CONSTRUCTION LAW INTERNATIONAL

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

Vol 21 ISSUE 1 **ISSN 1819-1371** **MARCH 2026**

INTERNATIONAL BAR ASSOCIATION
the global voice of the legal profession

Mastering FIDIC in arbitration: understanding, expertise and the price of ignorance

Mexico overhauls its federal public works law to enhance efficiency, transparency and digital transformation

Pop goes the compute? Contracting data centres and navigating bubble trouble

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

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

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

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

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

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

The eyeWitness to Atrocities app is available to download for free on Android smartphones. For more information, visit **www.eyewitnessproject.org**, follow **@eyewitnessorg** on X, formerly Twitter, or **Facebook**, or watch the eyeWitness **YouTube channel**.

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A Committee publication from the IBA Energy, Environment, Natural Resources and Infrastructure Law Section

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Sagrada Família in Barcelona, Spain, under construction since 1882. The tower is planned to reach 172 m (570 ft) when completed in 2026.
Credit: olyasolodenko/Adobe Stock

FROM THE EDITORS

Dear readers,

We are delighted to introduce the March 2026 issue of *Construction Law International (CLInt)*.

This is the first issue we have worked on as Committee Editor and Deputy Committee Editor, respectively. We are glad to work with an Editorial Board composed of top-tier professionals committed to producing a magazine of the highest quality: Thayananthan Baskaran (Chair of the Editorial Board), 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.

We aim to continue delivering a truly international magazine with insightful reflections on construction law and projects from around the world, as well as legal news and updates. As you know, most of the authors who publish in *CLInt* are members of the IBA International Construction Projects Committee (ICP), and we would like to invite all professionals interested in sharing relevant content to submit quality material for consideration. Even though we will publish formal calls for articles, as we have always done, we accept submissions at any time, so it is easier for authors to consider publishing in *CLInt*. We also invite you to contact us directly with any recommendations or initiatives that could benefit *CLInt*.

This issue includes articles commenting on the reform of the Mexican Public Works Law and Related Services; a recent judicial development in India that is poised to reshape how India's renewable energy disputes are interpreted and resolved; the significant investments that are being undertaken in regard to AI data centres and the challenges they face; how arbitrating a FIDIC contract requires understanding of the FIDIC contractual system; and the 2026 revision of the new mandatory rules on warranty and defect notification under the Swiss Code of Obligations. Further, you will find a legal update about the recent enactment of the new Paraguayan Arbitration Law and a book review of the second edition of Dimitar Kondev's excellent book, *Multi-Party and Multi-Contract Construction Arbitration*.

We thank our contributors for sharing their experience and insights. As always, we encourage all ICP members and those interested in contributing to *CLInt* articles, legal updates and news to Eric Franco at eric.franco@legaldelta.com.

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FROM THE CO-CHAIRS

Dear members,

It is a great pleasure to welcome you to the International Construction Projects Committee of the International Bar Association during our term (2026–27). We are honoured to serve as your Co-Chairs and to work alongside such a distinguished, diverse and globally experienced community of practitioners.

The construction and infrastructure industry is entering a period of profound transition. Rapid technological advancement, the accelerating use of artificial intelligence, heightened ESG expectations, supply-chain disruption, geopolitical uncertainty, climate-driven regulation and increasingly complex risk allocation are reshaping how projects are conceived, financed, delivered and disputed. These developments present challenges, but also extraordinary opportunities for our industry and for the legal professionals who support it.

As lawyers, arbitrators, experts and advisors operating at the intersection of law, engineering, finance and policy, we have a responsibility to respond thoughtfully and proactively. The legal community plays a critical role not only in resolving disputes, but in helping projects succeed through better contracting, dispute avoidance, risk management and collaboration across disciplines and jurisdictions. No single practitioner, firm or jurisdiction has all the answers. Progress comes when we work together.

This is where the strength of the IBA, and this Committee in particular, truly lies. The IBA provides a unique global platform for meaningful dialogue, professional exchange and relationship-building across borders, legal traditions and generations. The connections formed here are enduring professional relationships that shape careers, influence practice and strengthen the industry as a whole. We strongly believe in the power and value of this network, and we encourage you to use it fully.

We are deeply grateful to our predecessors, Virginie and Julio, whose leadership, dedication and vision have built on the Committee's strong traditions. We are committed to carrying forward the standards of quality, inclusiveness and intellectual rigour that they championed.

Looking ahead, we intend to collaborate closely with other relevant IBA committees (especially SEERIL, our 'parent' section) to address cross-cutting issues that affect construction and infrastructure projects, from energy, ESG and finance to technology, diversity, dispute resolution and professional ethics. The challenges facing our industry do not exist in silos, and neither should our response.

Above all, this Committee is your platform. We look to our members and officers to contribute actively, to share insight and experience and to showcase their talents through the initiatives, publications, panels and projects we will develop together. Whether you are an established leader in the field or an emerging voice, your perspective matters.

We are always open to constructive ideas, fresh thinking and good suggestions. Our aim is to create an environment in which our members and officers can thrive, professionally, intellectually and personally, while contributing meaningfully to the evolution of international construction practice.

We very much look forward to working with you and to an exciting and productive term ahead.

With our warmest regards,

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

COUNTRY UPDATE: INDIA

CERC at the centre: India reasserts regulatory primacy

Gagan Anand
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As the energy sector evolves, the laws that govern it must evolve faster.

This observation aptly frames a recent judicial development that is poised to reshape how India's renewable energy disputes are interpreted and resolved. In November 2025, the High Court of Delhi delivered a judgment that has become a significant turning point for India's power sector dispute resolution landscape. In *ReNew Wind Energy (AP2) Pvt Ltd v Solar Energy Corporation of India*,[1] the Court held that disputes arising from power purchase agreements (PPAs), particularly in the renewable energy sector, must be resolved exclusively through the statutory mechanism established under the Electricity Act 2003.

The Court reaffirmed the central role of the Central Electricity Regulatory Commission (CERC) in adjudicating or referring such disputes and clarified that parties cannot bypass this framework by invoking civil courts under the Arbitration and Conciliation Act 1996. This ruling strengthens regulatory coherence and has significant implications for investors, developers, regulators and dispute resolution practitioners as India continues to expand its renewable energy sector.

Factual background

ReNew Wind Energy ('ReNew'), a major private wind power generator, entered into a PPA with Solar Energy Corporation of India (SECI), a Renewable Energy Implementing Agency (REIA) designated by the Ministry of New and Renewable Energy (MNRE) in 2018 for a 300 MW wind project located in Kutch, Gujarat. In May 2025, SECI alleged that ReNew had failed to meet its minimum energy supply obligation for the preceding year and, accordingly, signalled its intention to deduct corresponding amounts from future invoices. ReNew contested the allegation, asserting that the shortfall was attributable to events beyond its control and therefore covered by the force majeure clause provided in the signed PPA. In response to SECI's allegations, ReNew filed a petition with the High Court of Delhi under section 9 of the Arbitration and Conciliation Act 1996 seeking interim relief. The petition alleged that the arbitration clause in the signed PPA permitted recourse to the Court for such interim measures before the constitution of an arbitral tribunal.

The legal issue: applicability of section 9 of the Arbitration and Conciliation Act 1996 in a regulated sector

The central issue before the Court was whether a party to a PPA governed by the Electricity Act 2003 could seek interim protection under section 9 of the Arbitration and Conciliation Act 1996 without first approaching the CERC. SECI maintained that the Electricity Act 2003 provides a comprehensive mechanism for resolving disputes between generating companies and licensees. Under section 79(1)(f), the CERC has the authority either to adjudicate such disputes or refer them to arbitration. In addition, it was argued that this statutory framework excludes the jurisdiction of civil courts for interim or ancillary relief. ReNew, however, relied on the arbitration clause in the PPA and argued that the general provisions of the Arbitration Act, including section 9, remained fully applicable and could be availed to seek relief in the event of a dispute between the parties.

The Court's reasoning and decision

The Court accepted SECI's position and dismissed the petition as not maintainable. The Court reaffirmed that where a dedicated statute such as the Electricity Act 2003 prescribes a streamlined mechanism for dispute resolution, that mechanism shall prevail over the general provisions of the Arbitration and Conciliation Act 1996. The Court also emphasised that the CERC's authority under section 79(1)(f) includes not only the power to adjudicate the dispute but also the exclusive discretion to determine whether it should be referred to arbitration or not. The Court further observed that permitting parties to invoke section 9 of the Arbitration and Conciliation Act 1996 would undermine the statutory scheme by allowing them to circumvent the CERC and dilute the technical expertise that Parliament intended the CERC to provide. The Court therefore declined to grant interim protection and directed the petitioner to seek a remedy before the CERC.

