CONSTRUCTION LAW INTERNATIONAL

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

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Regulatory changes in Argentina that promote infrastructure investment

Expert evidence, damages and costs: a DIFC case law update

The Standing International Forum of Commercial Courts (SIFoCC)

International Bar Association
Events 2024

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AUGUST

The role of the courts in arbitration: an Asia Pacific perspective
28 August, Singapore

SEPTEMBER

28th Annual Competition Conference
6 – 7 September, St Regis Florence, Florence, Italy

IBA Arb40 Symposium
15 September, Centro Citibanamex, Mexico City, Mexico

Rule of Law Symposium 2024
20 September, Centro Citibanamex, Mexico City, Mexico

OCTOBER

IBA Private Equity Transactions Symposium 2024
17 October, The Savoy, London, England

Young Lawyers Private Equity Forum 2024
17 October, The Savoy, London, England

10th World Women Lawyers' Conference: Driving Change
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7 – 8 November, Excelsior Hotel Gallia, Milan, Italy

IBA Anti-Corruption Committee Asia Conference
11 – 12 November, Singapore

7th Annual IBA European Start-up Conference
13 November, Stockholm, Sweden

Building the Law Firm of the Future
21 November, The Law Society, London, England

14th IBA French-Italian Day
28 November, Automobile Club de France, Paris, France

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9th Annual Corporate Governance Conference
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4 – 6 December, Riu Plaza España, Madrid, Spain

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4 – 6 December, Leonardo Royal Hotel London
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bit.ly/IBAevents

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REGULARS

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Cover image: Aerial view of large highway in the city of Mendoza, Argentina. Credit: SobrevolandPatagonia /Adobe Stock

FROM THE CO-CHAIRS

Dear ICP Committee Members,

As Co-Chairs of the IBA International Construction Projects (ICP) Committee, we are pleased to share that 2024 has been an exciting year for the ICP. We held several compelling sessions on construction and infrastructure topics at our Working Weekend in Oxford in April, as well as at the IBA Annual Conference in Mexico City in September. We extend our sincere gratitude to all ICP members for their participation in these events, with a special thank you to the officers who have been committed and dedicated throughout this journey. Your insights, experiences, and contributions are what make our Committee such a dynamic and resourceful body.

At the IBA Annual Conference in Mexico City, we hosted seven panels: 'Design, bid, build: contracts on trial'; 'Mediation for construction disputes: is it successful? What does it take?' (in collaboration with the IBA Mediation Committee); 'How to financially secure a project'; 'Local customs and practices in the construction industry'; 'Seeing is believing: evidence-gathering through site visits in energy, mining, and construction arbitrations'; 'Dispute resolution clauses fit for a queen'; and 'Use of innovative technology in the construction industry'. We also had a highly successful ICP Committee dinner at Hacienda de los Morales in the beautiful Polanco area.

At our Open Business Meeting at the conclusion of the IBA Annual Conference in Mexico City, we celebrated the launch of the 2025 ICP Working Weekend, to be held in Rio de Janeiro, Brazil, in April 2025. The Working Weekend is limited to a select group of participants, traditionally capped at 60 members. The list is determined on a 'first come, first served' basis following the ICP Business Meeting at each year's IBA Annual Conference. For more information, please contact our dedicated information desk at icpwwrio@gmail.com.

Additionally, our Committee is organising the traditional ICP Conference in Milan from 27–29 March 2025, and we invite all members to actively participate in this special event. We look forward to seeing you there. For more details, visit this link: www.ibanet.org/conference-details/CONF2531.

The next IBA Annual Conference will take place in Toronto, Canada, from 2–7 November 2025. The ICP Committee will host five panels at the conference. If you plan to attend, please be sure to follow up on the expression of interest call, which will be sent to all ICP members in June 2025. When registering for the event, be sure to also sign up for the ICP dinner and the traditional ICP excursion.

As for our publication, Construction Law International (CLInt), it's fantastic to see so many of you contributing. We encourage you to continue submitting drafts to the CLInt editors – your contributions enrich our community and advance the field.

Thank you for your continued support and engagement.

Best wishes,

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FROM THE EDITORS

Dear readers,

We are delighted to introduce the November issue of Construction Law International (CLInt), after the highly successful International Bar Association Annual Conference in Mexico City.

This issue continues our FIDIC around the world series with a contribution from Egypt. We also have country updates from Brazil and the Netherlands.

We have a feature article on regulatory changes in Argentina to promote infrastructure investment as well as an article on expert evidence, damages and costs in the Dubai International Financial Centre.

We also have an interesting submission on the contributions made by the Standing International Forum of Commercial Courts since its founding eight years ago in 2016.

Further, we have feature articles on two topical issues: the international enforcement of adjudication decisions and risk allocation and management in subsea site investigations and installations of offshore wind farms.

Finally, we were delighted to review a collection of essays on hospitality and construction disputes post-Covid-19, which have been edited and compiled in a book.

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

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FIDIC AROUND THE WORLD

Egypt

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References to FIDIC clauses are references to the 1999 Red and Yellow Books, unless otherwise indicated.

1. What is your jurisdiction?
The Arab Republic of Egypt.

2. Are the FIDIC forms of contract used for projects constructed in your jurisdiction? If yes, which of the FIDIC forms are used, and for what types of projects?
Yes, the FIDIC forms of contract are used in construction projects in Egypt, particularly for mega, industrial and infrastructure projects. The most common forms used are the 1987 and 1999 editions of the Red and Yellow Books, and previously the 1977 Red Book. The Silver Book is used for engineering, procurement and construction (EPC) and turnkey projects. However, some limitations exist in cases where the New Procurement Law No 182 of 2018 (governing contracts concluded by public authorities) applies, and where the FIDIC clause incorporates common law concepts that are incompatible with the civil law system in Egypt.

FIDIC contracts have been used in the execution of the Cairo Metro project, the Damietta Port Development project, and the Kafr El-Sheikh Wastewater Treatment Plants, among others.

3. Does FIDIC produce forms of contract in the language of your jurisdiction? If not, what language do you use?
While FIDIC produces its suite of contract forms in Arabic, the English language is used more in Egypt given the international nature of the construction sector, which mostly involves foreign parties. Nonetheless, where a dispute is examined by a local court, all documentation shall be submitted in the Arabic language.

It is worth noting that the 2017 FIDIC contract forms are translated into five major languages, among which is the Arabic language.

4. Are any amendments required in order for the FIDIC Conditions of Contract to be operative in your jurisdiction? If yes, what amendments are required?
There are no specific amendments that are required for the FIDIC Conditions of Contract to be operative in Egypt. However, FIDIC conditions that conflict with rules enshrined in Egyptian legislation are automatically overridden by domestic provisions that include mandatory rules which parties cannot derogate by agreement.

5. Are any amendments common in your jurisdiction, albeit not required, in order for the FIDIC Conditions of Contract to be operative in your jurisdiction? If yes, what amendments are common in your jurisdiction?
FIDIC Conditions of Contract are frequently altered in favour of the employer. For example, the contract conditions are often amended to lump-sum (fixed price) so the employer avoids the risk of variation in the quantities, along with keeping fluctuation clauses that grant the contractor the right to adjust prices, whether upward or downward, to reflect changes in the cost of labour, materials or other costs.

It should be noted that Egyptian law grants additional rights not contemplated under the FIDIC Conditions of Contract. For instance, Article (662) of the Civil Code permits subcontractors to directly request the employer to pay outstanding amounts, to the extent that such amounts are payable by the main contractor at the time of the claim. The Civil Code also imposes strict liability on the contractor and the engineer in respect of defects arising in a building or structure for a period of ten years. This is called decennial liability and is a matter of public order.

6. Does your jurisdiction treat Sub-Clause 20.2.1 of the 2017 suite of FIDIC contracts as a condition precedent to employer and contractor claims?
The 2017 suite of FIDIC contracts are not yet commonly used in Egypt but, generally speaking, there are no clear court precedents and interpretations in this context, except in scholars' studies.

7. Are dispute boards used as an interim dispute resolution mechanism in your jurisdiction? If yes, how are dispute board decisions enforced in your jurisdiction?
Yes, dispute boards are used by parties in Egypt as an interim dispute resolution mechanism, following the Engineer's Determination. Although resorting to the dispute board is often a mandatory step prior to commencing arbitration proceedings, its decisions are not enforced in many instances. The dispute board model typically used in Egypt is the ad hoc Dispute Adjudication Board (DAB), rather than the standing DAB.

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

Yes, arbitration is widely used in construction disputes. Commonly, contracts provide for arbitration under the auspices of the International Chamber of Commerce (ICC) or the Cairo Regional Centre for International Commercial Arbitration (CRCICA). The seat of arbitration is Cairo in most cases.

