolongation of months six through nine is, however, in a period during which indirect costs are comparatively lower, with $8 monthly spending, as highlighted in Table 2.

Should the quantification be based on a proportionality of contract preliminaries or a burn rate calculated at project level, it would therefore be overestimating the actual loss by about 25 per cent ($10 per month on planned budget, $9.7 on actual average instead of the actual $8 for the disrupted period).

A usual quick fix to this issue is to define windows in the analysis and to split the average burn rate calculation by window. This will result in a better relation between the phase (or state of progress) of the project and the level of spending in that phase.

For example, it could be envisaged that splitting the value of planned indirect costs into three windows for pre-construction, site works and commissioning/start-up may provide a slightly better granularity, with the delay falling towards the end of the pre-construction work (see Table 3).

This is unfortunately not the case and is the downfall of most assessments based on averages, in that the granularity needed for an average burn rate to be representative is so fine that the burn rate theory is not effective in obtaining a robust result. The facts of a case would frequently push one back to exclude the burn rate altogether and create windows only for the delayed periods – that is, fall back on an as-planned versus as-built analysis, singling out the actual costs of the disrupted period, which may be significantly different from the budgeted costs, in prior or later periods.

Are all indirect costs part of the actual prejudice?

The second issue with the burn rate, or even the singling out of disrupted periods, is that it fails to capture the actual effect of the delay but assumes that any expense is linked to that delay.

However, complex projects include multiple work fronts, both geographically (onshore and offshore), by discipline (civil, piping, etc) and by phase (engineering, construction, startup, etc). A project's daily burn rate includes indirect costs that support multiple work fronts. However, not all are impacted equally by delays on the critical path and their expenditures also fluctuate over time.

Therefore, the pool of indirect costs needs to be analysed more granularly: for example, on a bridge project, three project managers are mobilised, one for the piling works, one for slabs prefabrication and one for the connection to existing roads. Although, theoretically and for simplicity, all three are allocated for the 20-month duration of the project, a four-month delay in this scenario results in only one being extended, while the other two remain largely unaffected or not affected at all.

Without this factual and causal analysis, using a burn rate or simply looking at the indirect costs during the period of delay would lead to overestimating the prolongation of indirect costs by counting all three of them. The same would apply for a single person apportioning (potentially) their time on several work fronts.

These common issues mean that prejudice assessment requires the indirect costs to be analysed as individual resources (human, material, financial, etc). This approach depends on whether indirect costs can be attributed to activities, rather than treating the 'indirect' category as a single, undifferentiated group.

Questioning the causality

Are accounting records bulletproof?

The most reliable way to demonstrate costs is to present the project accounting records, which is how indirect costs are typically demonstrated.

However, it is important to recognise that accounting records are often not straightforward, since they typically present an extensive list of financial transactions with minimal information connecting these entries to any calculation of loss.

This means the records themselves, while demonstrating costs incurred, do not directly reveal additional costs or those exclusively linked to the prolongation of the project.

Assuming accounting records are accurate and reliable, certain key factors can cause major deviations in interpreting accounting figures, both in reading the accounts and during any analytical review. These factors are listed below.

Proper allocation

The accounting records materialise payments and commitments of a company. However, the correct attribution to the specific project and operation subject of the claim can be misleading. This is, for example, frequently the case for financial charges relative to working capital and insurances, usually committed for a full company or country, but may wrongly appear as a project cost. This specific case would need an apportionment of the cost to the part effectively relative to the project itself. This can be the case for many costs, so that ensuring the proper attribution of costs to the project in an audit is a first step in cleaning up the cost ledger.

The identification of costs as being 'indirect' and 'time-related' is not a category which is evident from accounting records, nor from any single simple rule, but depends on the actual analysis of cost evidence

Tax inclusion

While it is commonly understood that the costs considered in a compensation claim shall exclude the VAT, depending on how the accounting records are presented, this is not always exempt of the need for a rework of the figures extracted from the accounts. Conversely, other taxes (like a stamp tax or withholding tax on foreign services) or non-recoverable VAT should be part of the prejudice, as they are an actual charge to the company.

Distribution of charges

As discussed in the principles, the aim is to identify costs incurred due to (and during) the period of prolongation. However, most charges are registered as per their invoicing date, creating a delay between their occurrence and registration, which can misrepresent the proper period of the cost. Even more challenging is the need for correction of non-monthly charges (eg, an insurance premium which may be paid yearly in a unique transaction although they do relate to an actual 12-month period, or a crane rented for six months but paid in one go, or a downpayment not related to any work executed). These issues necessitate opening and studying the records underlying the accounting ledger (invoice, purchase order or contract, time sheets etc) to understand the actual periods during which a charge should be considered.

Combined costs

A common feature of construction accounts is the integration of charges for internal staff and equipment, or even reinvoicing of the same from a company to the joint venture or consortium under which the project is accounted. These costs need specific consideration as they may be inclusive of more than the direct costs of the actual material or service, but already include a part of overheads, allowances or profit, and for which the method of calculation and accounting needs to be studied to ensure only the actual prejudice is assessed. This is also the case for the settlement of sub-contractor claims (ie, presumably related to the same delay event claimed to the employer) which are often a single value, which may include various subjects (including prolongation), but that need to be unpacked to identify the various subjects, set-offs, penalties or incentives that may have been lumped.

Cost ledger audit

It is also beneficial to review the entire cost ledger as this can help identify potential adjustments at the end of a project or financial period – such as retrospective discounts, credits or reversals – that are often applied only to the final invoice or accounts but should actually be considered when estimating actual values throughout the project. Similarly, costs accounted for upfront may have been paid for items or services used over a longer timeframe.

Is identifying progress-related v time-related costs a simple task?

The identification of costs as being 'indirect' and 'time-related' is not a category which is evident from accounting records, nor from any single simple rule, but depends on the actual analysis of cost evidence.

While most claimants would present that categorisation as 'evident', this is not the case and needs proper support, explanation or adverse inspection. For example, a tower crane can be considered an indirect equipment if it serves the full worksite for its entire duration as a support tool, while another crane, brought in for a specific heavy-lift campaign can (and should) be attached to the direct works it is used for. This is often considered as a 'one-off' cost that, in theory, should be excluded from the quantum assessment of prolongation costs.

On the 'time-related' front, the same caution should drive the analysis of costs: a transaction of $30,000 showing as 'crane rental' in an accounting ledger could be relative to: a recurring rental charge on a long-term contract; a rental charge but for a short period that cannot be shortened or extended under the same conditions; or a rental which is in fact relative to on-demand services, with invoices by the actual number of hours of use in the month. Out of these three cases, only the first could be used for prolongation costs.

This exemplifies the idea that an accounting transaction for a resource needs to be analysed in detail before categorising it as either indirect or time-related.

Can and should unabsorbed overhead costs be included?