Analysis and sectoral impact: a global shift towards regulatory-centric energy dispute resolution

This judgment reinforces a principle that is increasingly relevant in regulated sectors: contractual arbitration clauses cannot override statutory frameworks designed to ensure sectoral consistency and

technical oversight. In India's current power sector, the Electricity Act 2003 operates as a comprehensive code, regulating transmission, grid standards and dispute resolution. By reaffirming the exclusivity of the CERC's jurisdiction, the Court brought clarity to an area in which stakeholders and industry leaders had often sought to rely on general arbitration law to obtain quicker interim remedies.

In practice, this decision shifts the litigation and arbitration strategy for renewable energy developers. Section 9 of the Arbitration and Conciliation Act 1996 has traditionally been an effective tool to prevent immediate adverse financial consequences arising from deductions or other unilateral actions across different sectors. As that route is no longer available, developers are compelled to depend solely on regulatory mechanisms, which may not invariably provide immediate interim relief. Given the financial sensitivities of renewable projects, typically backed by long-term, non-escalating tariffs and project finance structures, even temporary cashflow interruptions may trigger financing risks.

As India continues to integrate large volumes of renewable energy into its grid, there is an urgent need for dedicated dispute resolution mechanisms in the electricity sector. Globally, this trend is reflected in various jurisdictions, including the United States, where the *PJM Interconnection, LLC v FERC* case[2] provides a notable example of how energy market disputes, particularly those concerning transmission and tariffs, are primarily within the purview of regulatory authorities, such as the Federal Energy Regulatory Commission (FERC). While this decision does not categorically establish that all such disputes must be resolved by the FERC rather than through civil litigation, it reinforces the notion that specialised regulatory bodies play a central role in addressing complex energy sector issues. Similarly, in other jurisdictions, such as the European Union, legal precedents confirm that energy market disputes, especially those related to tariffs, transmission, interconnections and regulatory compliance, are generally managed by dedicated regulatory authorities. These cases suggest a broader, cross-jurisdictional shift towards resolving energy-related matters within regulatory frameworks rather than through traditional civil or commercial litigation channels. This global alignment underscores the need for technical expertise and consistent regulatory frameworks to support long-term confidence and stability in the energy sector. In that sense, the *ReNew v SECI* judgment not only clarifies domestic legal positioning but also places India firmly within the international movement towards regulator-led dispute resolution in the energy transition era.

Taken together, these examples highlight a growing global consensus that regulatory authorities rather than courts are best equipped to handle specific energy market disputes. This emerging trend underscores the importance of regulatory governance in shaping the resolution of such issues across different legal systems.

Balancing innovation and regulation: CERC's critical role in energy reform

This decision also highlights the broader role of regulatory institutions in supporting national energy transition policies. India's commitment to expanding its renewable energy capacity depends not only on investors and technological capability but also on the stability of contractual and regulatory frameworks. By strongly affirming the jurisdiction of the CERC, the Court has reaffirmed and reinforced the institutional architecture that underpins India's renewable energy sector reforms. However, the decision also places additional responsibility on the CERC. As more renewable projects are commissioned and disputes increase, the CERC will need robust administrative capacity to ensure timely adjudication. Regulatory delay could undermine the very predictability and investor confidence that the current judgment seeks to reinforce.

Conclusion

The decision in *ReNew Wind Energy (AP2) Pvt Ltd v Solar Energy Corporation of India* serves as a significant marker in India's ongoing effort to harmonise contractual autonomy with statutory regulation in the renewable energy sector. For the international legal community observing India's regulatory evolution, this case illustrates the judiciary's commitment to preserving the integrity of specialised statutory mechanisms in industries where uniformity, technical expertise and public interest concerns are significant.

For legal practitioners, the judgment provides clear guidance for developing dispute strategies in the renewable energy sector and highlights that such strategies must be shaped with the understanding that the CERC is the exclusive entry point for arbitration and related relief. For policy-makers and investors, the ruling reaffirms the significance of strong, capable regulatory institutions in sustaining the momentum of India's clean energy transition.

As India continues to expand its renewable energy capacity and integrate complex grid-level technologies, the need for a harmonised regulatory and arbitration ecosystem becomes even more critical. This ruling represents a decisive step in that direction, fortifying the institutional backbone

of the sector, reducing the risk of fragmented adjudicatory pathways and enhancing investor confidence in the stability of India's energy market architecture.

Ultimately, the *ReNew v SECI* judgment contributes to a maturing regulatory landscape in which clarity, consistency and technical competence form the foundations of dispute resolution. It sets the stage for India's power sector to evolve in a manner that is not only legally robust but also aligned with global best practices governing modern energy systems.

Notes

1 *ReNew Wind Energy (AP2) Pvt Ltd v Solar Energy Corporation of India* (2025) SCC OnLine Del 8252.

2 *PJM Interconnection, LLC v FERC*, 915 F3d 1030 (DC Cir 2019).

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Aerial shot of Delhi metro station with solar panels being installed. Credit: Memories Over Mocha/Adobe Stock

COUNTRY UPDATE: PARAGUAY

New arbitration law: Paraguay

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On 23 December 2025, Law 7561 (the 'Arbitration Law') was published, revoking the previous Law 1879/2002 (the 'Arbitration and Mediation Law'), except for Articles 53–67 thereof, which govern mediation. The new law applies to private arbitration, both domestic and international, with its seat in Paraguay, and provides for specific rules on judicial assistance and judicial control, including – under defined circumstances – even where the seat is outside the country. This legislation constitutes a comprehensive update of Paraguay's arbitration regime, aligned with international standards inspired by the United Nations Commission on International Trade Law (UNCITRAL) Model Law, that strengthens the independence of arbitration, the arbitral tribunal's authority to rule on its own jurisdiction (*kompetenz-kompetenz*), the restriction of court intervention and overall procedural legal certainty.

The main developments introduced by the new law are set out below.

Disputes

The law allows any dispute involving pecuniary/economic interests and capable of settlement to be submitted to arbitration, excluding disputes arising out of individual employment relationships. It introduces succession arbitration by testamentary stipulation, admits professional sports arbitration – applicable until the issuance of the specific regulation contemplated in Law 2874/2006 – and allows the state, its entities and state-owned or state-participated companies to resort to arbitration in certain cases, always in the form of arbitration at law and subject to the principle of publicity.

Arbitration agreement

An arbitration agreement is valid if it is in writing in any form, including electronic communications. It may also be evidenced by an exchange of statement of claim and statement of defence that affirms its existence without being denied. In addition, the law recognises the valid receipt of electronic communications within the arbitral proceedings.

Prohibition of undue judicial interference

One of the most significant advances of the new regime is the express prohibition of undue judicial interference. Such interference is characterised as judicial misconduct, reaffirming the functional autonomy of the arbitral tribunal. Court intervention is permitted only in the cases expressly provided by law, including cooperation with interim measures, evidence practice and the enforcement of awards.

Transparency and procedural simplification

The law introduces innovations aimed at strengthening transparency and procedural simplification, including:

- the possibility of an express or implied waiver of arbitration;
- the extension of the arbitration agreement to non-signatories in cases of active participation or direct benefit;
- formal acceptance and constitution of the arbitral tribunal within set time limits, and the possibility of the tribunal reconsidering non-final decisions;
- the full or partial reimbursement of arbitrators' fees in cases of resignation, removal or annulment of the award; and
- the interruption of the statute of limitations for any right upon notification to the other party of the request for arbitration or upon filing with the agreed arbitral institution administering the arbitration.

Interim measures

The new regime expands the arbitral tribunal's powers to order interim measures directly, including measures to preserve the status quo, prevent imminent harm or ensure the effectiveness of the award. It recognises the possibility of requiring security (counter-security), as well as ordering ex parte measures (without notice) in duly justified urgent cases. Courts, for their part, must enforce the arbitration's interim decisions, without reviewing their merits or admitting opposition.

Annulment action

The arbitral award's effectiveness is reinforced, maintaining the annulment action as the sole means of challenge, with exhaustive

grounds subject to restrictive interpretation. A new ground for annulment is added for late issuance of the award, applicable only where the parties or the arbitration rules have expressly provided for it. In addition, the requirement of judicial recognition (exequatur) is eliminated for domestic awards, which may be enforced directly before the competent judge.