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

Generally, Egyptian courts interpret provisions and articles set out in the Civil Code, or other legislations, applicable on construction matters but do not particularly tackle FIDIC clauses in terms of interpretation. Yet, a decision issued by the Cairo Court of Appeal in 2012 ruled that the non-compliance with the requirement to submit a claim to the engineer, prior to initiating arbitration proceedings, renders the claim inadmissible, being a procedural precondition agreed upon between the parties in the standard terms of the contract (Cairo Court of Appeal, Circuit (63) – Commercial, Appeal No 9 of 127 JY). This might be considered as an indirect reference and interpretation of the FIDIC conditions.

It is worth considering that the Egyptian Civil Code does not regulate in detail the role of the engineer, employer or the contractor, nor regulate issues related to claims procedures, extension of time, foreseeable and unforeseeable risks, etc. The provisions are rather generic in the Civil Code and, accordingly, courts have no specific approach in this respect.

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

Private contracts and public works contracts are subject to a different set of rules in Egypt; consequently the application of the FIDIC Conditions on each type differs in terms of limitations and amendments.

COUNTRY UPDATES: THE NETHERLANDS

Recent court decisions of relevance to construction projects

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Dutch Supreme Court, 12 January 2024, ECLI:NL:HR:2024:17 (Afzinkkelder-arrest)

In the case, decided by the Supreme Court at the beginning of 2024, there was damage to an adjacent property due to the construction of an immersion cellar. The adjacent property owner took the matter to court to request a declaratory decision (Article 3:302 BW). The plaintiff argued that their right to the full and unaffected enjoyment of their property was breached due to an unlawful act of the contractor, considering that the damage to their adjacent property was a foreseeable consequence. However, with reference to the legislative history of Article 6:162 of the Dutch Civil Code, the Supreme Court stated that damage to adjacent property does not create an infringement of the rights of the adjacent property owners just because the damage was foreseeable. An act, such as construction, can only be found to be unlawful if it is contrary to a standard of written or unwritten law that intends to prevent such property damage.

In their second argument, the plaintiffs relied upon the (broader) duty of care to argue that the contractor shall still be liable. The Supreme Court recognised that if the damage materialises, even if the construction work was carefully planned and correctly executed, it cannot be accepted that this is a liability the plaintiff must carry. The conclusion of the case was that the contractor was held liable, regardless of whether he had acted diligently, and had to pay a compensation to the affected neighbour. The Supreme Court stated that it was of importance in this case that (1) the construction was in the interest of the client of the contractor and that the plaintiffs had no interest in it; (2) the damage was beyond what a third party, according to generally accepted standards, should tolerate in the case of construction work carried out by a neighbour; and (3) that it was the contractor's responsibility to insure itself against liability for causing damage to third parties. This ruling is relevant because it takes into consideration the diligence of the contractor when carrying out the works.

Dutch Supreme Court, 9 February 2024, ECLI:NL:HR:2024:216

The frequent question of whether a property is a construction site for VAT purposes has significant financial relevance when a building is being sold. The Supreme Court decided that in the sale of an immovable property that considers one plot that contains not only a building but also unbuilt land, the fiscal qualification for VAT purposes shall be determined by a step-by-step analysis:

1. Is it considered a building with unbuilt land?
2. If this is not the case, is it all unbuilt land?
3. If the answers to questions 1 and 2 are negative, it must be considered whether those unbuilt areas must be considered separately and treated differently when transferring of ownership of that plot.

Court of first instance, Zeeland-West-Brabant 21 February 2024, ECLI:NL:RBZWB:2024:1623

In this case, a contractor entered into a contract with his client to build a house. The contractor terminated the contract alleging that the client wanted to wait too long before starting the building process. The contractor did not want to wait that long. Dutch law does not recognise the possibility of termination of service contracts; nevertheless, this is possible if it is a building contract. The court of first instance determined that it was a service contract, applying Article 6:217 in combination with Article 7:750 of the Dutch Civil Code. Those articles say that, for a service contract when there has been an offer to create and deliver a work of a material nature against an agreed price to be paid by the client, if such an offer has been accepted by the client, it has to be executed by the building contractor. Thus, the building contractor was in breach of contract. The court of first instance determined that the client had a right to retain the down-payment in compensation and that the building contractor had no right to any counterclaim.

Dutch Supreme Court, 15 December 2023, ECLI:NL:HR:2023:1755

The court of first instance had requested the Supreme Court to rule on the question of whether a plot of land with the purpose in the zoning plan being 'living' (see the Spatial Planning Act) is immovable property, or a component thereof, with the intention for residential use in the sense of Article 7:2, paragraph 1 of the Dutch Civil Code.

The Supreme Court stated that to answer whether one speaks of a sale of 'an immovable property, or component thereof, with the intention for residential use', it is decisive whether the seller has obliged itself to the buyer to deliver a home respectively whether the buyer has a right against the seller for delivery of a home. It follows that if a seller has obliged itself against the buyer in the contractual agreement of delivery of a house, the requirement that the agreement should be set out in writing as noted in Article 7:2, first paragraph, and the buyer's remorse period stated in Article 7:2, second paragraph, Dutch Civil Code, are applicable. A contract of sale in which the seller obligates itself against the buyer to deliver a plot of land with the purpose in the zoning plan being 'living' cannot be ascertained as a contract of sale in the sense of Article 7:2, paragraph 1, Dutch Civil Code.

Change in the local law of relevance to construction projects

Quality Assurance (Building Sector) Act, in effect 1 January 2024

A new Environmental and Planning Act entered into force on 1 January 2024. This new law is a significant change in the Dutch legal system that regulates the physical environment. With the Environmental and Planning Act being implemented, the gradual entry into force of the Quality Assurance (Building Sector) Act (the 'Quality Assurance Act') has also been initiated.[1] The Quality Assurance Act is one of the four supplementing acts that substantiates the Environmental and Planning Act and makes it executable. The Quality Assurance Act aims to increase construction quality and strengthen the rights available to clients.[2]

The public law part of the Quality Assurance Act relates to all the permits necessary for construction of new buildings (especially building permits and permits under the Environment and Planning Act). Permits that have been requested before 1 January 2024 will still be considered under the former law. For permits that have been requested before 1 January 2024, the old system remains applicable. The same is true for proceedings where an objection or appeal is pending.[3]

The Quality Assurance Act only applies to structures within Class 1, according to the classification contained in Article 2.17 of the Structures (Living Environment) Decree. In general, Class 1 structures include residences and small commercial buildings.[4] The main requirement for applying the Quality Assurance Act is whether the relevant structure is considered Class 1. It is still unclear what is meant by the concept of 'structure', as no definition has been included in the Quality Assurance Act even though it is regarded as an essential concept in determining the reach of the Act.[5] It is assumed, however, that the definition is likely to be included in the attachment of the Environmental and Planning Act at a later stage. When exactly this will be the case is still uncertain.

The private law part of the Quality Assurance Act applies to service contracts that have been concluded after 1 January 2024. Whether a contract is considered a service contract is not decisive for the application of the private law part of this Act. What is decisive, however, is that it related to a Class 1 structure. The private law part of the Quality Assurance Act has thus far led to five changes in Book 7 of the Dutch Civil Code that considers sale and barter.

Firstly, a contractor is initially liable for the defects after handing over the structure (Article 7:758, paragraph 4, Dutch Civil Code). Secondly, Article 7:754, paragraph 2 of the Dutch Civil Code now formalises the contractor's duty to warn the client of inaccuracies in the instructions, as far as they knew or shall reasonably be expected to know.

Thirdly, Article 7:757a of the Dutch Civil Code was included to oblige the contractor to provide a handover file with its request for preliminary inspection before handing over the structure. In this handover file, the contractor must show that it has met all requirements of the contract. Fourthly, Article 7:765a of the Dutch Civil Code now ensures that the contractor informs the client of financial securities that will cover the risks. This is only applicable to the construction of residencies for consumers.[6]

Lastly, Article 7:768 of the Dutch Civil Code now states that the client has the right to retain as security 5 per cent of the contract price on the last instalment(s) and to deposit it with the notary. After three months the retained amount shall be paid out, unless the client informs the notary that the conditions for suspension have been met. A suspension may be justified if a shortcoming is included in the delivery/completion report of the building. This retention can be up to three months.

Notes

1 'Wet Kwaliteitsborging voor het bouwen (Wkb)' (*IPLO*, 2024) https://iplo.nl/regelgeving/regels-voor-activiteiten/technische-bouwactiviteit/kwaliteitsborging/wet-kwaliteitsborging-bouwen-wkb/, accessed 11 July 2024.