The question of overheads requires the same level of investigation and the components of this concept need to be unpacked.

Overheads usually include the various types of general costs that cannot by nature be specifically attributed to a project, inclusive of head office costs, general management, commercial department, marketing, research and development, insurance, financing of the debt of the company and so on.

They also sometimes include local corporate offices, which may be more focused compared to the global overheads, servicing only a handful of projects.

In a company, these overheads are a net charge and cannot be related to any kind or revenue. They are by nature a running cost and are usually budgeted yearly and then apportioned in budgets and project offers as an average of revenues – for example, coming up to a figure of five per cent.

For simplicity, prolongation claims are often inclusive of either a mark-up for overheads or based on a prolongation formula.

However, these costs may be problematic and necessitate investigation as:

- they may overlap with specific project costs (eg, insurance);
- they are not actually cost overruns, as they would have been incurred irrespective of the project prolongation; and
- their calculation as part of a prolongation may seem misplaced as they are in the accounting records related to the revenue, not the time.

While overheads may legitimately be claimed, they need to be dissociated and reasoned to ensure the compensation requested corresponds to an actual prejudice and that the causality links that prejudice to the delay claimed.

Conclusion

Evidently, counsel and the trier of fact are rarely faced with a perfect presentation of a prolongation claim and their award will have to integrate a level of imprecision on effective causality and detail of quantum assessments.

Regardless of expert evidence, the tests discussed highlight key aspects for analysing causation and valuation when determining an award.

These inquiries would need to be adapted to the value of the dispute, as well as the availability and granularity of the supporting evidence.

These test points are not comprehensive, but they provide enough guidance for counsel and arbitrators to evaluate the valuation and determine whether the quantum assessment and award amount are reasonable and causally linked, should the delay claim be accepted.

Notes

1 Society of Construction Law, *Delay and Disruption Protocol* (2nd edn, Guidance Part B: Core Principles Arts 20 and 22, 2017).

2 Y M Laithier, 'Les règles juridiques relatives à l'évaluation du préjudice contractuel (droit anglais, droit français, droit suisse)' (2015) , Revue de l'Arbitrage, Comité Français de l'Arbitrage 361.

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Coercion or commercial necessity? The fragile validity of supplementary agreements in construction contracts

Supplementary agreements often sit at the heart of construction disputes, raising a familiar question: were they freely negotiated or signed under pressure? This article explores how Indian courts address such concerns, with particular reference to the recent decision in *Union of India v Mago Construction*.[1] A clear pattern emerges wherein courts are slow to unsettle arbitral findings where coercion or economic duress is alleged, especially in the presence of unequal bargaining power or forced waiver of claims. Set against the rapid growth of India's infrastructure sector, the article considers how this judicial approach shapes contractor–employer relationships.
It highlights the increasing relevance of supplementary agreements in disputes involving waiver and estoppel and offers a concise guide to their treatment under Indian law.

Introduction

At its most benign, a supplementary agreement, or 'supplemental agreements'[2] or simply 'amendment',[3] is a practical instrument, an agreed addendum to an existing contract. It modifies or adds specific terms that the parties to the existing contract wish to agree to, while leaving the remainder intact; it may change the scope of work envisaged under the contract or, at times, even terminate the original contract. In the construction sector, such agreements are common: project completion times get extended, specifications change and the parties have to reassess and adapt.

However, supplementary agreements also pose a challenge. Construction contracts in India are generally characterised by unequal bargaining power. A public sector employer commands the award of future contracts, while the contractor is dependent on cash flow and timely release of contractual obligations such as completion certificates, performance securities and final bills. When an employer withholds these contractual entitlements, the contractor may in some cases be left with no other choice but to sign the supplementary agreement.

With a rapidly expanding construction sector in India, buoyed by government investment in the sector surging nearly 800 per cent in a single decade, from Rs1.12 lakh crores in 2014 to Rs10 lakh crores in 2024,[4] disputes between contractors and employers are bound to be on the rise. In view thereof, it has become imperative to address the proverbial elephant in the room: the treatment of supplementary agreements executed between contractor and employer by courts in India.

The legal framework governing supplementary agreements in India

The validity of supplementary agreements in India is governed by the Indian Contract Act 1872 ('Act'). At its core lies a simple requirement – that is, free consent. Under Section 14 of the Act, consent is free only if it is not caused by coercion, undue influence, fraud, misrepresentation or mistake. Section 15 of the Act defines coercion narrowly, as acts or threats forbidden by the Indian Penal Code 1860 (former substantive code of criminal offences in India) or unlawful detention of property. Notably, the Act does not use the term 'economic duress', yet Indian courts have interpreted Sections 15 and 16 to give effect to the concept in commercial settings.

Section 16 of the Act defines 'undue influence', which captures situations where one party is in a position to dominate the will of another and uses that position to obtain an unfair advantage. The principle contained in Section 16 has been utilised by the Supreme Court of India in the judgment of *Larsen and Toubro Ltd v Puri Construction Pvt Ltd*[5] to hold that a supplementary agreement was a 'non-starter' as it was vitiated by economic duress in view of Section 16(3) of the Act. While a party must ordinarily raise coercion or undue influence as a specific ground in arbitral or court proceedings, Indian courts have, in appropriate cases, addressed the issue under Section 34 of the Arbitration and Conciliation Act 1996 where the vitiating circumstances are apparent from the record.

The courts have also utilised Section 23 of the Act, which voids agreements opposed to public policy. In *Central Inland Water Transport Corporation v Brojo Nath Ganguly*, the Supreme Court of India held that 'courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract [...] entered into between parties who are not equal in bargaining power'.[6] It is worth noting that in *Central Inland Water Transport*, the Supreme Court invoked Section 23 on appeal, on facts placed before it by the parties; the Court did not raise the public policy objection of its own motion at first instance.

> *The judgment [*Union of India v Mago Construction*] shows how a dispute between a contractor and an employer, centred around the execution of a supplementary agreement, would generally play out*

Together, these provisions allow Indian courts to look past formal validity of a signed agreement and examine the conditions under which it was executed. The question that the courts often find themselves examining is not merely whether the contractor signed, but whether the contractor had any alternative left but to sign.

The recent decision of Delhi High Court in *Union of India v Mago Construction Pvt Ltd*

The judgment of Delhi High Court in *Union of India v Mago Construction*, decided on 14 January 2026, offers an illustrative example. It shows how a dispute between a contractor and an employer, centred around the execution of a supplementary agreement, would generally play out.

The parties had entered into a construction contract. A dispute arose when the employer failed to vacate 13 buildings, preventing the contractor from completing the relevant portion of the works for what the arbitrator described as an 'unending period'.[7] On 5 December 2013, the contractor signed an amendment removing those 13 buildings from the scope of work. On 6 December 2013, the next day, the employer issued the completion certificate that had previously been withheld.