International arbitration

The law clarifies the criteria for international arbitration. It harmonises recognition and enforcement with applicable treaties, allowing the application of the most favourable rule for enforcement and, failing that, provides a specific domestic procedure with refusal grounds aligned with international standards.

Interpretative approach

The law expressly adopts an interpretative approach favourable to arbitration: in case of doubt, disputes must be resolved in favour of arbitration. Additionally, the law instructs interpreters to rely on general principles when the law is silent on the matter. This approach sets a limit for judicial intervention to that expressly provided for in the law.

Waive or limit the annulment action

The law also incorporates the possibility for the parties to waive the action for annulment entirely or limit it to specific reasons by express agreement when neither party is Paraguayan and neither has its domicile, residence or principal place of business in Paraguay. This preserves the autonomy of the parties in cross-border cases.

Conclusion

This new law approved a modern, digital and autonomous arbitration framework, geared towards effectiveness, institutional trust and predictability in dispute resolution. This positions Paraguay as a reliable and competitive seat for domestic and international arbitration by strengthening the autonomy of arbitral proceedings, limiting court intervention and prioritising the enforceability of arbitral awards, aligned with international standards.

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COUNTRY UPDATE: SWITZERLAND

Swiss construction law revision 2026: key changes for international projects

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How will the 2026 revision of Swiss law affect international construction projects? This article provides a practical overview of the new mandatory rules on warranty and defect notification under the Swiss Code of Obligations, highlighting the implications for contract drafting, risk allocation and dispute resolution. International contractors and employers should be aware of these changes to ensure compliance and avoid unexpected liabilities when working on projects governed by Swiss law.

Introduction

On 1 January 2026, a significant partial revision of the Swiss Code of Obligations came into effect, introducing important changes to the legal framework governing contracts of sale and work – changes that are particularly relevant for the construction and plant engineering sectors.

For international stakeholders, understanding these recent changes is essential, as Swiss law, frequently chosen for its neutrality, predictability and well-developed jurisprudence, often governs major infrastructure and construction contracts worldwide. Switzerland's stable legal environment and arbitration-friendly framework further enhance its appeal for cross-border construction and engineering projects.

This article provides a practical guide to the new Swiss warranty and defect notification rules introduced by the 2026 revision, with a focus on their implications for contract drafting, risk allocation and dispute resolution in construction and plant engineering projects.

Background and objectives of the revision

The 2026 revision of the Swiss Code of Obligations is the culmination of a lengthy legislative process aimed at modernising and improving the legal framework for contracts of sale and work, with a particular focus on the construction sector. The primary motivation for the revision was to strengthen the rights of buyers and employers (owners), who were often seen as disadvantaged under the previous regime, especially when it came to asserting claims for defects.

A key objective was to simplify and clarify the rules on defect notification. Under the old law, parties were required to provide notification of defects 'immediately', a standard that frequently led to uncertainty and disputes over whether claims had been made in time. The revision now introduces a clear 60-day notification period in many cases, providing greater legal certainty and reducing the risk of losing rights due to procedural missteps.[1]

The legislative process involved extensive consultation with industry stakeholders, legal experts and political representatives. While more far-reaching proposals, such as abolishing notification deadlines altogether or extending limitation periods, were considered, the final revision represents a balanced compromise. It balances the interests of employers with those of contractors and suppliers, aiming to enhance fairness and predictability without undermining legal certainty.

Overall, the revision aims to align Swiss contract law more closely with the practical needs of the construction and engineering sectors, making it more accessible and reliable for both domestic and international parties.

Key changes in warranty and defect notification

The 2026 revision introduces several important changes to Swiss contract law, particularly affecting warranty rights and the handling of defects in construction contracts.

Extended notification periods

One of the most significant changes introduced by the 2026 revision is the establishment of a clear 60-day period for providing notification of defects, replacing the previous requirement for notification 'immediately' or 'without undue delay'. This new rule applies to both contracts of sale and contracts for work, and is particularly relevant where goods or services are integrated into construction projects. The extended period gives parties more time to identify and report defects, thereby reducing the risk of losing warranty rights due to procedural delays.[2]

The statutory 60-day notice period for defects applies specifically to contracts for the sale of goods intended for incorporation into immovable works, contracts for the sale of property, contracts for works relating to immovable works, contracts for works involving movable items incorporated into immovable works that cause

defects and contracts for works produced by architects or engineers used as the basis for construction. For other contracts, such as those involving movable goods or works not incorporated into immovable works, the obligation to notify defects 'immediately' remains unchanged.

The 60-day notification period begins when the defect is discovered. Importantly, a defect is considered 'discovered' not only when the employer actually becomes aware of it but also when it should have been detected through proper inspection. Thus, both actual knowledge and grossly negligent ignorance can trigger the start of the period. The period for obvious defects begins upon acceptance of the work, while for hidden defects, it starts upon their discovery. However, notification must always be provided within the applicable limitation period for warranty claims. This means that if a defect is discovered shortly before the end of the limitation period, notification must still be provided before the limitation period expires, even if the 60 days have not yet elapsed. General contractors who are not themselves owners of the property can also rely on the extended period in their dealings with subcontractors.

It is important to note that this 60-day period is relatively mandatory: contractual agreements that seek to shorten the notification period to the detriment of the employer are invalid, though parties remain free to agree on a longer period if they wish, further enhancing protection for the employer.

This extension of the notification period significantly strengthens the position of employers, and takes into account the practical realities of complex construction projects, where defects may only become apparent after some time or following the installation of components. The new 60-day period gives all parties sufficient opportunity to carefully examine and report any defects, without the risk of prematurely losing their rights.

Mandatory free rectification

A cornerstone of the 2026 revision is the introduction of a non-waivable right to the free rectification of defects in buildings and other immovable works. Under the revised Swiss Code of Obligations, parties can no longer contractually exclude or limit this right in advance. This addresses previous practices where developers or contractors would exclude warranty rights, leaving employers with limited recourse in the event of defects.[3]

The new rule ensures that, whenever a defect arises in an immovable work, the contractor is obliged to remedy it at no cost to the employer. This protection applies regardless of whether the contract attempts to exclude or restrict the right to rectification; such clauses are now invalid.

Importantly, this right is mandatory for defects in buildings: it cannot be waived or limited by prior agreement. However, the law allows for a waiver only after a defect has been discovered and a dispute has arisen, reflecting the principle that parties should not be deprived of essential protections before they are aware of a problem.

Codification of case law on substitute performance

The 2026 revision brings welcome clarity to the right of substitute performance after acceptance of the work. Under the revised Swiss Code of Obligations, if the contractor fails to remedy a defect within a reasonable period, the employer is entitled to have the defect rectified by a third party and to claim the associated costs from the contractor, provided certain conditions are met.

This legislative change codifies well-established Swiss case law, which had already recognised the employer's right to substitute performance even after formal acceptance of the work.[4] Previously, the legal basis for this right was found in court decisions rather than in the statutory text, sometimes leading to uncertainty in practice.

To exercise this right, the employer must generally give the contractor an opportunity to remedy the defect within a reasonable time. Only if the contractor fails to act, or refuses to do so, may the employer proceed with substitute performance and seek reimbursement. The costs recoverable are limited to what would have been necessary for proper rectification by the contractor.

This change is particularly relevant for complex construction and plant engineering projects, where timely and effective remedies for defects are critical to project success.

Unwaivable five-year limitation period

Another major change introduced by the revision is the mandatory five-year warranty period for defects in immovable works, such as buildings and other structures permanently attached to the ground. This period is now strictly mandatory and cannot be contractually shortened to the detriment of the employer.[5] The aim is to provide greater certainty and protection for those commissioning construction projects, ensuring that claims for defects remain valid for a substantial period after completion. This extended limitation period is particularly important for complex projects, where certain defects may only become apparent several years after handover.

Practical implications for construction and plant engineering

The 2026 revision of Swiss contract law brings significant changes for construction and plant engineering projects, both domestically and internationally.

Contract negotiation and drafting

The new mandatory provisions require parties to carefully review and update their standard contract templates and internal procedures to ensure compliance and manage risk effectively. Clauses that previously limited defect notification periods, excluded free rectification or shortened warranty periods will no longer be enforceable. International contractors and employers should pay particular attention to these changes when negotiating contracts governed by Swiss law, as failure to adapt may result in unenforceable terms and unexpected liabilities.

Risk allocation

The strengthened rights of employers, especially the mandatory 60-day notification period and the non-waivable right to free rectification, shift the balance of risk in construction contracts. Contractors must be prepared for longer periods of potential liability and should adjust their project management and quality assurance processes accordingly. This may require enhanced documentation, more rigorous inspection procedures and proactive defect management throughout the project lifecycle.