2 A ter Mors, H Plas et al, 'Wkb en BW: wat, kwaliteitsborging en beter werken?' (2023), 51, Bouwrecht.

3 Article 4.3, Act implementing the Environment and Planning Act (in Dutch: Invoeringswet Omgevingswet).

4 A Duijverman, et al, 'Het begrip 'bouwwerk' volgens de Wet kwaliteitsborging' (2022), 10, Bouwrecht.

5 A ter Mors, 'Wkb: nu dan toch echt' (2024), 13, Bouwrecht.

6 See n2 above.

BRAZIL

Amendment to Brazil's Civil Procedure Code limits forum-selection clause

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Background

On 4 June 2024, the Brazilian Government issued Law No 14.879 amending the forum selection rules provided in the Brazilian Code of Civil Procedure.[1] There are several undetermined legal concepts in the new law, which opens space for interpretation and may create – at least at this early stage – legal uncertainty for those who negotiate contracts governed by Brazilian law.

Until this legislative innovation came into force, parties were free to choose the seat for resolving contractual disputes, regardless of where the parties or their obligations were located. Since 4 June, the chosen forum must 'be relevant' to the domicile or residence of one of the contracting parties or to the place of the obligation. The new law also establishes that filing a lawsuit in a 'random' court – meaning one without ties to the domicile or residence of the parties or the legal transaction in question – can be considered an abusive practice, allowing the court to decline its jurisdiction on an ex officio basis. The purpose of these new provisions is to prevent forum shopping, transferring to judges the decision of whether a determinate court is appropriate to solve a particular dispute. In practice, Law No 14.879 brings Brazil closer the doctrine of *forum non conveniens*, which surrounds the idea of the existence of an 'inadequate' or 'inconvenient' court.[2]

The impact of Law No 14.879 on construction contracts

In the short term, the restrictions imposed by Law No 14.879 may create an unwanted and unpredictable outcome for contracting parties. As it consists of a procedural rule, one could consider that the new law impacts choice of forum clauses in pre-existing contracts.

This raises specific concerns regarding commercial contracts, including those involving construction, in which sophisticated and well-advised parties often choose a place that may not relate to their domicile or to the fulfilment of the obligation at stake. In Brazil, parties frequently select specialised courts focused on commercial law matters (seated in São Paulo and Rio de Janeiro) to solve controversies related to major projects. These courts are also commonly chosen to grant interim and conservatory measures prior to the commencement of arbitral proceedings.

In 2023, the Brazilian Association of Infrastructure and Basic Industries (ABDIB) reported that only 17 per cent of the ongoing infrastructure projects (led solely by state governments or in association with private entities) were developed in the states of São Paulo and Rio de Janeiro,[3] while the majority of projects were underway in Brazil's northeast region. The new law could potentially limit the parties' freedom to solve a dispute regarding a construction project before a court seated in a different state.

Another problematic scenario would be one involving foreign parties to a construction contract in Brazil. In this case, the choice of a different forum, including a foreign one, could be deemed ineffective. Recently, the São Paulo Court of Appeals invoked Law No 14.879 to disregard parties' intention to solve their disputes in England because the 'forum chosen by the parties is totally disconnected from the place where the legal acts and facts took place'.[4]

Moving forward

The legislative innovation at hand evidently requires meticulous attention when drafting contracts or amendments. From now on, legal advisors shall ensure a clear connection between the selected forum, the domicile or residence of one of the contracting parties and the place of the obligation. This will prevent clauses from being deemed abusive and consequently annulled, preserving party autonomy and legal certainty.

Furthermore, as a result of Law No 14.879, contracting parties could avoid submitting their disputes to courts, opting instead for private methods such as mediation, dispute boards and (especially) arbitration. In this context, parties might even be encouraged to opt for an emergency arbitrator to grant reliefs prior to the commencement of the proceedings, avoiding conflicts of jurisdiction in courts when time is of the essence.

Notes

1 Law No 14.879, see www.planalto.gov.br/ccivil_03/_ato2023-2026/2024/lei/L14879.htm, accessed 1 October 2024.

2 In a recent judgment, Judge Sang Duk Kim referred to the principle of *forum non conveniens* when applying Law No 14.879 (São Paulo Court of Appeals, Judge Sang Duk Kim, Appeal no 1038331-25.2023.8.26.0100, 20 August 2024)

3 *Livro Azul da Infraestrutura* (ABDIB, 2023), see www.abdib.org.br/wp-content/uploads/2024/05/Livro-Azul-da-Infraestrutura-Edicao-2023-2.pdf, accessed 1 October 2024.

4 São Paulo Court of Appeals, Judge César Zalaf, Appeal no 1003898-64.2023.8.26.0562, 31 July 2024.

Aerial view of large highway in the city of Mendoza, Argentina. Credit: SobrevolandPatagoni/Adobe Stock

Regulatory changes in Argentina that promote infrastructure investment

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Jorge Ignacio Muratorio and Ana Belén Micciarelli, partners at O'Farrell, review the main amendments recently approved to the public works concession law in Argentina, which are intended to encourage domestic and foreign investment in public works and infrastructure.

Introduction

As from the enactment of the Law 'Bases of and Starting Points for the Freedom of Argentineans' (Law No 27,742, *Official Gazette* 8 July 2024, hereinafter 'Bases Law'), significant modifications have been introduced in the public works concession contract to generate the necessary conditions to encourage both domestic and foreign investments in public works and infrastructure.

Legislative amendments that promote investment in public works and infrastructure

Until now, the referred 'public works concession' (Law 17,520) was used for the construction, maintenance or operation of public works (roads, airports, ports, bus or railroad stations, among others), which are paid for by charging fees or tolls to their users – or other remunerations – during the time of their operation, which is necessary to amortise the investment made and obtain a profit.

By means of this figure – then with the reforms incorporated on the occasion of the State Reform Law, No 23,696 of 1989 – bridges and interprovincial tunnels were built, as well as Buenos Aires' main long distance bus station; the city's highway network was privatised; the national airport system was given in concession; the beaconing and signalling of the fluvial corridor of the Hydrovia was privatised, and so on.

Currently, the Bases Law has broadened the scope of the figure so that the concession becomes a concession of public works, public infrastructure and public services in favour of private companies, which allow its construction, conservation or operation. It is admitted that a 'specific purpose company' is constituted, which must be constituted as a corporation.

The distinction between 'public work' and 'public infrastructure' is that 'public work' refers to any movable or immovable thing of artificial construction (man-made), owned by the state and used for general utility purposes (hospitals, schools, etc) while 'public infrastructure' refers to an asset that serves as 'support' for an activity or service (public service or service of general interest): the distribution of drinking water, gas distribution (gas pipeline), electricity distribution and oil pipelines, among others. Public works are state-owned; public infrastructure can be publicly or privately owned (eg, telecommunications networks).

It is possible to grant concessions for the operation, administration, repair, expansion, conservation or maintenance of existing works, with the purpose of obtaining funds for the construction or conservation of other works that are physically, technically or otherwise related to the former. Thus, funds may be obtained from the operation of a concessioned route to remodel another route connected to it.

Individuals may access the concession of public works or infrastructure through the national or international public bidding procedure. In the latter case, it is accepted that those who have their main business headquarters abroad and do not have a branch office in the country may apply as bidders; at the same time, the call for bids must be made on international websites.

The regime provides that, during the term of the public works or infrastructure concession contract, the maintenance of the 'balance of the economic-financial equation' taken into account at the time of its execution must be guaranteed. The maintenance of the contractual balance is essential for the contract to be fulfilled and integrates the contractor's property rights (Article 17 of the National Constitution and Article 965 of the National Civil and Commercial Code).

It is not a question of profitability, but rather the relationship between costs and benefits assumed, which allows a reasonable profit to be obtained

The 'balance of the economic-financial equation' can be defined as the situation of proportionality between the reciprocal benefits established by the parties at the time of entering into the contractual relationship. It is not a question of ensuring a specific profitability, but rather the relationship between costs and benefits assumed, which allows a reasonable profit to be obtained.[1] In practice, the economic-financial equation of the contract may be altered as a consequence of abnormal risks external to the parties or originated by the direct or indirect intervention of the state in the execution of the contract. For example, indirect intervention is configured through the enactment of new regulations (tax, import requirements, etc) that have an impact on the economic equation of the contract. In Argentina, a key distorting factor has been inflation.[2]

We describe below the main provisions established in the rules for the concession of public works or infrastructure that will make it possible to show the protection of the investment.

As regards the term of the concession, works or infrastructure concessions may be granted as follows:

- *Fixed term*: for which the estimated time required for the amortisation of the capital invested by the concessionaire,

the payment of financial services, the recovery of maintenance, conservation, administration and operation expenses of the works or infrastructure and the concessionaire's profit will be taken into consideration.