Not every supplementary agreement executed in difficult commercial circumstances will be vitiated by coercion

The contractor invoked arbitration under the dispute resolution clause of the original construction contract, challenging the validity of the amendment on the ground of coercion; the arbitrator was appointed pursuant to that clause and determined the dispute at first instance. The arbitrator found that the amendment had been executed under coercion. The chronology was clear: the contractor had signed away its entitlement to the 13 buildings on Monday; the certificate appeared on Tuesday, the next day. The arbitrator described the withholding of the completion certificate as a 'coercive fact', a deliberate lever used by the employer to compel execution of the amendment. The contractor, whose ability to recover its final bills, secure the release of its securities and invoke its bank guarantees depended on that certificate, had no practical means of resistance.

The employer challenged the award under Section 34 of the Arbitration and Conciliation Act 1996. The Delhi High Court refused to interfere. The Court held that, on the facts before it, the arbitrator's finding of coercion was a reasonable conclusion, not a perverse one, and that there was no basis for the Court to substitute its view for that of the tribunal.

The case makes a point that is easy to state but difficult for employers to internalise: withholding a contractual entitlement in order to extract a concession is not merely commercially aggressive; it is potentially a coercive fact that a court would find hard to ignore.

The Supreme Court's decision in *Larsen and Toubro Ltd* ('L&T') *v Puri Construction Pvt Ltd* ('PCL')

In *Larsen and Toubro Ltd v Puri Construction Pvt Ltd*,[8] under a 1998 development agreement, L&T undertook to develop PCL's Gurgaon land in exchange for 75 per cent of the developed area. Having privately assessed the market conditions as unfavourable, L&T failed to perform and did not pay external development charges, triggering a regulatory authority show-cause notice threatening licence cancellation of PCL. Faced with this risk, PCL signed L&T's proposed supplementary agreement on 30 December 1999. After dispute resolution proceedings that spanned over 25 years, the matter reached the bench of the Supreme Court of India which finally dismissed L&T's appeal in April 2025. The Supreme Court agreed with the view of the arbitral tribunal that the supplementary agreement was a 'non-starter', vitiated by economic duress, in view of Section 16(3) of the Act.

When supplementary agreements may be valid: *M/S Unikol Bottlers*

Not every supplementary agreement executed in difficult commercial circumstances will be vitiated by coercion. In *M/S Unikol Bottlers Ltd v M/S Dhillon Kool Drinks*[9] the parties had entered into a supplemental agreement that terminated the original agreement. The Delhi High Court, while considering the plaintiff's plea of duress, coercion and unequal bargaining power, examined the facts in detail. It found no material to suggest that any coercion or duress had been exercised. The Court also held that the plaintiff had failed to show unequal bargaining power. On the contrary, the facts and circumstances surrounding the negotiations suggested otherwise. The absence of any immediate protest, competent legal advice received by the plaintiff and the commercial considerations reflected in its conduct all pointed to the exercise of free will. These factors indicated that the supplemental agreement was not vitiated by coercion or duress.

Conclusion

The validity of a supplementary agreement in a construction contract in India is not determined at the moment of signing but rather by the facts and circumstances surrounding the execution by the parties. Even if the contents of the agreement were to state: 'the parties have entered into this agreement of their own free volition', it would not be the conclusive factor deciding its validity. As demonstrated by the decision in *Mago Construction*, what would matter more is whether the contractor was compelled to sign without being presented with a genuine choice.

The decisions in *Mago Construction* and *L&T v PCL* reflect a coherent judicial instinct: that none of the parties should have been compelled to give up a right that it otherwise would not have given up were it not for the coercive factor. On the other hand, as demonstrated in *M/S Unikol Bottlers Ltd*, if a party has displayed, through its conduct, that it negotiated the supplementary agreement after considering its own commercial necessities, the supplementary agreement it enters into will not be considered to have been vitiated by coercion or economic duress.

The courts in India present a very cogent assessment of validity of supplementary agreements: if the parties are unequal in bargaining power; if one of the parties was compelled by the conduct of the other party to waive its rights; if one of the parties had no genuine choice left due to the conduct of the other party but to sign; such supplementary agreements are likely to be held to be vitiated by coercion or economic duress. Contractors doing business in India should especially be mindful of the views of the Court in *M/S Unikol Bottlers Ltd*: lack of protest, receiving competent legal advice during negotiation and commercial necessity are indicative of the factors that will work against them.

Notes

1 *Union of India v Mago Construction Pvt Ltd* [2026] SCC OnLine Del 166.
2 *M/S Unikol Bottlers Ltd v M/S Dhillon Kool Drinks* [1985] SCC OnLine Del 62 para 2.
3 See n 1 above, at para 4.3.
4 BW Legal World, *Mega Projects, Mega Disputes: How Arbitration is Shaping the Future of India's Infrastructure Boom* (2025).
5 [2025] 10 SCC 545.
6 [1986] 3 SCC 156.
7 See n 1 above, at para 5.2.
8 [2025] 10 SCC 545.
9 [1985] SCC OnLine Del 62.

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Curating the record in construction arbitration: the institutional responsibility of tribunals in the age of evidentiary inflation

Introduction

Construction arbitration is experiencing a crisis of evidentiary inflation. On complex infrastructure and engineering projects, the documentary record has grown from filing cabinets to terabytes. Claims and counterclaims routinely number in the hundreds. And yet, the fundamental architecture of dispute resolution – a panel of arbitrators, a hearing measured in days or weeks, advocates presenting and testing evidence in oral submissions – has not changed in any fundamental respect.

The conventional response to this mismatch is technological: use AI-assisted review to identify relevant documents, deploy sophisticated document management platforms, leverage search algorithms to navigate the record. These tools are useful. But they do not address the underlying problem. The underlying problem is that size has become a proxy for seriousness in construction arbitration, and no institution with sufficient authority is challenging that assumption.

This article argues that the record management crisis is, at its root, an institutional failure. And the institution best positioned to address it is the tribunal itself.

The anatomy of record inflation

Construction arbitration has a record problem. Not a document management problem. Not a technology problem. A record problem – and the difference matters. International construction arbitration is inherently characterised by the massive volume of documents involved, such as daily progress reports, drawings, specifications and the vast correspondence generated over the lifespan of a project.

This problem is not new. According to the Queen Mary University of London's 2019 *International Arbitration Survey: Driving Efficiency in International Construction Disputes*,[1] 66 per cent of surveyed professionals identified large amounts of evidence as one of the most defining features of these disputes. The document overabundance was highlighted by 42 per cent of respondents as a primary cause of procedural inefficiency, causing delays and heavily burdening an already complex evidentiary process.