Dispute resolution

The clearer rules on defect notification and warranty periods are likely to reduce disputes over procedural issues, such as whether a claim was made in time. However, parties should remain vigilant in documenting defects and maintaining transparent communications, as failure to comply with the new requirements can still result in the loss of rights. In practice, this means ensuring that all notifications are timely, detailed and properly archived. Effective record-keeping and prompt responses to identified defects will be essential to safeguard contractual entitlements because, as always, these fundamentals remain critical to avoiding unnecessary conflict and preserving your position.

International relevance

Given the widespread use of Swiss law in cross-border construction and engineering contracts, these changes will affect not only Swiss parties but also international stakeholders. Companies operating globally should ensure that their legal teams and contract managers are familiar with the new rules and adapt their practices to avoid unintended exposure or unenforceable contract terms. An awareness of these mandatory provisions is crucial for risk management and successful project delivery in an international context.

Transitional provisions

The revised provisions of the Swiss Code of Obligations apply only to contracts concluded on or after 1 January 2026. Earlier contracts remain governed by the previous legal framework, even if the new rules would be more favourable to a party.[6]

There are no special transitional rules; the law in force at the time of contract conclusion determines its content and validity. Mandatory rights or protections introduced by the revision do not retroactively affect existing agreements. For ongoing or long-term projects, it is crucial to determine which version of the law applies. Only contracts entered into from 1 January 2026 onwards benefit from the new protections and obligations.

However, there is an important exception: the new mandatory limitation periods also extend to contracts concluded under the previous regime where a shorter limitation period was agreed and had not yet expired as of 1 January 2026. This ensures that parties cannot circumvent the new protections by relying on previously agreed shorter limitation periods that have not yet expired.

Conclusion

The 2026 partial revision of the Swiss Code of Obligations marks a major step forward in modernising the legal framework for construction and plant engineering contracts. By introducing extended notification periods, mandatory rights to free rectification and unwaivable warranty periods, the new provisions strengthen the position of employers, while providing greater clarity and predictability for all parties.

For international stakeholders, these changes reinforce Switzerland's reputation as a reliable jurisdiction for cross-border construction projects. However, the mandatory nature of many provisions means parties must carefully review and update their contract templates and procedures to ensure compliance.

Ultimately, the revision enhances legal certainty and fairness in Swiss construction law, making it more accessible and attractive for international business. Practitioners and companies are well advised to familiarise themselves with the new rules and adapt their practices to take full advantage of the improved protections and clearer regulations now in force.

Notes

1 See Arts 201(1), 219a and 367(1bis) of the revised Swiss Code of Obligations (the 'revCO'), which govern the sale of goods integrated into immovable works, the sale of real property and works relating to immovable structures, respectively.

2 The revised 60-day period applies, in particular, under Arts 201(1), 219a, 367(1bis) and 370(4) of the revCO. See also Swiss Federal Supreme Court decision 4A_55/2012 of 31 July 2012, cons 5.1, which, under the former law, applied a seven-day period running from the time the defect became known.

3 Mandatory free rectification for defects affecting an immovable work is set out in Art 368 (2bis) of the revCO, which renders any contractual waiver agreed in advance invalid.

4 Substitute performance after acceptance is expressly incorporated via Art 368(2) sentence 2 of the revCO referring to Art 366(2) of the revCO. See also Swiss Federal Supreme Court decision 107 II 50 of 27 January 1981, cons 3.

5 See Art 371(2) of the revCO (five-year limitation for immovable works) and Art 371(3) sentence 1 of the revCO (prohibition of contractual shortening).

6 Pursuant to Arts 1–4 of the Final Title of the Swiss Civil Code, the revised warranty provisions apply exclusively to contracts concluded on or after 1 January 2026; earlier contracts remain governed by the previously applicable law.

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Aerial view of building under construction in Mexico City, Mexico. Credit: Erich Sacco/Adobe Stock

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Mexico overhauls its federal public works law to enhance efficiency, transparency and digital transformation

On 16 April 2025, the Mexican Government published a reform (the 'Reform') to the Public Works Law and Related Services (the 'Works Law') in the Federal Official Gazette (Diario Oficial de la Federación (DOF)). The President stated that the Reform seeks to enhance traceability, streamline procurement procedures and address corruption risks, secure more competitive pricing and strengthen domestic production chains. The Reform modernises public contracting processes and enhances oversight mechanisms for public works projects. Key changes include establishing a new digital contracting platform and imposing additional requirements on contractors and supervising authorities. Notably, the Reform introduces strategic dialogues between government entities and the private sector to improve project information-sharing and bolster more accurate bid submissions. The Reform also mandates market research to

promote transparency. However, it preserves the fundamental structure of the existing contracting procedure. This article highlights the Reform's principal amendments.

New platform

Mexico introduced the new Digital Platform of Public Procurement (the 'Platform') to facilitate public procurement procedures for public works and related services, as well as contract execution and management. The Platform offers free public access and serves as the exclusive channel for conducting contracting procedures. However, in limited circumstances, the Anti-Corruption and Good Governance Ministry (the 'Ministry') may authorise contracting procedures outside the Platform (Article 74).

The Platform collects information on public contracting, annual programmes, the electronic registry of individuals and legal entities, sanctioned contractors, calls for bidding and their amendments, minutes of clarifications, proposal submissions, contract awards, contract details and amendments, challenges, notices and other relevant data (Article 74 bis).

New features in the contracting procedure

Market research

Prior to the commencement of contracting procedures, agencies and entities shall conduct market research (Articles 24 bis and 1 ter).

Strategic dialogues

Before conducting market research and initiating the contracting procedure, agencies and state entities may hold strategic dialogues with interested parties in the relevant sector. Through these dialogues, agencies and entities will disclose the description and location of the public work or service, enabling interested parties to propose technical and economic considerations for the proposal. Strategic dialogues may last up to five calendar days (Article 26 bis).

Subsequent discount offers

Agencies and entities may request subsequent discount offers in public tenders and invitations to at least three participants to secure the best prices for the state. They must justify the use of this method and verify that sufficient competition exists before proceeding (Article 30).

Direct awards of contracts

If a procedure inviting at least three participants is declared void, the contracting officer in the agency or entity may directly award the contract, provided the requirements in the original invitation remain unchanged. Additionally, agencies and entities may directly award contracts for extraordinary work not covered by the scope of lump-sum contracts (Article 42).

Construction logbook

The construction logbook is mandatory for all public works and related services contracts. It must be prepared, managed and monitored through electronic communication. To facilitate this process, the Ministry will implement dedicated software (Article 52 bis).

The Reform establishes exceptions to the mandatory use of the electronic construction logbook in the following circumstances:

- technological difficulties at the worksite hinder the use of the electronic logbook;
- the works performed arise out of force majeure events;
- the use of the electronic logbook may compromise national security; and
- the agencies and state entities perform works and services on an ad hoc basis.

The Ministry and the audit office may access the logbook information when exercising their inspection, oversight and control powers (Article 52 ter).

The resident engineer

The area manager responsible for the project must appoint a public servant as the resident engineer, considering the candidate's expertise, skills and capacity to supervise,

monitor, control and review the work. The manager must also consider the candidate's academic qualifications, experience in administering and constructing works and providing services, professional development and familiarity with similar projects.

The site management office (*residencia*) may consist of one or more public servants appointed by the agency or entity, based on the characteristics, magnitude and complexity of the work or related service. Each resident will assume responsibility according to its speciality and will directly supervise, monitor, control and review the work, including approving contractors' work estimates.

The supervisor shares joint and several liability with the resident engineer(s) for the scope covered by its contract, including the authorisation of work contract estimates under its supervision (Article 53).

The Reform introduces strategic dialogues between government entities and the private sector to improve project information-sharing and bolster more accurate bid submissions

Work estimates

For unit price contracts, parties must prepare work estimates at intervals not exceeding one month. For lump-sum contracts, parties may agree to pay either upon completion of the entire work or upon completion of each main activity, as specified in the schedule of planned progress and payments.

Estimated payments authorised by the site management office do not constitute final acceptance of the work or payment, as they may remain subject to further review. Agencies and state entities retain the right to seek reimbursement for incomplete work, defective execution or overpayments (Article 54).

Original prices

Bidders must use the prevailing supply prices at the time of proposal submission and opening. They may not modify or replace these prices based on any fluctuations occurring between the submission or notification of acceptance and the last day of the month in which the proposal or notification was submitted.