- *Variable term*: sometimes it is not possible to establish with a sufficient degree of approximation the volume of traffic or users of the works or infrastructure under concession. In these cases, the term will depend on the demand for the works or infrastructure effectively configured, regardless of the estimate and market studies carried out for the bidding process.

The retribution in favour of the private parties will be through the collection of tariffs, tolls or remuneration, which may be charged to the users, third parties or the state, and which may be revised, according to the procedure established in the contract, to preserve the economic-financial equation of the contract. Minimum revenue guarantees may even be established (this method was used in the public works concession of the highways of Buenos Aires).

It is specified that in cases of termination of the contract for reasons of public interest, no rule establishing a limitation of liability in favour of the Public Administration shall be applicable

It is foreseen that the contracts will include clauses to guarantee the concessionaire's income with speed and certainty of payment[3] to preserve the balance of the economic-financial equation.

In turn, the regime also establishes that the national state will be released only if the concessionaire receives the amounts committed in the agreed currency.

In each case, the conditions under which the concessionaire may raise the exception of breach of contract – *exceptio non adimpleti contractus* – must be established. For such purposes, it is foreseen that, in each case, it will be established which are the breaches of the grantor that affect the timely payment of the price or remuneration of the concessionaire. Until now, this exception was considered to be of very restrictive application in contracts with the state.

In some cases the concession will be 'free' to the concessionaire, while in other cases the concessionaire may be required to make a specified contribution to the state.

Among the benefits to individuals, it is foreseen that deductions may be established in the income tax balance to be paid by the investments of the concessionary companies.

The well-known 'prerogatives of the Public Administration', such as the right to modify the contract and terminate it for reasons of timeliness and illegitimacy, typical of public contracts, are attenuated. Thus, for example, it is provided that the bidding documents and the contract must foresee the grounds for termination of the contractual relationship, and must contemplate the compensation in cases of early termination, its scope and method of determination and payment. It is specified that in cases of termination of the contract for reasons of public interest, no rule establishing a limitation of liability in favour of the Public Administration shall be applicable. In other words, full indemnity is established.

Loss of profit is recognised in the event of unilateral early termination through no fault of the concessionaire.

The total or partial assignment of the contract to a third party is allowed, provided that the third party meets similar requirements as the assignor and at least 20 per cent of the original term of the contract or of the committed investment has elapsed, whichever occurs earlier. Likewise, the acceptance of the financiers, guarantors, sureties and guarantors, and the authorisation of the administration must be obtained.

It is foreseen that in the event that the economic-financial equation of the contract is broken, it must be renegotiated in order to achieve its recomposition, which may include:

- modification of the term;
- modification of the tariff;
- deferral, suspension or suppression of investments;
- authorisation to carry out new complementary or collateral operations to obtain additional income;
- direct economic compensation through funds from the National Treasury; and
- combination of the alternatives denounced or others that may be compatible according to the characteristics of the contract.

The regulation of the renegotiation of the contractual equation is a significant contribution to the legal security of the contract, since renegotiation is usual in long-term contracts exposed to multiple contingencies: if it is not foreseen, it may lead to administrative inactivity or arbitrariness.

The renegotiation must be carried out within 12 months of the occurrence of the cause of the imbalance in the economic-financial equation. In Argentina, there have been cases of contractual renegotiations that, due to regulatory changes and various deferrals, exceeded half of the originally foreseen contractual term.

In cases of force majeure or actions of the administration that result in a substantial breach of the economy of the concession contract, the possibility of extension for the same term of the initial concession is provided for, and that, in those cases in which the force majeure does not absolutely prevent the execution of the work or the continuity of its exploitation, the administration will ensure the minimum income agreed in the contract. This provision is important to avoid the questioning of the granting of an extension that allows repairing the affectation of a contract, as opposed to the requirement of a new bidding process. The administration is now also allowed, in order to repair the damaged equation, to ensure the minimum income agreed in the contract.

With regard to conflict resolution mechanisms, it is established that all contracts may provide for dispute prevention and resolution mechanisms, conciliation and/or arbitration: an essential aspect that provides an alternative that may be more effective than the systems of exhaustion of administrative procedures and subsequent judicial proceedings.[4]

Thus, discrepancies of a technical or economic nature that arise between the parties during the execution of the concession contract may be submitted to a technical panel or arbitration tribunal at the request of either party, and a suitable response may be obtained with the speed required for the execution of the contract.

The technical panels are made up of independent and impartial professionals of proven competence and experience in the field. These bodies will be competent to intervene, compose and resolve disputes of a technical, contract interpretation and economic or patrimonial nature that may arise during its execution or termination, applying for such purpose criteria of speed and efficiency in the processing of conflicts that are compatible with the execution times of the contracts. Such panels were already provided for in the Public-Private Participation Contracts Law No 27,328 (2016) and also appear in Argentina in contracting financed by multilateral credit agencies.

In the event of opting for arbitration with extension of jurisdiction, the respective arbitration clause must be included, which shall be expressly approved by the President or the agency of the public administration to which the President delegates such authority, and immediately reported to the Honourable Congress of Argentina.

An interesting aspect is that private individuals may propose private initiatives for the execution of public works and infrastructure, provided that the financing is private. This allows individuals to bring feasible and innovative proposals to the state and to fight for their realisation.

Epilogue

The reforms introduced by the Bases Law tend to encourage the intervention of the private sector in the proposal, financing and execution of public works and infrastructure.

In this sense, it is positive that greater legal security and investment protection has been provided, safeguarding the maintenance of the economic-financial equation of the contract and private initiative, while introducing alternative dispute resolution mechanisms (technical panels and arbitration).

It is expected that a large number of works and infrastructure in the areas of energy, mining, telecommunications, transportation, etc, will be carried out for the benefit of the country and for the development and progress of its inhabitants.

Notes

1 Jorge I Muratorio, 'The Public Interest in Guaranteeing the Public Contractual Equation' (2023) 148 *Administrative Law Review*, 20.

2 Jorge I Muratorio, 'Impact of Inflation on Public Procurement' (2022) *E La Ley*, 264.

3 Jorge I Muratorio, 'Payment Terms in Public Procurement' (2021) *Administrative Law Review*, digital citation: ED-MMLXXX-183.

4 Jorge I Muratorio, 'Public Contract Dispute Resolution Systems. Necessary Changes' (2023) *La Ley*, digital citation: TR LALEY AR/DOC/2785/2023.

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Dubai Financial center district DIFC, United Arab Emirates. Credit: Evaldas/Adobe Stock

Expert evidence, damages and costs: a DIFC case law update

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Background

A recent Dubai International Financial Centre Courts (DIFC) decision deals with three interesting areas of construction law:

- party-appointed expert evidence;
- general damages and loss of profit under the UAE Civil Code; and
- cost recovery under DIFC Rules.

In *Bond v Tr88*,[1] the Technology and Construction Division of DIFC decided on a dispute involving the performance of two contracts:[2] MEP and Fitout Works contracts at premises occupied by the defendant in Blue Water, Marsa Dubai. The law of the contract is the law of Dubai and the laws of the UAE. The parties nominated DIFC as the appropriate jurisdiction.

The parties dispute the final account, including prolongation costs, variations, liquidated damages and general damages. Within days of the commencement of each contract, the Contractor gave notice of delays as matters for which it asserted the Client is responsible. For example, it stated in the notice lack of design or design changes. The Client reciprocated the allegations of delay by the Contractor in performing the contract. This pattern of cross-allegations continued throughout the project. Ultimately, the Contractor claimed for prolongation costs and variations, while the Client counterclaimed for liquidated damages (LDs) and loss of profit.

This article aims to analyse the three aspects of the decision.

Party-appointed expert evidence

The Contractor relied on expert evidence from one of its employees, whereas the Client relied on an independent consultant. The quality of both parties' expert evidence was criticised for five reasons. First, 'neither party adduced any direct evidence of the detailed facts upon which their respective cases depended'.[3] Further, the factual evidence was given at a great level of generality, and some of it was irrelevant to the issues in dispute. Second, the expert's conclusions made no reference 'to any knowledge or experience of the sequence or manner in which the Works were performed'[4] and were deemed unacceptable. Third, the Contractor's appointed expert failed to address counter-allegations. Further, he assumed all variations not refused by the Client to be valid.[5] Fourth, the Client's appointed expert took the position that the Contractor's delay analysis had not been established but did not produce his own version.[6] Fifth, the lack of as-built records became apparent in the Client's appointed expert's inability to answer when the rectification work was performed or what work was performed.