To mitigate this issue, the survey's conclusions pointed towards two main solutions: a strategic shift in case management and the decisive adoption of new technologies. Procedurally, the report recommended that legal teams focus on presenting core documents rather than producing massive volumes of information, with 51 per cent of respondents favouring limiting document production to highly pertinent documents. Notably, 33 per cent of users were willing to completely forego the document production or disclosure phase to save time and resources. On the technological front, the report concluded that it was highly beneficial to use common platforms to centralise electronic disclosure. Furthermore, 40 per cent of respondents believed that adopting technological automation for document production and review could significantly increase the efficiency of these document-heavy arbitrations without compromising the quality of the dispute resolution process.

It is clear, therefore, that as long ago as 2019, Queen Mary University of London's survey had already identified record volume and its management as a significant driver of procedural inefficiency in construction arbitration. The prescribed remedy, as the survey's respondents envisaged it, lay primarily in technological solutions.

We are now in the artificial intelligence era, with powerful tools at our disposal which not only help with document production and review automation as envisaged by Queen Mary University of London's survey but also go much further into advanced and complex analysis of thousands of documents in short periods of time. And yet, the record problem seems to have worsened rather than improved.

The growth of the project record is driven by three reinforcing dynamics. First, modern project management software – Aconex, Procore, Primavera, BIM platforms – generates records automatically and continuously. Every RFI, every schedule update, every document transmittal is logged, timestamped and stored. The system does not distinguish between a document that matters and one that does not.

Second, legal culture rewards volume. In a system where omission is a professional liability and inclusion is relatively costless, rational advocates include everything. The submission of a comprehensive bundle signals preparation. The omission of a potentially relevant document creates adverse inference risk, or so the argument runs.

Construction arbitration has a record problem. Not a document management problem. Not a technology problem

Third, and most importantly, tribunals seem to have historically been passive recipients of whatever parties choose to submit. This passivity is not inevitable. It is a choice – or, more precisely, a habit.

Record abundance does not equal probative clarity

Probative value – the capacity of a document to prove or disprove a fact in issue – does not scale with volume. A single contemporaneous site diary entry written on the day of a critical event may be more probative than 10,000 automatically generated system logs. A concise programme narrative prepared at the time of a delay event may do more to illuminate causation than a forensic delay analysis reconstructed years later from scheduling metadata.

The traditional legal principle of best evidence has been quietly displaced, in construction arbitration practice, by a principle of all available evidence. These are very different standards. The former requires parties to identify and present their most probative evidence. The latter simply requires them to produce everything they have and invite the tribunal to sort it out.

The consequences of this displacement are significant. Tribunals are asked to absorb volumes of material that cannot meaningfully be reviewed in the time available. Advocates are incentivised to over-produce rather than curate. And the probative signal is buried in documentary noise.

The technology paradox

AI-assisted document review is frequently presented as the solution to the record management problem. AI can review hundreds of thousands of documents in hours, identify thematic clusters, flag potential inconsistencies and generate privilege logs with minimal human input. These are genuine capabilities and they represent real value.

But AI review, at its current state of development, answers the question of which documents touch on a given topic. It does not answer the prior question: which of those documents is genuinely probative of a specific fact in issue? The advocate who uses AI to identify all documents potentially relevant to a claim and then submits them all has not curated the record. That advocate has industrialised the production of an uncurated record.

More troubling still is the role of AI as a record generator. Modern project management platforms produce continuous streams of automatically-generated records – clash detection reports, sensor data logs, automated workflow notifications, version histories. These records exist. They are technically part of the project record. But they were not generated by a human being making a decision or observing an event. Their probative value, in most cases, is minimal. They are the digital exhaust of software systems doing what software systems do.

We risk building a dispute resolution system in which the project record is increasingly composed of documents that no person wrote, describing events that no person witnessed, submitted in volumes that no tribunal can meaningfully review.

The institutional responsibility of tribunals

Tribunals have the tools to address this problem. They have always had the tools. The *IBA Rules on the Taking of Evidence in International Arbitration* permit tribunals to limit document production to what is genuinely relevant and material. The Prague Rules provide a model for active tribunal management of the evidentiary process. Institutional rules under the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the Singapore International Arbitration Centre (SIAC) and comparable institutions vest broad procedural authority in tribunals. None of this is new.

What is new is the scale and urgency of the problem. In a large dispute with a terabyte record, the passive receipt of whatever parties choose to submit is not a neutral procedural choice. It is an abdication of the tribunal's responsibility to ensure that the dispute resolution process functions effectively.

The counterargument deserves to be taken seriously. Parties to arbitration are autonomous actors who bear responsibility for the manner in which they present their case. If a party chooses to submit thousands of documents without properly guiding the tribunal as to where it should look and why, that is a strategic choice – and its consequences, including the risk that the tribunal fails to find the probative needle in the documentary haystack, fall on the party that made it. Tribunal intervention, on this account, risks distorting the adversarial process and creating due process exposure that prudent arbitrators rightly seek to avoid.

There is something to this view. Party autonomy is not merely a procedural convenience in international arbitration; it is a constitutive value of the system. And the due process concern is real: an arbitrator who imposes documentary limits risks a losing party arguing, on the way to annulment proceedings, that its right to present its case was impaired.

But the argument proves too much. A tribunal's responsibility is not simply to provide a neutral arena in which parties deploy whatever evidentiary strategy they choose. It is to administer justice – and that function carries with it a duty to ensure that the process is capable of reaching the facts. A party that buries a probative document in a ten-thousand-page bundle has not assisted the tribunal in finding the truth; it has transferred to the tribunal a curation burden that was always the party's own to discharge. Permitting this transfer is not neutrality. It is a form of institutional abdication dressed as procedural deference.

The contrast with domestic court litigation is instructive, though it should not be overstated. Construction disputes that reach state courts – including technically complex, document-intensive ones – do not routinely generate evidentiary records of the scale common in international arbitration. The difference is not the nature of the disputes. It is the culture of the forum. Domestic judges exercise their case management authority with a directness and confidence that is sometimes absent in arbitral tribunals and they do so without routinely generating the due process challenges that arbitrators fear. The lesson is not that arbitration should replicate domestic litigation. It is that the exercise of legitimate procedural authority is compatible with due process; indeed, it is one of its requirements. A process that cannot manage its own evidentiary record is not protecting the parties' right to be heard. It is simply failing to function.

The practical implications are not radical. Tribunals should establish documentary management protocols at the first procedural conference. Parties should be required, when producing documents, to articulate not merely their relevance but their probative value – the specific fact in issue they are said to prove or disprove. Hearing bundles should be subject to document or page limits, with exceptions available on reasoned application. Parties should be required, in advance of the hearing, to identify the specific documents they intend to rely upon in oral submissions.

None of this prevents parties from maintaining comprehensive document repositories for their own reference. None of it prevents the tribunal from requesting additional documents if it considers them necessary. What it does is shift the burden: instead of tribunals sifting through everything parties choose to submit, parties must do the intellectual work of identifying what is genuinely probative – what is the best evidence to support their case as opposed to all the evidence available for that purpose.