For unit price contracts, agencies and entities may authorise an adjustment factor if they justify the need and the work begins more than 60 days after the proposal submission or notification of acceptance (Article 56).

Additional work

If additional quantities or items of work become necessary during execution, agencies and state entities may authorise payment estimates for the extra work before finalising the corresponding amendment agreements, provided these increases do not exceed the contract's authorised budget.

Agencies and entities must pay for additional quantities at the original unit prices agreed upon in the contract. For items not included in the contract's catalogue, parties must reconcile and authorise their unit prices before making any payment (Article 59).

Amendments of more than 50 per cent

If a contract modification increases or reduces the original contract amount or execution period by more than 50 per cent, the contractor may request from the agency or entity concerned an adjustment of indirect costs and financing within 15 calendar days from the date of physical acceptance of the work. During this period, the agency or entity may also request a downward adjustment of indirect costs and financing.

Once the period specified in the previous paragraph has expired, contractors may no longer request adjustments to indirect costs and financing, nor may the agency or entity seek downward adjustments (Article 59 bis).

New contractor after notification of the termination

Once the agency or state entity provides notification of the termination (*rescisión*), it may award a new contract to the bidder offering the most favourable terms. The agency or entity will focus on continuing and completing the remaining work or service, as specified in the detailed termination report (Article 61).

Conclusion

The Reform demonstrates the government's ongoing commitment to modernise and enhance transparency in public procurement. By introducing a centralised digital platform, an electronic construction logbook and new procedural rules for contract execution, the Reform signals a decisive move towards digital governance and greater accountability. Both contractors and public entities must now adjust their operations to meet these strengthened requirements, which, if effectively implemented, promise to streamline processes and bolster confidence in Mexico's public works contracting framework. From a practical perspective, the Reform will have significant operational implications for both contractors and public entities. Nonetheless, the Regulations to the Works Law have not been updated yet. The new Regulations must clarify aspects of the Platform, clarify the electronic construction logbook and specify how the revised procedures may impact the day-to-day procurement process, contract administration, compliance requirements or internal workflows.

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Pop goes the compute? Contracting data centres and navigating bubble trouble

In the second quarter of 2025 alone,[1] the seven big tech companies committed over $100bn towards artificial intelligence (AI) data centres, an amount exceeding the annual gross domestic product (GDP) of countries such as Croatia and Costa Rica.[2] Forecasts suggest that between 2025 and 2029, global capital deployment to AI data centres could reach $3tn.[3] The United States Energy Department estimates that data centres will account for an estimated 12 per cent of all electricity use by 2028.[4] The prevailing narrative suggests that this surge in investment is due to the explosive growth and interest in large language models (LLMs).[5] But hand-held case summaries and instant shopping lists are only part of the story. Rising demand and reliance on cloud-based solutions,[6] which remain a driver of computing demand, coupled with the strategic imperative to secure an advantageous position in harnessing AI's greater potential use cases, have driven corporations to build at a pace that assumes sustained, exponential demand for high-density processing.

Whether that anticipated demand will materialise is the key question. In the science, technology, engineering and mathematics (STEM) areas, the knowledge extracted from human data is rapidly approaching a limit:[7] the majority of high-quality data sources – those that can actually train an agent – have either been consumed or are about to be. As such, many in the space are predicting that a new source of data will be required. A possible source is where AI agents continually learn from their own experience, that is, data that is generated by the agent interacting with its environment. Without this progression, AI may simply exist to be an echo chamber of existing human knowledge, which will lead

to severe market overcapacity. If AI becomes a general feature of human life, it could establish its place as 'the most important technology that enables the most new products and innovation and value creation in history'.[8] Computing demand is likely to accelerate even beyond today's ambitious forecasts. However, as many are currently writing about, the mismatch between supply and demand for extensive computing could trigger a major correction resembling the post-dotcom crash of the early 2000s.

The opportunity for the industry lies in preparing for both potential scenarios. The choices made today in procurement strategy, contract design and risk allocation are likely to determine who thrives and who falls among the uncertainty.

Power and capacity

If the optimistic trajectory is realised, AI is likely to evolve into a general-purpose technology embedded in nearly every sector of the economy. A key potential check to this growth, apart from grid connectivity, is the mismatch between technological requirements and the capacity of existing data centre designs. This is particularly relevant as more facilities are being built for single-tenant use. Tenants are increasingly demanding enhanced power and cooling to support new generations of graphics processing units (GPUs).[9] For example, current GPUs designed for AI data centres can consume up to 200 kW per rack, over ten times the average, making upgrades to power and cooling infrastructure unavoidable.[10] Without the flexibility to adapt, tenants may choose not to renew leases for facilities that no longer meet their operational needs, exposing data centres to the risk of being under-occupied.

Adapting contracts for technological evolution

Traditional engineering, procurement and construction (EPC) and design & build models often struggle with variations triggered by evolving standards. A common challenge is determining whether requested upgrades fall within the scope of a valid variation.

Perhaps then, variation clauses should make explicit reference to upgrades that are likely to be required if AI growth accelerates. For example, parties could specifically address instances where an industry standard guideline is expected to evolve to accommodate higher cooling requirements than the existing design. Doing so would ensure that the variation was reasonably within the contemplation of both parties and is not materially different from the original contract. In addition, employers should consider updating their 'Employer's Requirements' by making it clear that the project should be designed and constructed with the latest standards and building sufficient redundancy to contemplate innovative future expansions. However, there is an inherent tension between the commercial reality of an employer's imperative to deliver the project to market swiftly while remaining abreast of technological advancements, and the fact that risk allocation in contracts is often determined by information available years prior. The contract clauses introduced to manage this often do so via the use of caps in the variation process to create a threshold (determined by *contractor* valuations of outstanding variations) which, once met, relieves the contractor of the obligation to agree to and implement a variation until a price for the variation is determined before commencing further critical variation work. This ends up creating a situation where a data centre developer may be held to ransom. If the employer does not agree, programme delay is all but unenforceable.

variation clauses should make explicit reference to upgrades that are likely to be required if AI growth accelerates

Where changes are material but do not fundamentally alter the nature of the data centre, such as the addition of an extra hall or an overhaul of the cooling system, these can usually be managed as variations under the main contract, provided the variation clause is drafted with sufficient foresight. However, issues are likely to arise when these upgrades have continual knock-on effects that result in multiple variations across the whole project. English case law, including *Cobalt v HMRC*,[11] indicates that only changes so fundamental as to create a different project altogether would require a new contract. So, to avoid the inefficiency and

risk of multiple piecemeal variations as technology advances, parties may prefer to structure the contract to allow for anticipated upgrades through a single, comprehensive variation or, for larger expansions, through a framework agreement. It operates as an umbrella contract, setting out the overarching commercial and legal terms that will govern future works, including risk allocation, pricing and performance standards. In a situation where capacity requirements increase, each new phase of expansion (eg, 20 MW–30 MW) can be called off. These call-offs can inherit the pre-agreed terms with the existing contractor, ensuring consistency and avoiding the need to renegotiate the fundamentals. By contrast, incremental or minor upgrades, such as minor improvements or efficiency tweaks, will still be managed as variations under the existing main contract. This approach balances flexibility with certainty because the employer can pause, accelerate or reshape the project in response to market demand or regulatory change without being trapped by the limitations of a single, rigid construction contract.

Supply chain challenges

Industry research in 2023 found that 93 per cent of operators had experienced supply chain challenges, with the most common being power and cooling systems.[12] Common bottlenecks involve the procurement of:

- generators (especially smaller gas turbines and diesel gensets);
- switchgear and transformers;
- cooling equipment (computer room air conditioner (CRAC)/computer room air handler (CRAH) units and chillers);
- specialised batteries and uninterruptible power supplies (UPS) systems; and
- high-capacity cables and busbars.

Demand for AI-ready facilities has driven lead times for custom components to double or more.[13] Supply chain difficulties have constrained employers' ability to scale up quickly enough to capture surging demand, leaving them exposed to lost revenue opportunities. One way to manage this is by combining early procurement with contractual flexibility. In cases where the contractor is responsible for the procurement, a pre-construction services agreement can be used to authorise the contractor to place binding orders for long-lead items, such as transformers, generators and chillers. Title to these items typically vests in the employer upon payment, with storage and insurance obligations clearly defined. Later, when demand materialises, the contract provides for the installation of such equipment at pre-agreed rates, avoiding delays and disputes. On the other hand, if the employer chooses to undertake the procurement itself, framework supply agreements provide a safety net. For instance, a framework agreement with multiple suppliers of critical components, such as GPUs, will enable a call-off from supplier A if supplier B slips, mitigating the risk of derailing the project by having to restart negotiations mid-project.