In summary, the decision gives guidance to experts and appointing parties on areas that may affect the admissibility, relevance, materiality and weight of their evidence:

- facts need to support the expert's case. If the facts are disconnected from the analysis, no case is being made, rather an illogical construct;
- project planning software should not be used as a 'black box'[7] into which data is put and conclusions extracted that the expert cannot verify or explain. This highlights the risk of overreliance on software to achieve a certain result without taking into account the actual events of the project and its critical path;
- defending counter-allegations of delay is expected from experts on both sides;
- each party ought to produce its own analysis, and it is insufficient to argue that the opposing party's version has not been established; and
- the importance of keeping and using as-built records to support expert's evidence.

Liquidated damages, general damages and loss of profit

The decision dealt with liquidated damages (LDs) under the contract, and general damages and loss of profit under the UAE Civil Code. The contract provided for LDs of AE$10,000 per day in the MEP contract and AE$5,500 per day in the Fitout Works contract, up to a maximum of 10 per cent of the stated sum in the agreement. However, the contract provided that LDs are 'subject to the failure is exclusively attributed to the Contractor'.[8] Despite the problems highlighted in the Client's appointed expert evidence, his evidence accepted that there was a concurrent delay for which both parties were responsible. This resulted in losing the counterclaim for LDs, as the contract required that the Contractor be the sole party responsible for the delay.

project planning software should not be used as a 'black box' into which data is put and conclusions extracted that the expert cannot verify or explain

General damages may be claimed under UAE Civil Code Art 390 (2), which provides that 'the judge may, in all cases, at the request of one of the parties, amend such an agreement, in order to make the amount assessed equal to the prejudice. Any agreement to the contrary is void'.[9] However, as the Client failed to discharge the burden of proving that the Contractor was the sole party responsible for the delay, the court decided general damages could not be awarded. If there had been no concurrent delay, the Client may have been able to claim general damages under UAE law.

Even though there was no contractual provision for loss of profit claims having to be solely the responsibility of the Contractor, the Court took a similar position to LDs: 'obviously TR88 could not claim for lost profits if delays for which it was responsible operated concurrently with delays for which Bond was responsible'.[10] The Client's appointed expert evidence assumed a profit margin of 20 per cent 'out of the air',[11] which he was unable to substantiate. Thus, even if the court entertained a loss of profit claim, the percentage needed to have come from factual evidence such as previous profit and loss accounts, and not a made-up figure.

Cost recovery

Third, the English cost rule applies in DIFC Courts pursuant to DIFC Rule 38.7, which provides that:

> 'If the Court decides to make an order about costs: (1) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but (2) the Court may make a different order.'[12]

The court excluded the Contractor's appointed expert's report from the cost award. It provided three reasons for this. First, the expert is not an independent consultant but rather an employee of the Contractor. Under DIFC Rule 31.4,[13] like the English Civil Procedure Rules

(CPR) Part 35,[14] an expert's duty to help the court overrides any obligation to the person from whom he has received instructions or by whom he is paid. This is impossible to achieve if the expert is an employee of the party.

uncontested concurrent delays can save a contractor not only from LDs but also general damages and loss of profit

Similarly, the independence of a party-appointed expert is expected in arbitration proceedings as provided under IBA[15] and International Chamber of Commerce (ICC) rules.[16] How can an employee be unbiased when his income comes from the same party? It is unclear why the court permitted an employee's evidence as that of an expert in the first place. DIFC Rule 31.13 provides that 'no party may call an expert or put in evidence an expert's report without the Court's permission'. Presumably, the Contractor was given permission, but that does not necessarily mean an employee will meet the test of independence, and his fees may not be recovered.

Second, the expert's report was not without difficulties, as highlighted above. Third, the prolongation costs claim was abandoned, to which the expert report related. While the decision did not refer to DIFC rules, Rule 31.18 empowers the Court to limit expert fees and expenses recovery.

Conclusion

First, expert evidence must be linked to the facts presented. The use of planning software in expert reports needs to be referenced to knowledge or experience of the sequence in which the works were performed. Otherwise, the output may be of no use to the court.

Second, uncontested concurrent delays can save a contractor not only from LDs but also general damages and loss of profit. This was specifically provided for in the contract in relation to LDs, which was extended to general damages and loss of profit, and the Client failed to discharge the burden of proving otherwise.

Third, the expert's independence and the Court's permission of an employee to provide expert evidence are not the same thing. An employee's expert evidence may not be a recoverable cost as he is not considered independent.

Notes

1 *Bond Interior Design LLC v Tr88house Restaurant and Entertainment Center LLC* [2023] DIFC TCD 001 (28 February 2024).
2 Each contract is described as one page, referring to other documents. It is unclear whether it was a standard form or bespoke.
3 See n1 above, 74.
4 *Ibid*, 75.
5 *Ibid*, 76.
6 *Ibid*, 78.
7 *Ibid*, 75.
8 *Ibid*, 9.
9 Federal Law No 5 On the Civil Transactions Law of the United Arab Emirates State, see https://elaws.moj.gov.ae/UAE-MOJ_LC-En/00_CIVIL%20TRANSACTIONS%20AND%20PROCEDURES/UAE-LC-En_1985-12-15_00005_Kait.html?val=EL1, accessed 30 July 2024.

10 See n1 above, 95.
11 *Ibid*, 82.
12 Part 38, *The Rules of the Dubai International Financial Centre Courts 2014* (DIFC Courts, 2014), see www.difccourts.ae/index.php/tools/pdf/court_rule, accessed 31 July 2024.
13 *Ibid*, Part 31.
14 In England, CPR 35 provides that:
'2.1 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.
2.2 Experts should assist the court by providing objective, unbiased opinions on matters within their expertise and should not assume the role of an advocate.'
15 Article 5.2(c), *IBA Rules on the Taking of Evidence in International Arbitration* (IBA, 2020) www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b, accessed 14 August 2024.
16 Article 3.3, *Expert Rules* (ICC, 2015), see https://iccwbo.org/wp-content/uploads/sites/3/2015/01/2015-ICC-Expert-Rules-ENGLISH-version-1.pdf, accessed 14 August 2024.

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The Standing International Forum of Commercial Courts (SIFoCC)

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Uniting global commercial courts to enhance best practices and uphold the rule of law.

History

Founded in 2016 by Lord Thomas, former Lord Chief Justice of England and Wales, the Standing International Forum of Commercial Courts (SIFoCC) was established to unite commercial courts globally.

The inaugural meeting took place in London on 4–5 May 2017, including senior judges from 25 jurisdictions. This initiative supports global efforts to strengthen the rule of law and promote international legal services. Since then, SIFoCC has grown to include 58 member jurisdictions and has hosted regular meetings every 18 months: New York in 2019, Singapore in 2021, Sydney in 2022, and most recently Doha in April 2024.

Purpose and key objectives

SIFoCC addresses global challenges by promoting alternative dispute resolution and facilitating knowledge-sharing among commercial courts. Its key objectives are:

- *Serving users*: sharing best practices to keep pace with rapid commercial changes, benefiting businesses and markets;
- *Strengthening the rule of law*: promoting collaborative efforts of courts worldwide, contributing to legal stability; and
- *Supporting developing jurisdictions*: enhancing attractiveness to investors by providing effective commercial dispute resolution.

This collaboration enhances standards, ensures access to justice and upholds the rule of law: offering predictability, reducing uncertainty and inspiring investor confidence.

Importance of commercial law and courts

Commercial law governs business activities, both domestic and international. Commercial courts ensure the enforcement of contracts and protection of interests. However, the rise of international commerce presents challenges that no single jurisdiction can address alone. International collaboration is essential to manage costs, maintain standards, adapt to business and technological changes, and provide access to justice.

Judicial Observation Programme

The Judicial Observation Programme, a unique initiative, offers an intensive one-week mentorship in a SIFoCC host jurisdiction. Typically involving five to six participants nominated by their Chief Justice, this peer-to-peer engagement shares best practices and supports developing countries. Participants contribute to judicial relationships, fostering continuous knowledge exchange and application.

Promoting global legal standards: the work of SIFoCC

SIFoCC is dedicated to enhancing global legal standards through best practices, comprehensive reports, publications and speeches, all of which are accessible on its website.[1]

Contributions to legal development

In October 2022, SIFoCC released a significant report following its fourth full meeting, hosted by the Federal Court of Australia and the Supreme Court of New South Wales.[2] This meeting focused on crucial themes such as:

- integrated systems of dispute resolution;
- management of increasingly complex disputes;
- future issues for corporate legal responsibility; and
- international jurisdictional conflicts.

The report underscores SIFoCC's commitment to supporting a globalised commercial justice system, promoting the convergence of commercial laws worldwide, and viewing international commercial law as an interconnected system rather than a set of fragmented rules.