A note on civil law and common law

The civil law/common law divide is frequently invoked in discussions of evidence in international arbitration. Civil law tribunals are said to be more comfortable with an inquisitorial model; common law advocates are said to be more accustomed to comprehensive document disclosure. There is some descriptive truth to this.

But the framing obscures more than it reveals. The habits of over-production characteristic of common law practice and the habits of under-production sometimes seen in civil law practice both fail in the context of large disputes. The real divide is cultural rather than jurisdictional, and international arbitration, at its best, draws on both traditions. A tribunal with the confidence to exercise its procedural authority – to demand less when parties offer too much and to request more when parties have withheld genuinely probative material – serves the process better than a tribunal that passively receives whatever arrives.

> *At the first procedural conference, the tribunal should issue a documentary management order*

Turning principle into practice: mechanisms and enforcement

Identifying the tribunal's institutional responsibility is a necessary first step. But it immediately raises two harder questions: precisely how should a tribunal exercise its authority, and what happens when parties do not comply?

On the first question, the answer lies in graduated procedural architecture. At the first procedural conference, the tribunal should issue a documentary management order that does three things: establishes the categories of documents parties may produce without leave; sets a default limit on hearing bundle size; and – most importantly – requires each document submitted to be accompanied by a brief statement identifying the specific fact in issue it is said to prove or disprove. This last requirement is the most transformative. It forces advocates to perform the intellectual work of curation before submission. A party that cannot articulate what a document proves has no business submitting it.

Beyond this foundational order, tribunals have a range of further tools: hearing bundle protocols issued well in advance of the hearing, with genuine page or document limits and a procedure requiring leave to exceed them; bifurcation or phased hearings that confine the documentary record for each module to what is genuinely relevant to the issues in that phase; and strict annexure limits on witness statements and expert reports, which are the primary vehicles through which documentary inflation enters the record.

On the second question – non-compliance – the position is more demanding. Tribunals are understandably reluctant to exclude documents, fearing that a losing party will raise due process objections on the way to annulment proceedings. But this concern, while real, is frequently overstated. Due process requires that parties have a fair opportunity to present their case. It does not guarantee the right to present it in whatever manner the party chooses, regardless of the tribunal's procedural orders. A party that submits 3,000 documents in defiance of a 500-document limit has had its opportunity. It chose to exercise that opportunity in breach of the tribunal's order. The tribunal may properly decline to admit the excess.

Costs sanctions and, in appropriate cases, adverse inferences are also available. Where a party's conduct appears designed to obscure rather than illuminate – to bury an inconvenient document in a 1,000-page bundle rather than present probative evidence transparently – that conduct is itself a form of evidentiary manipulation that the tribunal may address.

The deepest practical challenge is the epistemic one. Presented with a 1,000-page bundle, how can a tribunal determine whether document 347 is genuinely probative without reading all 1,000 pages? The answer, in most cases, is that it cannot – and this is precisely the structural function of the oversized bundle. It transfers the curation burden from the submitting party to the tribunal. The solution is not for tribunals to read faster. It is for tribunals to require, in advance of the hearing, structured reliance schedules identifying each document, the witness or submission in which it will be used and the fact it is said to prove. Parties that cannot complete this exercise have not curated their record. Tribunals that receive it have a navigational framework that makes the bundle manageable. The presumption shifts: a document not identified in a reliance schedule carries no weight by default and the party wishing to rely on it must seek leave.

Conclusion

The record management crisis in construction arbitration will not be solved by better technology or by more sophisticated document management platforms. It will be solved when tribunals are willing to exercise the authority they already possess: to impose meaningful documentary discipline from the outset of proceedings; to require parties to identify their best evidence rather than submit all their evidence; and to insist that the project record, as presented in arbitration, reflects genuine probative value rather than mere volume.

More is not necessarily better. That principle is not controversial in the abstract. The challenge is to translate it into procedural practice. Tribunals are the institution best placed to do so. The question is whether they are willing.

Note

1 Queen Mary University of London, *International Arbitration Survey: Driving Efficiency in International Construction Disputes* (2019).

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FEATURE ARTICLE

Paradox of two wrongs: examining the unmentioned implications of the Supreme Court decision in *Providence v Hexagon*

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When does a cured default stop being a 'wrong' – and should it still count towards a contractor's right to terminate for repeat late payment under the Joint Contract Tribunal (JCT)'s standard form contractual clauses? The JCT has a suite of contractual clauses used in construction projects that allocate design, time, payment and risk. The article argues that the recent Supreme Court decision of *Providence Building Services Ltd v Hexagon Housing Association Ltd*,[1] that concerns the interpretation of clauses 8.9.3 and 8.9.4 jointly, has given rise to a paradox concerning repeated wrongs. This article seeks to analyse the recently published judgment, while simultaneously unpacking the paradox for an international audience.

Introduction[1]

If someone has done a wrong to you but corrected that wrong within X amount of time in which you said, 'if you do not correct the wrong within X amount of time our friendship is over', is that wrong still technically a *wrong*? Perhaps in the context of a friendship spat one might be inclined to say yes to the question, but in the context of construction law things get a little trickier.

In the recent Supreme Court judgment of *Providence v Hexagon*, an analogous question arose in the context of 'a short point of contractual interpretation' on the 2016 edition of the JCT Design and Build Contract, which affects the most recently published 2024 version whose wording of the termination clause is identical to that of the 2016 version.[2] The key question was whether a right to terminate under clause 8.9.3 *must* first have accrued before a contractor has any right to terminate under clause 8.9.4.

> 'If a specified default or a specified suspension event continues for 28 days from the receipt of notice under clause 8.9.1 or 8.9.2, the Contractor may on, or within 21 days from, the expiry of that 28 day period by a further notice to the Employer terminate the Contractor's employment under this Contract.'[3]
>
> Clause 8.9.3

> 'If the Contractor for any reason does not give the further notice referred to in clause 8.9.3, but (whether previously repeated or not): [...] the Employer repeats a specified default [...] then, upon or within 28 days after such repetition, the Contractor may by notice to the Employer terminate the Contractor's employment under this Contract.'[4]
>
> Clause 8.9.4

Clause 8.9.3 embodies what in practice is known as the right to cure principle. Under clause 8.9.3, a period of 28 days is provided to remedy any default in payment by the Employer. This period of 28 days is to be counted from the day on which the Contractor gives a notice to the Employer specifying the default of payment. A notice requirement is stipulated by clause 8.9.1 of the JCT[5] (and the parties') contract, acting as a precondition for the Contractor to seek termination rights under clauses 8.9.3 and 8.9.4. Under clause 8.9.3, the word 'continues' is important, as it implies that the default must be ongoing and unremedied at the 28-day mark.