Innovations in construction materials

Beyond power and cooling, the materials used to build data centres are becoming a strategic lever. Hyperscale owners are now using bespoke, performance-based concretes that are tailored for each project. These concretes are not only helping to reduce carbon emissions but also making it easier to keep construction on schedule. By using AI to design the concrete mix, builders can achieve faster strength gains while using less cement, which is both more sustainable and cost-effective.[14] In parallel, the industry is starting to use three-dimensional (3D) printing for certain concrete parts of the building, both structural and non-structural. This technology can speed up the most critical activities, cut down on waste and make it easier to repeat successful designs across different sites. Together, these changes show a move away from buying standard, off-the-shelf materials towards using custom-made solutions. These innovations shift risk in ways contracts must address, particularly concerning intellectual property, data rights and performance-based specifications related to these digital concrete designs.

For employers, these innovations can mean more predictable construction timelines and the ability to meet sustainability targets on a large scale. For contractors and suppliers, however, this is a new and more complex area of competition, where expertise in materials science, digital technology and new building methods all come together, bringing with it new types of risk that must be managed in contracts.

Mitigating the risk of the bubble bursting

It is estimated that by 2030, employers will need to secure around $2tn to meet projected computing demand.[15] Employers typically fund only the initial development costs themselves, leaving the bulk of construction reliant on external financing. Most of this funding is from structured finance, where securities are backed by projected lease payments from tenants. Therefore, if a bubble bursts, leasebacked securities could lose their value, undermining project viability.

A contingency against mid-project cancellations is to adopt a staged procurement method, where a project would be broken into phases. For example:

- Stage 1: The process begins with a pre-construction services agreement, under which contractors are engaged to carry out design work and surveys.
- Stage 2: The parties might consider entering into an early works contract in respect of enabling works such as site preparation and connection to utilities.

Although this might take more time and effort, each stage would act as a decision gate, creating a pause before significant additional costs are sunk in case there is uncertainty as to the direction of the market.

Further, escrow arrangements could be layered into the structure. A payment escrow account can hold staged drawdowns of the contract sum, which are released only against contractual milestones. This could track the stages described above, so that if the project is cancelled midway, the contractor is paid for completed works and the employer recovers the balance. Compared to performance bonds, escrow accounts provide mutual protection for both the employer and contractor. In volatile markets, escrow offers a more balanced and transparent safeguard than bonds alone, but in practice, the two can be used together, where the bond acts as a backstop against outright default and escrow acts as a practical tool for managing the staged deployment of capital given the capital-heavy nature of escrows compared to performance bonds.

Another key contractual risk mitigation strategy involves negotiating a robust termination for convenience and suspension clauses. These clauses are critical in a volatile market because they provide a legal framework for pausing or cancelling projects if they are no longer commercially viable. From an employer's perspective, the consequences of such a termination might be capped at demobilisation costs plus a modest percentage of lost profit. Contractors, however, are likely to seek to recover their full investment, including tendering costs and all losses resulting from the termination, potentially including consequential loss. Increasingly, contractors are also attempting to make termination rights contingent on the payment of outstanding variation sums.

In volatile markets, escrow offers a more balanced and transparent safeguard than bonds alone

Designing for adaptability and repurposing

In a burst bubble scenario, data centres risk facing a surplus of capacity relative to actual computing demand. Put simply, tenants will have little incentive to maintain leases for facilities that provide far more processing power than they require. An effective risk mitigation strategy is to implement a hybrid data centre model, combining an AI-optimised facility with a traditional on-premises data centre for general server workloads and cloud integration. Instead of committing the entire facility to AI workloads, employers can design contracts and technical systems that allow parts of the data centres to be repurposed between different uses. This means structuring the main EPC or design & build contract with variation clauses that permit the reconfiguration of halls into mixed-density or colocation spaces when utilisation drops. These variations should be tied to objective triggers, for instance, a sustained utilisation below 50 per cent for a defined period, and priced against a pre-agreed schedule of rates. This ensures that downsizing capacity can be done quickly and transparently while avoiding disputes.

For larger shifts, such as converting an entire wing of a facility into a cloud hub or repurposing space for enterprise colocation, a safer route might be to use modular construction. This would allow the employer to issue a new call-off contract for the repurposing of a project, resetting scope, risk allocation and pricing without

stretching the original contract beyond recognition. This mitigates the legal risk of variation claims, while still giving the employer and operator the flexibility to adapt to market conditions.

Modular data centres consist of prefabricated elements built offsite and assembled onsite, offering a flexible alternative to traditional construction. Key components such as cooling and power systems can be customised, and employers can purchase modules in stages rather than committing to a full build upfront. This staged approach allows employers to match capacity to actual demand, reducing upfront capital expenditure and the risk of stranded assets if markets change. If demand slows, future module orders can be paused or cancelled without disrupting ongoing works; if demand rises, additional modules can be quickly deployed, avoiding the long lead times of conventional builds.

However, modular data centres are not suitable for every project. Extensive customisation or integration with existing hyperscale facilities can be technically challenging. Adding modules mid-project requires careful coordination because any defects or delivery delays can disrupt the overall schedule and raise complex questions about risk allocation. It is essential to clarify procurement responsibilities from the outset, specifying whether the contractor or employer is responsible for sourcing modules. Contracts should also address whether adding or removing modules counts as a variation, with clear terms for cost and time adjustments.

To manage these risks, construction contracts should explicitly reference modular data centres as pre-agreed options or permissible variations for technology upgrades, capacity changes or sustainability improvements. Embedding this flexibility in the contractual framework enables employers and operators to adapt to changing market conditions, while managing downside risks.

Conclusion

Ultimately, in a market defined by volatility as much as velocity, flexibility is the only durable edge. By embedding adaptive contracting, staged procurement and modular options from the outset, operators can capture the upside while containing the downside. The winners will be those who build for change, not for a single forecast.

The opinions expressed are those of the author and do not necessarily reflect the views of Vinson & Elkins or its clients. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

Notes

1 Nick Lichtenberg, 'Spending on AI Data Centers is so Massive that it's Taken a Bigger Chunk of GDP Growth than Shopping – and it Could Crash the American Economy' (Fortune, 6 August 2025) (original graph from Journalist X account) https://fortune.com/2025/08/06/data-center-artificial-intelligence-bubble-consumer-spending-economy/ accessed 27 January 2026.

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3 Michael Dempsey, 'What's the Big Deal About AI Data Centres?' (BBC News, 23 September 2025) www.bbc.co.uk/news/articles/ckg2ldpl9leo accessed 27 January 2026.

4 Debra K Rubin and Johanna Knapschaefer, 'Power Hungry: AI-Fueled Data Center Boom Sets Energy Delivery's New Course' (Engineering News-Record, 24 July 2025) www.enr.com/articles/61083-power-hungry-ai-fueled-data-center-boom-sets-energy-deliverys-new-course accessed 27 January 2026.

5 See, eg, ChatGPT, Google's Gemini and DeepSeek.

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8 Lily Mae Lazarus, 'It's Not Just Sam Altman Warning About an AI Bubble. Now Mark Zuckerberg Says a 'Collapse' is "Definitely a Possibility"' (Yahoo, 19 September 2025) https://finance.yahoo.com/news/not-just-sam-altman-warning-192543725.html accessed 27 January 2026.

9 GPUs are chips built to run thousands of small calculations at once. First used for rendering images and video, this parallelism now accelerates data centre tasks like AI and data analysis beyond what a central processing unit (CPU) – optimised for fewer, sequential tasks – can manage. High-end GPUs draw significant power and generate heat, so they are typically deployed in clusters with robust cooling and networking.

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11 See *Blue Circle Industries plc v Holland Dredging Co Ltd* (1987) 37 BLR 40 and *Cobalt Data Centre v HMRC* [2024] UKSC 40.

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13 Tom Dotan and Asa Fitch, 'Why the AI Industry's Thirst for New Data Centers Can't Be Satisfied' *The Wall Street Journal* (New York, 24 April 2024) www.wsj.com/tech/ai/why-the-ai-industrys-thirst-for-new-data-centers-cant-be-satisfied-93c7eff5?msockid=195fbda350db615206e5abf5516360e7 accessed 27 January 2026.