Addressing multi-jurisdictional issues

SIFoCC regularly releases comparative law memoranda that address multi-jurisdictional issues. In March 2024, SIFoCC published its *Multilateral Memorandum on Enforcement of Commercial Judgments for Money*,[3] a comprehensive analysis of enforcement practices across more than 30 jurisdictions, including Australia, Brazil, Canada, China, Germany, Japan, Singapore, South Korea, Uganda and the United Kingdom. This memorandum highlights how these jurisdictions can enforce each other's commercial judgments, reinforcing the rule of law and promoting global legal cooperation.

Focus on construction disputes

SIFoCC places significant emphasis on construction disputes, with members frequently speaking and publishing on related topics. For instance, the Honourable Chief Justice Sundaresh Menon of the Singapore Supreme Court, a prominent SIFoCC member, recently highlighted the role of international commercial courts

the rise of international commerce presents challenges that no single jurisdiction can address alone

(ICCs) in the context of complex construction disputes, ensuring robust case management and addressing due process concerns.[4] ICCs offer unique advantages for resolving complex international construction disputes, including procedural flexibility, rights of audience for foreign counsel and the ability to join third parties. The quality of decision-makers in ICCs is assured, featuring internationally renowned judges.

SIFoCC and alternative dispute resolution

Alternative dispute resolution (ADR) methods require support from judicial courts before, during and after the parties have their dispute resolved through such methods. SIFoCC actively promotes the development and

integration of ADR mechanisms in different jurisdictions with the support provided by national courts. This strategic collaboration enhances the efficiency and enforceability of ADR processes, making them more reliable and accessible for resolving disputes.

To ensure consistency and fairness in the application of ADR across different jurisdictions, SIFoCC advocates for the creation of uniform rules. Standardising these rules helps to eliminate discrepancies and ensures a predictable and stable environment for ADR, which is crucial for businesses operating in multiple countries.

As part of its ongoing efforts, SIFoCC released *International Best Practice in Case Management* during its fifth full meeting in Doha on 20 April 2024.[5] This document examines how courts in various jurisdictions support ADR mechanisms and promotes best practices for managing complex disputes. The analysis provided in this publication serves as a valuable resource for courts worldwide, helping them to enhance their ADR capabilities and deliver more efficient justice.

Construction projects in particular are known for being highly litigious due to their complexity and the frequent involvement of parties from different jurisdictions. These projects often face numerous disputes arising from contractual disagreements, delays and other issues. By promoting collaboration among courts and encouraging standardised ADR practices, SIFoCC ensures legal certainty and provides strong support for resolving construction disputes through ADR. This approach not only improves the resolution process for such disputes but also boosts investor confidence by demonstrating a commitment to effective and reliable dispute resolution mechanisms.

In summary, SIFoCC's initiatives to support ADR through judicial collaboration and the establishment of uniform rules significantly enhance the predictability, efficiency and enforceability of ADR decisions. These efforts are particularly beneficial in complex cross-border sectors like construction, where reliable dispute resolution is critical for maintaining efficient operations and ensuring a stable investment environment.

Conclusion

SIFoCC's initiatives encourage collaboration among commercial courts, promote the sharing of best practices, and support the development of a cohesive and effective global commercial justice system. By addressing the challenges of an interconnected world, SIFoCC plays a pivotal role in enhancing legal standards, ensuring access to justice, and supporting global economic stability and prosperity.

For more information on SIFoCC's work and to access its reports, publications and speeches, visit its official website.

Notes

1 'Resources' (SIFoCC), see https://sifocc.org/resources, accessed 1 October 2024.

2 *Report on the 4th full SIFoCC Meeting* (SIFoCC, 28 October 2022), see https://sifocc.org/sifocc_documents/report-on-the-4th-full-sifocc-meeting, accessed 1 October 2024.

3 *SIFoCC Memorandum on Enforcement 2nd – With International Working Group Commentary* (SIFoCC, 13 March 2024), see https://sifocc.org/sifocc_documents/sifocc-memorandum-on-enforcement-2nd-with-international-working-group-commentary, accessed 1 October 2024.

4 *The role of Commercial Courts in the management of complex disputes* (SIFoCC, 9 April 2021), see https://sifocc.org/sifocc_documents/the-role-of-commercial-courts-in-the-management-of-complex-disputes/ accessed 1 October 2024.

5 'SIFoCC's 5th full meeting' (SIFoCC, 20–21 April 2024), see https://sifocc-events.org/sifoccs-5th-full-meeting#programme accessed 1 October 2024.

FEATURE ARTICLE

Credit: gearstd

A growing need for international enforcement of construction adjudication decisions

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'[Adjudication] is not an alternative to anything; for most construction disputes, it is the only game in town.'[1]

Introduction

According to the *Global Construction 2030* forecast, construction output is predicted to increase by 85 per cent to reach $15.5tn by the year 2030. The report also forecasts an average global construction growth rate of 3.9 per cent per year until 2030, which is projected to exceed the global GDP growth rate by over one percentage point.[2] At the same time, the construction industry has become increasingly globalised in the modern era. Throughout history, there has never been a time when so many construction companies from diverse backgrounds and regions have ventured outside of their domestic markets to undertake work in foreign countries.[3] Clear examples of such projects are the Panama Canal and the Suez Canal, which were both constructed by foreign contractors.

Despite the best efforts and intentions, construction projects frequently encounter

disputes. These disputes have the potential to disrupt the projects' progress, impact stakeholder relationships, affect the client's budgets, and erode the contractors' profit.[4] The potential for lengthy trials and vast legal expenses in construction and engineering disputes is notorious,[5] which makes disputing parties look for alternative methods – the most popular of which is arbitration.

International construction disputes account for a growing proportion of the cases arbitrated in international commercial arbitration. These disputes represent between 14 to 20 per cent of all the cases referred to the International Chamber of Commerce (ICC) annually.[6] As the yearly volume of international construction projects continues to rise, arbitration will remain a significant method for resolving construction-related disputes. However, institutional arbitration is becoming less viable as the primary dispute resolution method in international construction due to the industry's unique characteristics. Construction disputes involve extensive documentation and technical issues requiring specialised expertise, as well as the need for a quick resolution to avoid additional time-related costs. While arbitration remains the ultimate dispute resolution method in international construction contracts, it can no longer serve as the primary approach. Institutional arbitration has become overly formalised, time consuming and lacking in the technical skills required to effectively resolve construction disputes. Additionally, the expenses associated with institutional arbitration are often higher compared to litigation. Thus, the international construction industry has developed an innovative primary dispute resolution mechanism called the Dispute Adjudication Board (DAB). The DAB is a panel of technical experts who are intricately familiar with the specific construction project and its contract, and they adjudicate quasi-binding disputes arising from the contract.

The New York Convention requires courts [to] recognise and enforce arbitration awards […] However, an adjudication decision lacks this international enforceability feature

In the 1990s, the United Kingdom enacted legislation that was subsequently followed by similar laws in countries such as Australia, Ireland, Malaysia, New Zealand and Singapore. These legislations created 'statutory adjudication' that significantly reformed the freedom of contracting parties to mutually agree upon their respective rights and obligations in relation to a construction project, with the aim of operating as a fast-track form of dispute resolution that gives parties to a construction contract a quick and provisionally binding decision as to their rights and obligations.[7]

While there are similarities between statutory adjudication and arbitration, there are also several key differences. The primary distinction is that the decision made by an adjudicator has a provisional or temporary nature, whereas the decision of an arbitrator is final, subject only to a limited scope of appeal rights. However, it is well established that the grounds for resisting enforcement of an adjudication decision are also limited. A party must either persuade the court that: (1) the adjudicator had no jurisdiction to determine the dispute; or (2) the adjudicator has materially breached the rules of natural justice.[8] A party may also issue proceedings under Part 8 of the Civil Procedure Rules (CPR) to effectively overturn an adjudicator's decision.[9]

Another key difference is enforceability in the international realm. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention 1958, requires courts of contracting states to give effect to private agreements to arbitrate, recognise and enforce arbitration awards made in other contracting states. A large number of jurisdictions have adhered to the New York Convention, paving the way for enforcing an arbitration award in almost any country.[10] However, an adjudication decision lacks this international enforceability feature and, for example, it is not clear how an adjudication decision issued in the UK or Australia may be enforced in the United States or other countries.

With the expansion of adjudication in the construction industry, a need for international recognition and enforcement of adjudication decisions is growing. This article discusses the available frameworks for the international enforcement of statutory adjudication decisions.

Converting an adjudication decision to an arbitration award

Adjudication is described as a 'pay now, argue later'[11] mechanism that seeks to maintain cash flow during construction projects by providing a cost-effective and speedy means of determining disputes on a binding, but not final basis. Article 108 of the UK Housing Grants, Construction and Regeneration Act 1996 states:

> 'The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.'