Meanwhile, clause 8.9.4 governs situations where the Contractor had the choice to serve a notice as per clause 8.9.1 and 8.9.3 but chooses not to. The phrase 'for any reason' qualifies such situations and is one which the High Court and Court of Appeal disagreed on in terms of interpretation and implication.[6] The issue subsisted in the Supreme Court: namely whether 'for any reason' was 'broad enough to catch a case where the reason why the further notice may not be given is that there is no accrued right to give it'.[7]

Turning to the facts of the case, the dispute concerns two payment defaults that occurred in a contract for construction works in Purley, valued at approximately £7.2m. The contract was entered into in February 2019 between Providence Building Services (Contractor) and Hexagon Housing Association (Employer). The timeline of the two payment defaults is illustrated in Table 1.

Event	Date	Amount	Action
Payment due	15 December 2022	£264,242.55	Hexagon fails to pay
Notice served	16 December 2022	—	Providence serves Notice of Specified Default under clause 8.9.1
Cure period begins	16 December 2022	—	28-day clock starts ticking
Payment made	29 December 2022	£264,242.55	Hexagon pays within 28 days (13 days after notice)
Termination right	—	—	No right to terminate under clause 8.9.3 accrues (default was remedied in time)

Table 1 First default (occurring in December 2022)

Event	Date	Amount	Action
Payment due	17 May 2023	£365,812.22	Hexagon fails to pay again
Notice served	18 May 2023	—	Providence serves Notice of Termination under clause 8.9.4 (instead of 8.9.3)

Table 2 Second default (occurring in May 2023)

The first default illustrates Hexagon exercising its right to cure – the 28 days given to it under clause 8.9.3 – and nothing controversial occurs until the second default.

This time, however, Providence sought to immediately terminate the contract under clause 8.9.4, arguing that this second default amounted to a repeated and continued specified default[8] since Hexagon paid late in December and was now late again in May. This was done without notice and without needing to wait another 28 days, since Providence argued that clause 8.9.4 provides a basis for contractual termination independent of clauses 8.9.1 and 8.9.3. In response, Hexagon maintained that the first default does not count as a 'repeat' default for the purposes of clause 8.9.4 since it had been cured.

The saga stretched across several levels of the court. The High Court sided with Hexagon, the Employer, on the basis that the natural and ordinary meaning of clauses 8.9.3 and 8.9.4 in context was that a clause 8.9.3 notice could have been provided but was not, for whatever reason.[9] The High Court was not persuaded by arguments in the theme of 'harsh and uncommercial' implications – for example, that the Employer could make a payment 27 days late but still within the 28 day time window and so avoid the Contractor being able to terminate.[10]

The Court of Appeal, however, sided with Providence, the Contractor. It found that a right to terminate under clause 8.9.3 need not have accrued as a prerequisite for triggering termination rights under clause 8.9.4. The 'for any reason' clause upon textual interpretation was broad enough to encompass a situation where no right under clause 8.9.3 had accrued. The conclusion was that the second default amounted to a repeated and continued specified default.[11] However, the Court of Appeal was similarly not persuaded by arguments in the theme of commercial commonsense, such as the Employer's argument that there is a 'battery' of other remedies for a contractor to counter cash flow difficulties created by an employer making late payments.

The Supreme Court, in its first published judgment of 2026, returned to side with the Employer, however, through an approach to interpretation that is more dynamic of both clauses than that of the High Court. While the High Court interpreted clause 8.9.3 in a 'straightforward' way before turning to clause 8.9.4, interpreting both clauses as two subsequent and isolated steps,[12] the Supreme Court read clause 8.9.4 as 'parasitic' on clause 8.9.3.[13] The Supreme Court put this in another way: 'it is only if the Employer has failed to cure any earlier specified default within 28 days that the Contractor can terminate for a repetition of the specified default'.[14]

Interestingly, Lord Burrows, with whom the other judges agreed, hypothesised several reasons for the Contractor not exercising its earlier right to terminate. In Lord Burrows' words:

> 'It may have been, for example, that the late payment was made by the Employer, albeit after the 28 days allowed for cure, and the Contractor exercised the choice to accept that payment and to continue with the contract; or the Contractor may have inadvertently failed to exercise its right to give the further notice of termination. The precise reason why the Contractor failed to give the further notice to terminate is not significant because the words "for any reason does not give the further notice [to terminate]" clearly cover all possible reasons.'[15]

Although Lord Burrows was careful at the end not to dilute the 'for any reason' broad wording, the paragraph itself implicitly presses the significance of a contractor providing a notice that corresponds to the 'specified default'. In other words, this approach of interpretation that makes clause 8.9.4 dependant on clause 8.9.3 would mean that every particular employer default must be responded to a contractor's own particular notice, heightening the duty on contractors.

The courts, although exercising pure interpretation, would inevitably create commercial implications that benefit one group over another in the same industry, here the Employer over the contractor. In the author's view, the method of reasoning at each level veils a deeper analytical framework. The courts express a leaning towards a certain commercial reality without falling foul of the orthodox canons of English contract law interpretation that focus on the words used by the parties in the contract and express a caution towards placing weight on commercial sense.[16] The Supreme Court's dynamic approach to interpretation may have further explored implications for further standard form contracts, both in the UK and, on the basis of the prominence of English law, outside (if the UK Supreme Court's dynamic interpretation influences the reasoning of other courts – for example, in Commonwealth jurisdictions such as Malaysia, Singapore or Hong Kong).

The remainder of this article will be dedicated towards these unexplored implications, beginning with what a 'wrong' is in light of how the Supreme Court resolved this paradox.

Paradox of wrongs and canons of interpretation

The Supreme Court has now ruled conclusively that an interpretation which allows the contractor to walk out the door after two breaches, in this sense of 'repeated', would result in an 'extreme outcome'.[17] Lord Burrows explained what this could entail if taken to the extreme:

> 'It would mean that any breach by late payment (provided a specified notice of default were given by the Contractor), if repeated by any subsequent late payment, would entitle the Contractor to terminate the contract. For example, if the Employer made two late payments, each being made one day late, the Contractor, on this interpretation, would be entitled to serve a notice terminating the contract (provided a specified default notice had been served in respect of the first late payment). That might be thought to provide a sledgehammer to crack a nut.'[18]

A sledgehammer being used to crack a nut does connote an overly disproportionate response on the part of the contractor. Yet, although the result is concluded, it cannot be denied that this case left a philosophical question lingering: is a corrected wrong still a wrong? Returning to the facts, it sounds right to say that the 'wrong' existed at a point in time, in the 13 days in which Hexagon had not corrected its first default. However, Hexagon was acting within the 28-day time-limit it was given. In other words, there was no 'wrong' in this second sense of failing to abide by an obligation.