14 See www.enr.com/articles/print/61140-amrize-meta-partner-on-low-carbon-concrete-for-minnesota-data-center accessed 27 January 2026.

15 See www.moodys.com/web/en/us/insights/podcasts/behind-the-bonds/how-data-centers-are-defying-growth-risks.html accessed 27 January 2026.

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Mastering FIDIC in arbitration: understanding, expertise and the price of ignorance

Introduction

Arbitrating a FIDIC contract requires far more than general experience in construction disputes. It demands a nuanced understanding of the FIDIC contractual system, its procedural sequence and the role each actor plays within the structure designed by FIDIC.

Although FIDIC contracts appear to be standardised templates, in practice, each signed and formalised FIDIC contract constitutes a legal and technical ecosystem that requires a full understanding of what is inside each contract.

When knowledge, understanding and mastery are missing from arbitrators, counsel or experts, the arbitration becomes obscure and unbalanced, the FIDIC principles are misapplied and the party with more strategic skills ends up influencing the outcome disproportionately, whose end may be an inappropriate award.

This article briefly examines the main features of FIDIC disputes, the risks that arise when participants are not familiar with the system and cases where one party uses its advanced strategies to twist the FIDIC principles in its favour, often without the other party or the tribunal realising it in time.

Contract disputes and construction arbitration

Construction projects generate disputes unlike any other type of commercial conflict. Claims develop while the project is ongoing, delays interact with design issues, variations overlap with access restrictions and cost overruns reflect multiple cumulative causes. Evidence relies on daily records and technical documentation that are rarely linear.

In arbitration, teams must reconstruct years of project activity using approved programmes, daily reports, site minutes, engineer's notes, instructions, change orders, laboratory tests, incurred costs and baseline schedules. This complexity demands arbitrators and lawyers who are not only technically strong but also able to read the dispute through the lens of the contractual model that governed the project.

When that construction model contract is a FIDIC contract, adhering to its procedural logic and entitlement methodology is essential.

FIDIC model contracts and their peculiarities

There is no such thing as a single, universal 'FIDIC contract'. FIDIC does not publish one standard model contract; instead, it offers several sets of General Conditions, each designed for different types of project delivery systems. These books reflect different approaches to design responsibility, risk allocation, pricing philosophy and the role of the engineer (when it has a role). Referring to 'the FIDIC contract' is therefore inaccurate. What exists is a family of contracts in which each book operates as a distinct contractual model.

I have met with colleagues around the world who have kindly shared with me their participation in the arbitration of FIDIC contracts, and when I ask them about the 'colour' of the book they are working with, they usually do not know and minimise this 'little detail', saying that 'it does not matter, it is FIDIC'.

The Red, Yellow and Silver Books are not simple variations distinguished by colour. They are fundamentally different legal and technical frameworks that assign responsibilities and risks in different ways. Understanding these distinctions is indispensable in any dispute and for any practitioner (including, most of all, arbitrators) because the entitlement logic, procedural requirements, obligations of the parties and valuation methods change significantly with each book.

Under the Red Book, the contract is based on an employer-designed project. The employer (or its engineer) is responsible for providing the design, while the contractor focuses on construction. This creates a risk structure centred on the employer's duty to provide timely and accurate information. Variations are common and valued through detailed measurement. Disputes in Red Book projects often arise from late drawings, discrepancies, access limitations or design errors: risks that belong to the employer. The engineer plays an active and essential role in supervising, administering, certifying and determining matters throughout the project.

When that construction model contract is a FIDIC contract, adhering to its procedural logic and entitlement methodology is essential

The Yellow Book operates under a completely different logic. Here, the contractor takes responsibility for the design and must deliver a functioning plant or system that meets performance requirements. With design responsibility transferred to the contractor, the risk profile changes dramatically. Performance tests, commissioning requirements and interface management become central issues. Variations are more limited and carry heavier consequences because they can affect design integration. In this model, disputes commonly arise from performance failures, deficiencies in design or problems during testing and commissioning. The engineer remains important, but the emphasis shifts towards approvals, performance verification and functional testing.

The Silver Book represents an even more stringent allocation of risk. It is used for engineering, procurement and construction (EPC)/turnkey projects in which the contractor assumes almost all risks: design, quantities, geotechnical conditions, interfaces, performance and delivery deadlines. The price and time are expected to remain fixed, and the contractual philosophy is that the contractor must deliver a complete, operating facility with

minimal intervention by the employer. Under the Silver Book, the engineer's traditional authority is greatly reduced, or may even be absent (the fact that it is an employer's representative is considered instead). The contract design intentionally limits the employer's involvement to avoid variations and scope changes. As a result, disputes frequently revolve around unforeseen conditions, the boundaries of the contractor's risk and the validity of claims in a system where adjustments are highly restricted.

These differences are not cosmetic. They fundamentally shape the parties' rights and obligations. Treating these books as interchangeable or assuming that all FIDIC contracts function under the same principles leads to serious errors in contract administration and, more critically, in arbitration.

A tribunal that analyses a Yellow Book dispute as if it were a Red Book project may incorrectly assign design responsibility, misinterpret risk allocation or apply valuation rules that do not correspond to the contract used. Likewise, attempting to apply Red Book logic to a Silver Book EPC model distorts the entire contractual structure because the Silver Book is built on an exceptional degree of risk transfer.

It is not uncommon for arbitrators around the world to accept any kind of disputes: from life sciences to corporate, including among all their cases, construction. For many arbitrators, accepting a construction dispute is a challenge because they do not know the industry and practices, including what FIDIC contracts are and mean in a construction dispute.

The problem of lack of knowledge of the FIDIC system: it is not only about the contract

One of the greatest challenges in FIDIC arbitration is that many lawyers, arbitrators and experts approach the contract as an isolated document rather than a coherent system. Understanding FIDIC requires more than reading individual clauses; it requires grasping the logic, intent and sequence that govern entitlement, notices, the engineer's or employer's representative's functions, dispute avoidance/adjudication board (DAAB) procedures and the valuation rules embedded in each book. When this systemic view is missing, claims are presented as if proving the facts and the damages were enough; notices are dismissed as trivialities; and expert analyses fail to align with the valuation methods mandated by the contract.

This lack of familiarity becomes particularly evident during hearings. Counsel immediately sense when arbitrators do not understand basic FIDIC mechanisms, especially when they ask questions that reveal uncertainty about notice triggers, the engineer's role or the sequencing of entitlement. The dynamic forces lawyers into the uncomfortable position of educating the tribunal while arguing their case, often prompting them to overexplain, alter their strategy or soften strong arguments to compensate for the tribunal's confusion. Expert reports may follow the same pattern, drifting away from the contract and towards general principles that do not reflect the parties' agreed framework.

Arbitrators, counsel and experts: a duty to know about FIDIC contracts

It is an ethical duty for arbitrators, counsel and experts to acknowledge when they lack sufficient knowledge of the FIDIC system and to disclose this to the parties before accepting an appointment.

FIDIC disputes operate under a specific procedural logic – notice regimes, engineer determinations, DAAB steps, entitlement sequencing and valuation methods – that cannot be improvised during the proceedings. Entering arbitration without this literacy risks more than personal embarrassment; it jeopardises procedural fairness, distorts the allocation of rights and burdens under the relevant FIDIC book and exposes the case to avoidable costs and delays. In high-value infrastructure disputes, the absence of FIDIC fluency among the tribunal and the parties' teams can lead to misapplied condition precedents, the admission of expert methodologies that contradict the contract and determinations that ignore the role and limits of the engineer or DAAB. The result is often years of litigation and millions of dollars in fees deployed around issues that should have been framed – or disposed of – early if the participants had understood the FIDIC framework from the outset.

Professional integrity demands transparency at the start: if an arbitrator, lawyer or expert does not speak the FIDIC language with confidence, they should disclose it, decline the engagement or undertake the necessary preparation before proceeding. In significant cases, parties deserve decision-makers and advisers who are competent in the specific contractual system governing their dispute; anything less places the procedure – and the outcome – at unnecessary risk.

Is FIDIC contract arbitration unique?

FIDIC arbitration requires not only a solid theoretical understanding of the FIDIC system but also practical knowledge of how these contracts operate on real projects. The combination of theory and practice is essential because FIDIC disputes follow a particular procedural logic that governs notices, entitlement, engineer determinations, DAAB steps, valuation methods and the sequencing of claims. When participants lack these foundations, they are unable to identify the correct procedures, do not follow the contractual pathways that create or extinguish rights and often misunderstand the evidence required to support entitlement under the specific FIDIC book. Practical experience – seeing how FIDIC mechanisms function day-to-day on live projects – is equally important because it allows counsel, arbitrators and experts to interpret contemporary records, understand the timing and meaning of instructions, recognise the implications of technical decisions and evaluate whether the parties complied with the procedural steps mandated by the contract. Without this dual literacy, the arbitration becomes vulnerable to mistakes that can distort the dispute, prolong the procedure, increase costs and ultimately put the integrity of the process at risk.