In Joint Contracts Tribunal (JCT) and New Engineering Contract (NEC) standard forms, and in many bespoke construction contracts, a provision that requires parties to submit their dispute to arbitration following an adjudication determination is very common.[12] This provides an opportunity for the winning party to convert the adjudication decision into an arbitration award to enjoy its international enforceability through the New York Convention. However, this solution faces two main issues. First, arbitration is a dispute resolution method and the arbitrators have to follow a specific procedure to issue an award. Article 5 of the New York Convention states that recognition and enforcement of the award may be refused if 'the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case'. These time-consuming procedural requirements undermine the fast-track nature of adjudication and adversely impact the cash flow of contractors.

Second, seeking conversion of an adjudication decision into an arbitration award allows the unsuccessful party the opportunity to raise arguments on the underlying merits of the dispute that oblige arbitrators to review all claims and documents to issue an award.[13] This also prolongs the enforcement process, which is inconsistent with the purpose of adjudication in providing a cost-effective and efficient way to resolve construction disputes.

Converting an adjudication decision to a court judgment

Following the issuance of an adjudication decision and if the losing party does not comply with it voluntarily, the next step is to pursue enforcement of the decision in the fast-track procedure in the UK Technology and Construction Court (TCC). After the claim documents are filed, a TCC judge will typically address the application within three business days. The judge will then provide instructions regarding the filing of the acknowledgment of service, any additional evidence that may be required, and the date for the enforcement hearing. This hearing is usually scheduled for the first available court date after 28 days from the date of the order.[14] The court will generally not interfere with the adjudicator's decision unless specific circumstances can be proven, ie, that the adjudicator did not have jurisdiction or there has been a material breach of the rules of natural justice.[15] Enforcing an adjudicator's decision means that it will be converted into a court order.

seeking conversion of an adjudication decision into an arbitration award allows the unsuccessful party the opportunity to raise arguments on the underlying merits of the dispute

Once the court judgment has been issued, some international conventions and treaties help the enforcement of the judgment in other countries. Prior to the UK's departure from the European Union, such enforcement in relation to other EU countries could be done by the Brussels Recast Regulation.[16] These regulations no longer apply as of 1 January 2021 and have been replaced by legislation giving effect to the Hague Convention on Choice of Court Agreements 2005 (the 'Hague Convention'). The UK has also requested to accede to the Lugano Convention, which is very similar to the Brussels Recast Regulation, but its accession has yet to be agreed by the EU. In the meantime, the Hague Convention rules will apply to cross-border disputes involving EU countries and certain other jurisdictions including the US. On 12 January 2024, the UK signed the 2019 Hague Judgments Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters ('The Judgments Convention'). The

Judgments Convention will differ from but complement the 2005 Hague Convention on Choice of Court Agreements. There are also bilateral treaties for the enforcement of judgments such as the '1994 Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters Treaty' between the UK and Australia which provides for the mutual recognition of civil and commercial judgments involving the payment of money, except judgments concerning taxes or other charges, or orders requiring the payment of maintenance.

Working Group II's decision to use model clauses instead of model legislation appears to have missed the chance to establish a comprehensive and harmonised legal framework for statutory adjudication

The UK courts maintain the speedy nature of adjudication by issuing a summary judgment; when an adjudication decision is converted to a judgment, it can be enforced in several other countries based on international conventions and treaties. However, the contracting parties of these conventions are far fewer than the New York Convention,[17] and the enforcement procedure seems to be more complicated than enforcing an arbitration award.[18]

UNCITRAL's work on adjudication

In February 2022, the United Nations Commission on International Trade Law (UNCITRAL) Secretariat held that:

> 'In jurisdictions without statutory adjudication, adjudication remains available on a contractual basis. In these jurisdictions, the main issue is the lack of a framework regarding the enforceability of decisions by adjudicators.'[19]

The Secretariat then formulated a set of questions to be addressed through its work. First, it explored whether a harmonised legal framework to enable the international application of adjudication would be desirable and viable. Secondly, it inquired about how adjudication decisions could be enforced while still allowing for potential challenges.

From 12–16 February 2024, WGII (Working Group II) convened at the United Nations headquarters for its 79th session. In keeping with the previous sessions, the inaugural meeting of 2024 also allocated time for adjudication. WGII is currently working on a proposal made during its 68th session, where delegates recommended concentrating on 'facilitating the use of adjudication in the context of long-term projects, in particular construction projects'.[20] WGII thus focused on adjudication as a mechanism to accelerate proceedings and to provide provisional enforcement of decisions, which would be subject to review by the same tribunal or another arbitral tribunal.[21]

At the 76th session, the Secretariat came up with a model clause in the form of an Expedited Arbitration. It explained that:

> 'Recognizing the importance of dispute resolution mechanisms that are particularly suitable for long-term contracts, the Model Clause on Adjudication enables parties involved in long-term contracts to incorporate a dispute resolution process that ensures prompt decisions on disputes arising from infrastructure or similarly complex projects. While the idea derives from adjudication as used in construction cases, the aim of the Model Clause is to provide for adjudication for all types of long-term and complex contracts. The clause foresees a mechanism to enforce the decision by the adjudicator through a highly expedited arbitration using the Model Clause on Highly Expedited Arbitration.'[22]

Article 1(5) of the UNCITRAL Arbitration Rules incorporates the Expedited Rules, which are presented as an appendix to the UNCITRAL Arbitration Rules. The phrase 'where the parties so agree' in that paragraph emphasises the need for the parties' express consent for the Expedited Rules to apply to the arbitration. Expedited arbitration is a streamlined and simplified procedure with a shortened timeframe, which makes it possible for the parties to reach a final resolution of the dispute in a cost- and time-effective manner. However, WGII's approach has not been immune from criticism.

Working Group II's decision to use model clauses instead of model legislation appears to have missed the chance to establish a comprehensive and harmonised legal framework for statutory adjudication. The common law experience demonstrates that the success of statutory adjudication largely stems from its integration with the court system, which guarantees the enforceability of the adjudicator's rulings. Drafting a

model law of adjudication could have been an ideal opportunity to set an international standard, thereby promoting uniformity across different legal jurisdictions. Furthermore, even if expedited arbitration appears to be one of the best solutions to reproduce adjudication in a cross-border context, this option entails a risk as the legal nature and enforceability of an award rendered under expedited arbitration is still subject to debate.[23]

Conclusion

A fast and relatively inexpensive means of dispute resolution, adjudication can help resolve interim payment disputes and keep projects moving. In the UK, 25 years after its incorporation in the 1996 Construction Act, the UK Supreme Court has endorsed adjudication of construction disputes as 'a conspicuously successful addition to the range of dispute resolution mechanisms available for use in what used to be an overly adversarial, litigious environment'.[24] As more contractors get involved in international construction projects, the enforceability of adjudication decisions in other countries remains an issue. Two major solutions can be proposed, namely converting an adjudication decision to an arbitration award or converting it to a court judgment.

While applying for an arbitration award after receiving an adjudication decision can help the winning party to benefit from the New York Convention and enforce the award in a foreign country, the time-consuming arbitration procedure and the obligation of the arbitration tribunal to hear all the claims regarding the merit of the case would undermine the fast-track nature of adjudication. On the other hand, turning an adjudication decision into a court judgment seems to be a better solution because the UK courts maintain the speedy nature of the award and the judgment can be enforced by means of related international conventions; though the coverage of these conventions is not as wide as New York Convention on enforcement of arbitral awards.

UNCITRAL's WGII has also recognised the necessity of enforcing adjudication decisions and attempted to design a framework for a fast-track process to deal with this issue. However, the WGII's focus has been on the creation of a new expedited model of arbitration, rather than paving the way for enforcing statutory adjudication decisions.

Notes

1 *John Doyle Construction Ltd v Erith Contractors Ltd* [2021] EWCA Civ 1452, at [29], per Lord Justice Coulson.

2 Graham Robinson, 'Global construction market to grow $8 trillion by 2030: driven by China, US and India' (Global Construction Perspectives and Oxford Economics), available at: https://myice.ice.org.uk/ICEDevelopmentWebPortal/media/documents/news/ice%20news/global-construction-press-release.pdf, accessed 1 October 2024.

3 Roberto Hernandez-Garcia, 'Globalization of Construction', in Wendy Kennedy Venoit (ed), *International construction law: a guide for cross-border transactions and legal disputes* (2009, American Bar Association), 5. See also AB Ngowi et al, 'The globalisation of the construction industry – a review', 40 (2005), *Building and Environment*, 135–141.

4 Janine Stewart, et al, 'Adjudicator jurisdiction across jurisdictions' 16(3) 2021, *Construction Law International*, 17–18.