Since this obligation is only 'activated' by the issuance of a notice under clause 8.9.1 and its subject matter contained in clause 8.9.3, it could be said that this is a new obligation that exists separately from the first default. Could it then be said that there were two separate wrongs? On this interpretation, the first wrong remains alive regardless of any measures to correct it and regardless of the success or failure of those measures. Alternatively, could it be said that the new obligation created by clauses 8.9.1 and 8.9.3 replaces the first wrong, as that is the 'logically sensible' way to interpret clause 8.9.3, as otherwise why have a clause governing the curing of a defect at all?

The Supreme Court sidestepped such philosophical arguments, putting forward what can be regarded now as a principled approach to the interpretation of standard forms. The Supreme Court revived the approach used by the High Court in first instance comparing the words used in clauses 8.9.3 and 8.9.4 with the words used in clauses 8.4.2 and 8.4.3 of the JCT. The inclusion of the words 'as a result of the ending of any specified default' in the clause 8.4.2 and 8.4.3 dynamic, which were absent in the clause 8.9.3. and 8.9.4 dynamic, was interpreted by Lord Burrows as 'there need be no previously accrued right to terminate'.[19] Lord Burrows also took this opportunity to note that Stuart-Smith LJ's reasoning in the Court of Appeal that looked at the words of clause 8.9.4 in isolation was mistaken.[20] The movement away from looking at words in isolation erodes the foundation of philosophical arguments like the paradox of two wrongs. The contextual comparisons internal to the JCT standard form bore more significance since it is 'the carefully considered product of the work of experienced construction professionals advised by expert lawyers'.[21] To clients, this suggests that any future disputes surrounding the interpretation of standard form contracts should begin by looking at structurally similar clauses in the standard form.

Obligation and right to cure

The facts of *Providence* present clause 9.8.3 as an obligation to cure, implied by the ticking-down clock before the 28-day period to cure is breached. The principles of the common law, however, had suggested that a legal *right* to cure exists as well. This refers to a contractual provision that gives the party in breach the opportunity to remedy or correct that breach within a specified time frame before the other party can exercise the more drastic termination or damages claim.

The right to cure is often relied upon by the contractor. In *Manor Co-Living Ltd v RY Construction Ltd*,[22] the employer purported to terminate the contractor's employment under clause 8.4.2 of the JCT Standard Building Contract 2016. The employer served a default notice giving 14 days to remedy, then denied the contractor access into the construction site. However, the notice was found to be invalid and thus the employer had terminated the contract before the cure period had expired.

In other jurisdictions, such as under New York law, the courts may imply a right to cure via notice before allowing termination, treating such a right as a natural incident of the contractual relationship.[23] This approach has been reinforced by 'right to repair' statutes enacted in numerous states – including California, Florida, Texas and Washington – which mandate that contractors be given notice and an opportunity to repair defective work before owners may terminate or pursue litigation.[24]

There are several rationales for the right to cure, including giving the contractor a chance to correct the problem before drastic action is taken, since the contractor may face cash flow issues and time is often the necessary solution to remedy the default. Meanwhile, termination could delay the project and increase cost, not just to the parties but to general economic efficiency which relies on these projects. In *East Empire Construction Inc v Borough Construction Group LLC*,[25] the Appellate Division held that right to cure provisions may only be bypassed in 'very limited and rare circumstances' – namely, where the other party expressly repudiates or abandons performance or where the breach is impossible to cure.

Arguably, the same policy considerations apply to employers. Thus, in theory there should be no difference since the right to cure should be mutually provided to maintain a close business relationship. Internationally used standard forms, such as FIDIC, recognise this. Structured parallelly, clause 6.2 of FIDIC Red Book 2017[26] provides that a contractor must first give 14 days' notice stating its intention to terminate and identifying those grounds.[27] If the employer does not remedy the breach within 14 days, the contractor may then issue a notice of termination, which takes effect when received.[28]

Similarly, the employer must first issue a 'notice to correct' under clause 15.1, specifying the failure and a reasonable time within which the contractor must remedy it.[29] Only if the contractor fails to correct may the employer proceed under clause 15.2 to issue a notice of intention to terminate (14 days), followed by a notice of termination if the default persists.[30]

The Supreme Court decision, although settled entirely as a matter of contractual interpretation, could be viewed in light of the ubiquity of the right to cure. If it is accepted that the second default by Hexagon is its own separate wrong, should it not deserve its own cure period? Had the Court of Appeal decision been affirmed instead, the employer who was now 'skating on thin ice'[31] would be assumed to have lost their right to cure through their own wrong. Would this be too much of an alignment of power in favour of contractors?

Moving forward: global industrial impact of the Supreme Court's interpretation

Clients would most likely be attracted by the UK apex court's approach to standard forms, with courts in Commonwealth jurisdiction at least potentially persuaded by the influential body. *Providence* has redirected attention to the fact that there are 'two types of standard form contract':

> 'In *A Schroeder Music Publishing Co Ltd v Macaulay (formerly Instone)* [1974] 1 WLR 1308, Lord Diplock helpfully distinguished between two types of standard form contract.

One type is a "take it or leave it" standard form used by a party with superior bargaining power. The other type is an industry-wide standard form that has been negotiated by representatives of contracting parties on both (or all) sides of a particular trade or industry. Lord Diplock gave as examples, bills of lading, charterparties and contracts of sale in the commodity markets. One can add the JCT standard form contract as a further example.'[32]

The paragraph ends by stating that in relation to such 'industry-wide standard form[s] [...] inequality of bargaining power is not a problem' and, citing Lord Diplock in *Macaulay*, it is to facilitate the conduct of trade. Thus, returning to our discussion on the policy behind the right to cure, the court may be less persuaded by arguments that seek to rebalance the power between employer and contractor. However, it is not impossible to argue that the obligation and right to cure exist to facilitate the conduct of trade.

Not every widely used standard form has a repeated breach provision. It is noteworthy that among JCT, FIDIC, NEC and EJCDC, it is only FIDIC which contains provision for immediate termination without notice. Under FIDIC, every breach requires fresh notice and a fresh 14-day cure period. Each default under FIDIC is a separate event requiring its own procedural compliance; no cumulative 'strikes' system operates.[33]

Similarly, under the NEC, which gives an employer 13 weeks before the contractor has the right to terminate, every fresh and separate breach must be allowed to run that 13 weeks.[34]

The Supreme Court decision could thus be said to place the contractual interpretation in JCT in line with the international standard form. While the Court of Appeal's reading of clause 8.9.4 would render it without a close comparator in other standard forms, and could perhaps from a marketing angle be attractive as a template clause, the Supreme Court ultimately tended towards balance of obligations between employer and contractor and, simultaneously, whether intended or not, harmonisation across standard forms.