Specialised organisations: can they help for a better future in FIDIC arbitration?

Last year, the international construction and arbitration community responded to the growing complexity of FIDIC disputes by creating an organisation dedicated to promoting excellence among arbitrators who deal with FIDIC contracts.[1] This development is not accidental; it arises from the industry's clear demand for decision-makers who understand the contractual logic, risk allocation, procedural pathways and technical mechanisms unique to the FIDIC system.

This organisation encourages rigorous training, certification and peer recognition, helping to ensure that arbitrators deciding FIDIC cases possess both the theoretical foundations and practical experience required for fair and effective decision-making.

Its emergence marks an important step towards more professional and predictable dispute resolution. When arbitrators understand FIDIC deeply, parties can rely on arbitration as an efficient and trustworthy mechanism rather than fearing outcomes distorted by misunderstandings, procedural errors or misapplied principles. The trend towards specialised FIDIC arbitration expertise, therefore, enhances confidence in the process and reduces the chances of negative or unbalanced results that often arise when decision-makers are unfamiliar with the system.

if an arbitrator, lawyer or expert does not speak the FIDIC language with confidence, they should disclose it, decline the engagement or undertake the necessary preparation before proceeding

Conclusion

The quality and reliability of FIDIC arbitration depends fundamentally on the level of expertise brought to the process by arbitrators, counsel and experts. FIDIC is not a generic construction framework but a detailed contractual system with its own procedural logic, entitlement pathways and technical mechanisms. When those directing or participating in the arbitration do not fully understand this system, the dispute becomes vulnerable to misinterpretation, procedural errors and outcomes that fail to reflect the contract actually agreed by the parties. To avoid these distortions, parties must prioritise the appointment of professionals who possess real, demonstrable mastery of FIDIC's structure and who can navigate its requirements with precision.

The consequences of inadequate FIDIC knowledge are felt immediately in hearings. Tribunals unfamiliar with notices, sequencing

rules, the engineer's role, valuation methods or DAAB procedures generate uncertainty that forces counsel to shift their strategic focus away from the merits and towards basic education of the arbitrators. This dynamic weakens advocacy, distorts expectations, increases costs and reduces confidence in the arbitral process. By contrast, when specialised FIDIC arbitrators and practitioners handle the dispute, proceedings become more predictable, arguments are assessed within the proper contractual logic, and parties can trust that the outcome reflects both the facts and the contractual framework governing the project.

For this reason, parties should not only rely on specialists but also remain close to the organisations now emerging worldwide that promote excellence in FIDIC knowledge and training. Their work strengthens the global community of FIDIC-literate decision-makers and improves the quality of arbitral outcomes.

In high-value infrastructure conflicts, the message could not be clearer: if parties want fair, efficient and contract-faithful arbitration, they must entrust their disputes to professionals who truly speak the FIDIC language.

Note

1 International Construction Arbitrators Association www.intcaa.org/ accessed 27 January 2026.

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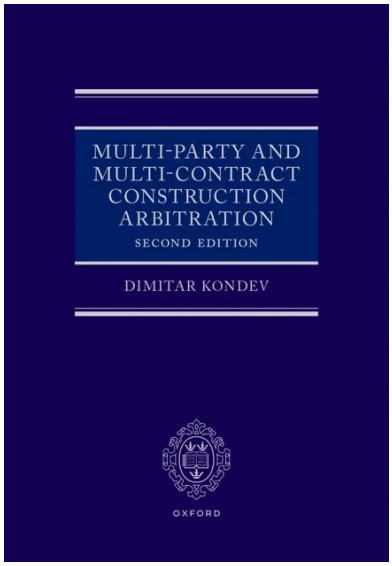
Multi-Party and Multi-Contract Construction Arbitration (2nd edn)

Author: Dimitar Kondev

Published by: Oxford University Press, 2025
ISBN: 978-0-19-286765-0
496 pages, £175
Publication date: 23 September 2025

Reviewed by Thayananthan Baskaran and Ng Faye Xiang



Multi-Party and Multi-Contract Construction Arbitration provides a comprehensive examination of the legal, procedural and contractual challenges arising from multi-party disputes in the construction sector. The book combines theoretical analysis with practical insight, and progresses from foundational concepts and terminology to a detailed examination of multi-party arbitration. It further undertakes a comparative analysis of institutional arbitration rules and national arbitration laws, and examines contractual solutions adopted in leading international standard forms of construction contracts. The later chapters propose jurisdictional, contractual and institutional reforms aimed at addressing structural limitations in existing frameworks.

This review focuses on Chapter 2, 'Multi-Party Arbitration in General', which offers an overview of the concept, procedures, advantages and practical difficulties of multi-party arbitration. Chapter 2 begins with a clear discussion of terminology, defining multi-party arbitration and distinguishing it from multi-contract arbitration. The author highlights that the terms multi-party arbitration and multi-contract arbitration are sometimes used interchangeably. While the terms may overlap, they are conceptually different. The chapter then outlines procedures relating to multi-party arbitration, including single requests against multiple parties, joinder, intervention and consolidation. These explanations are concise yet informative, providing readers with a practical understanding of how multi-party proceedings are initiated and managed. The requirements as to the application of each procedure are discussed in Chapters 4–6.

A central focus of Chapter 2 is the discussion of the advantages of multi-party arbitration, notably the avoidance of inconsistent findings; reduction in time and costs; and the minimisation of factual errors. These advantages are clearly articulated and grounded in procedural efficiency, demonstrating why multi-party arbitration is increasingly regarded as a desirable mechanism in complex construction disputes involving multiple participants and interrelated claims.

Chapter 2 also examines the principal obstacles to multi-party arbitration, with a particular emphasis on the consensual nature of arbitration; the traditional perception of arbitration as a bipartite process; and concerns relating to confidentiality, the setting aside of proceedings and the recognition and enforcement of arbitral awards. It further addresses practical difficulties inherent in multi-party arbitration. The author also considers scenarios where multi-party arbitration is not possible, offering a realistic perspective.

One of the key strengths of Chapter 2 is its balance between conceptual clarity and practical insight. The analysis is accessible

and well structured, and is grounded in references to institutional arbitration rules, relevant national arbitration laws and broader scholarly literature, reflecting the author's dual perspective as both a scholar and practitioner. By addressing both the advantages and challenges of multi-party arbitration, the chapter enables readers to assess its feasibility and implications in construction disputes in a measured and informed manner.

Overall, Chapter 2 makes a significant contribution by providing a foundational analysis of multi-party construction arbitration, and highlighting both its benefits and practical challenges. It establishes the analytical framework for the book's subsequent examination of construction-specific applications, institutional rules and contractual solutions, and responds to the increasing complexity of modern construction disputes. For practitioners involved in multi-party or multi-contract disputes, as well as academics seeking a clear conceptual overview, this book constitutes a concise, authoritative and highly useful resource.

Construction Law International

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Construction Law International

The publication of the IBA International Construction Projects Committee of the Energy, Environment, Natural Resources and Infrastructure Law Section (SEERIL)

MARCH 2026 Vol 21 Issue 1
ISSN 1819-1371
Citation (2026) 21(1) *CLInt*

International Bar Association
Events 2026

Conferences

February

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

UKELG - Evening Talk 2026
25 February

March

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

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

April

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

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

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

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

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

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

May

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

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

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

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

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

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

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

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

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

June

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

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

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

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

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

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

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

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

IBA European Fashion and Luxury Law Conference
8–9 July, Paris, France

IBA Judges Forum: In defence of justice
9–10 July, Abuja, Nigeria

IBA Law Firm Management Committee Academy for Leaders
27–30 July, King's College London, London, England

30th Annual Competition Conference
4–5 September, St Regis Florence, Italy

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

Webinars

Ending child marriage: legal obligations and global responses
13 February, 1500 – 1600 GMT

Nature and biodiversity as a new frontier of risk and opportunity for lawyers: launching the Nature-Intelligent Legal Services Toolkit
24 February, 1300 – 1400 GMT

Data centres and the energy sector: emerging risks and reliability challenges
18 March, 1200 – 1300 GMT

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