Notes

1 *Providence Building Services Ltd v Hexagon Housing Association Ltd* [2026] UKSC 1.
2 *Ibid* [1].
3 JCT Design and Build Contract 2016, cl 8.9.3.
4 *Ibid* cl 8.9.4.
5 *Ibid* cl 8.9.1.
6 *Providence Building Services Ltd v Hexagon Housing Association Ltd* [2024] EWCA Civ 962 [16], [28] [34].
7 *Providence Building Services Ltd v Hexagon Housing Association Ltd* [2026] UKSC 1 [20].
8 *Ibid.*
9 *Providence Building Services Ltd v Hexagon Housing Association Ltd* [2023] EWHC 2965 (TCC) [16].
10 *Ibid* [23].
11 *Providence Building Services Ltd v Hexagon Housing Association Ltd* [2024] EWCA Civ 962 [31].
12 *Providence Building Services Ltd v Hexagon Housing Association Ltd* [2023] EWHC 2965 (TCC) [16] [18].
13 *Providence Building Services Ltd v Hexagon Housing Association Ltd* [2026] UKSC 1 [32].
14 *Ibid.*
15 *Ibid.*
16 *Arnold v Britton* [2015] UKSC 36.
17 *Providence Building Services Ltd v Hexagon Housing Association Ltd* [2026] UKSC 1 [32].
18 *Ibid.*
19 *Ibid* [37].
20 *Ibid* [36].
21 *Ibid* [37].
22 [2022] EWHC 279 (TCC).
23 Adams LeClair LLP, 'Notice of Default and Opportunity to Cure: Considerations and Limitations' (17 May 2023) https://adamsleclair.law/blog/notice-of-default-and-opportunity-to-cure-considerations-and-limitations-to-examine-when-a-contract-party-is-in-breach accessed 28 November 2025; see also *East Empire Construction Inc v Borough Construction Group LLC* (2021) 200 AD 3d 1, 156 NYS 3d 148 (NY App Div, 1st Dept).
24 See, eg, Cal Civ Code sections 895–945.5 (California Right to Repair Act); Fla Stat section 558.004 (Florida Construction Defect Statute); Tex Prop Code sections 27.001–27.007 (Texas Residential Construction Liability Act); Wash Rev Code section 64.50.020 (Washington Construction Defect Actions).
25 *East Empire Construction Inc v Borough Construction Group LLC* (2021) 200 AD 3d 1, 156 NYS 3d 148 (NY App Div, 1st Dept).
26 FIDIC, Conditions of Contract for Construction (2nd edn, 2017).
27 *Ibid* cl 16.2.2.
28 *Ibid.*
29 *Ibid* cl 15.1.
30 *Ibid* cl 15.2.
31 *Providence Building Services Ltd v Hexagon Housing Association Ltd* [2024] EWCA Civ 962 [41] [42].
32 *Providence Building Services Ltd v Hexagon Housing Association Ltd* [2026] UKSC 1 [25].
33 FIDIC, Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (2nd edn, 2017) cls 15.2.1–15.2.2 'If the Contractor fails to remedy the matter described in the notice within 14 days of receiving the notice, the Employer may by giving a second notice to the Contractor immediately terminate the Contract; for subparas (f)–(h) the first notice may itself immediately terminate.'
34 NEC4 Engineering and Construction Contract (2017) (UK/International).

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BOOK REVIEW

Major Issues in International Construction Law

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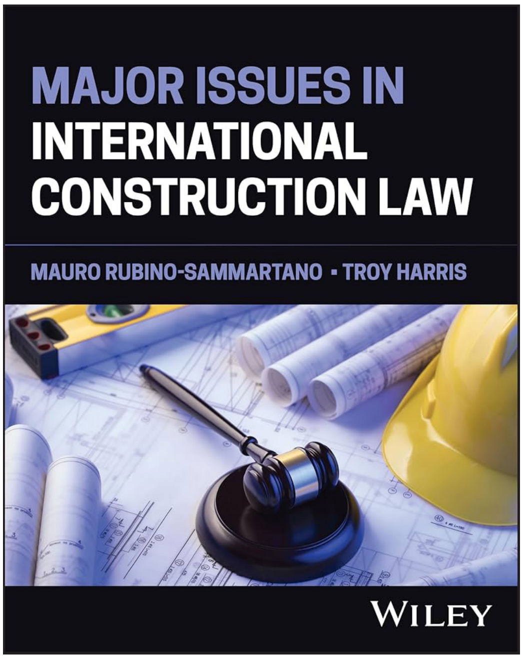

Mauro Rubino-Sammartano and Troy Harris have gathered an impressive group of construction law experts to offer a comprehensive, practitioner-led analysis of the project lifecycle, moving methodically from the embryonic stages of design and procurement through to the finality of dispute resolution.

One of the most compelling strengths of this volume is its editorial philosophy. By assembling a global roster of contributors, the text avoids the 'jurisdictional parochialism' that often plagues legal treatises. The contributors bring experience from both common law and civil law traditions, reflecting the reality of modern mega-projects where a London-based law firm might represent a Chinese state-owned enterprise building infrastructure in South America.

The book is structured to follow the project's chronological development. Early chapters provide a rigorous examination of project delivery methods. While many texts focus heavily on traditional design-bid-build models, this volume gives significant weight to public–private partnerships (PPPs), alliancing and turnkey contracts. This is particularly valuable given the rising popularity of collaborative contracting models that seek to move away from the adversarial 'claims culture' that has historically defined the industry.

The sections dedicated to payment security and contract parties are perhaps the most practical for the day-to-day practitioner. The editors delve into the nuances of payment structures – lump sum, cost-plus and unit pricing – while providing a vital deep dive into statutory holdbacks and liens. In an era where insolvency remains a constant threat in the supply chain, the focus on payment security and the roles of guarantors and banks is both timely and essential.

Furthermore, the book's treatment of insurance is a standout feature. By addressing builder's risk and general liability alongside the often-overlooked political risk, the authors acknowledge the external pressures that can derail a project regardless of engineering quality.

Perhaps the most significant contribution this book makes to the field is its emphasis on claim prevention. Rather than focusing solely on how to win an arbitration, the text advocates for 'paths to the prevention of claims'. The discussion on NEC-style early warnings, risk registers and design professional determinations reflects a modern shift in construction law toward proactive project management. It highlights that the most successful legal strategy is often the one that keeps the project out of the courtroom or the arbitral tribunal.

Major Issues in International Construction Law is more than just a collection of essays; it is a roadmap for the modern construction practitioner. Its succinct, practice-oriented summaries and 'key takeaways' at the start of each chapter make it accessible for busy professionals who need quick, reliable answers.

Construction Law International

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Articles should be submitted to **eric.franco@legaldelta.com**.

Articles/features should normally fall in the range of 3,000 and 4,000 words.

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

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

Endnotes are to be used for citations only. Footnotes are not used in this publication.

We welcome any graphs or other visual illustrations, including photographs that enhance the article.

The Editorial Board cannot guarantee publication. All contributions may be subject to evaluation by the Editorial Board prior to publication.

Updates can be up to 1,500 words, and should address a recent (from the past six months) court decision or change in local law of relevance to construction projects.

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