5 See, eg, *Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd* [2005] NSWSC 1167. In *McSpedden v Hartnett* (1942) 42 SR (NSW) 116, which concerned an interlocutory application for particulars of a defence in a final account dispute, Jordan CJ held (at 117): 'It is deplorable that the parties should have been unable to arrive at a compromise. Anyone familiar with this type of action can foresee that it will almost certainly involve considerable loss to the ultimately successful party, and perhaps ruinous loss to the loser.' See also at 124, per Halse Rogers J.

6 Bryan M Seifert, 'International Construction Dispute Adjudication under International Federation of Consulting Engineers Conditions of Contract and the Dispute Adjudication Board', 131(2) 2005, *Journal of Professional Issues in Engineering Education and Practice*, 149.

7 Julian Bailey, *Construction Law: Volume II* (2nd edn, Routledge, 2016) 1715.

8 *Discain Project Services Ltd v Opecprime Development Ltd* [2001] *EWHC Technology 435. Rsl (South West) Ltd v Stansell Ltd* [2003] EWHC 1390 (TCC). *Ellis Building Contractors Ltd v Goldstein* [2011] EWHC 269 (TCC). *Fastrack Contractors Ltd v Morrison Construction Ltd & Anor* [2000] EWHC Technology 177.

9 Paragraph 9.2.1 of the Revised TCC Guide, 2022. See also *Sleaford Building Services Limited ('SBS') v Isoplus Piping Systems Limited* ('*Isoplus*') [2023] EWHC 969 (TCC).

10 There are 172 contracting states. See www.newyorkconvention.org/contracting-states, accessed 1 October 2024.

11 'Pay now argue later' is a phrase which has appeared in a number of authorities, and refers to the fact that an adjudicator's decision has a curious status at law,

being one of so-called 'temporary finality'. See eg, *J Tomlinson Ltd v Balfour Beatty Group Ltd* [2020] EWHC 1483 (TCC) at 10; *RHP Merchants and Construction Ltd v Treforest Property Company Ltd* [2021] EWHC B40 (TCC).

12 It should be noted that, under the FIDIC conditions (Clause 21), the Dispute Avoidance/Adjudication Board's decision becomes final and binding unless one or both parties issue a 'Notice of Dissatisfaction' with the DAAB's decision; the dispute can only be submitted to arbitration if such a Notice of Dissatisfaction has been filed within the time limit.

13 Sir Vivian Ramsey, 'A View from the Bench', 13(1) 2018, *Construction Law International*, 74. Also see FIDIC conditions, Sub-Clause 21.6: 'The arbitrator(s) shall have full power to open up, review and revise any certificate, determination (other than a final and binding determination), instruction, opinion or valuation of the Engineer, and any decision of the DAAB (other than a final and binding decision) relevant to the dispute.'

14 The current practical turnaround time is approximately eight to ten weeks, owing to the high workload of the TCC.

15 In the first enforcement case *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] EWHC Technology 254, the court considered a claim of alleged procedural error by the adjudicator, and dismissed the claim suggesting that the rapid nature of the adjudication process would undoubtedly result in some procedural errors. The case of *Carillion Construction Ltd v Devonport Royal Dockyard* [2005] EWHC 778 (TCC) further confirmed that the adjudicator's decision must be enforced even if the adjudicator has made an error of procedure, facts, or law.

16 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

17 The contracting parties of Hague Convention are currently 34 countries and the members of the Judgments Convention is 29; while the contracting parties of NY Convention is 172.

18 See eg, Bernardo Ruiz Lima & Antonio de la Campa Cervera, 'Enforcement of Judgments from the United Kingdom in Civil and Commercial Matters in Spain' (Penningtons Law, 1 February 2024), www.penningtonslaw.com/news-publications/latest-news/2024/enforcement-of-judgments-from-the-united-kingdom-in-civil-and-commercial-matters-in-spain, accessed 1 October 2024.

19 United Nations Commission on International Trade Law, 75th session (New York, 14–18 February 2022), 9.

20 UN Report of Working Group II (Dispute Settlement) on the work of its 68th session (New York, 5–9 February 2018), 152.

21 *Ibid*, 161.

22 United Nations Commission on International Trade Law Working Group II (Dispute Settlement) 79th session (New York, 12–16 February 2024), 19 (6).

23 In the case of *Nobles Resources Pte Ltd v Good Credit International Trade Co Ltd* (2016) Hu 01 Xie Wai Ren No 1, a Shanghai court refused to enforce a SIAC award passed under the expedited procedure (Rules of 2013). The court ruled that it is not in consonance with the intention of the parties and it does not uphold party autonomy.

24 *Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25, 10.

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FEATURE ARTICLE

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Risk management and contractual risk allocation in subsea site investigations and installation activities for offshore wind farms

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Since the establishment of the inaugural offshore wind farm at Vindeby, Denmark in 1991, there have been tremendous advancements in the field. Modern wind turbines have increased considerably in size and are now positioned further offshore. Importantly, offshore wind turbines can be much larger than their onshore counterparts and the largest have rotor diameters of nearly 300m, covering a maximum swept area equivalent to nine soccer pitches.[1] This requires cable laying, the utilisation of innovative foundation types,

and poses several subsea engineering challenges with potential cost and time consequences for project developers.

This article focuses on subsea engineering-related risks and their investigation in the design stage, leaving to one side other risks such as regulatory and supply chain risks, and contracted offtake arrangements which, in sum, leave little margin for error on these projects. During the design phase, it is essential to understand the ground conditions. Site investigations thus require ground sampling and in situ tests. However, these explorations come with their own risks and challenges, potentially resulting in incomplete or inaccurate information about the ground conditions and causing delay and additional costs.

The importance of collecting geotechnical data at an early stage

Planning and implementing a geotechnical investigation for offshore wind farms introduces a unique set of complexities.

Nevertheless, some developers fail to understand the importance of collecting geotechnical data from the outset. During the planning stage of a wind project, a primary aim of subsea surveys is to secure environmental consents by identifying protected marine species and habitats. This also feeds into determining the project site location. However, these surveys typically do not prioritise the collection of geotechnical data, and the consideration of project-specific hazards, to undertake investigations and guide the design.[2]

these explorations come with their own risks and challenges, potentially resulting in incomplete or inaccurate information about the ground conditions and causing delay and additional costs

Offshore site investigation demands specialised equipment capable of operating under significant pressures and depths. Additionally, these operations are costly and time-intensive, requiring efficient strategies to minimise vessel usage and personnel deployment. These operations are planned during good weather seasons which means that specialised vessels are in high demand at the relevant times; any unexpected delays can lead to vessels moving to another project, thus compounding project delay.

Anchoring point to the seabed and adverse ground conditions

Foundations typically account for 35 per cent of the total cost of an offshore wind farm. The turbines may be supported by any of a variety of foundations (gravity base, suction caisson, monopile, tripod or jacket/lattice foundations – collectively categorised as grounded structures) or may use floating platforms through anchors that moor the turbines. Generally, grounded structures are used for shallow waters, up to 60m depth, while floating systems are used for deeper waters.[3] Monopiles, due to their simplicity in shape and straightforward manufacture, have been the industry-preferred foundation type.[4]

Geological conditions are a critical factor in choosing the appropriate foundation type. Differing or adverse ground conditions have proven to be a significant risk that can impact the installation of the turbines. For example, soils with unexpectedly low strength can necessitate deeper pile penetration for the foundation, whereas unforeseen excessively hard layers may hinder pile drivability. Even more simple gravity-based structures demand a relatively level seabed and can require extensive seabed preparation, potentially escalating project costs.[5] The anchoring of floating structures can also be affected by ground risks such as early refusal due to obstructions or presence of rock.[6]

Cable laying

Cable laying is another activity prone to disruption due to ground conditions. It involves laying and burying high-voltage cables on the seabed to connect the wind turbines to each other and to the offshore substation. Depending on seabed conditions, the level of protection or relevant type of hazard, the burial depth of several wind farm cables is typically in the range of 0.5–2 m. This process requires knowledge of the seabed composition to adopt the best installation method. Indeed, it is reported that around 80 per cent of insurance claims in these projects result from issues during cable installations, which brings cable-laying contracts into focus as an area of risk mitigation.[7]

To mitigate these ground risks, the fundamental challenge, similar to onshore projects, lies in accurately predicting ground conditions despite inherent uncertainty in the behaviour of the soil in terms of spatial variability.

Non-intrusive and intrusive techniques each pose challenges

The offshore environment itself adds layers of complexity to geotechnical site investigations, especially for seabed sampling. Non-intrusive techniques such as remote sensing and geophysical surveys, typically conducted during the planning and feasibility stages, offer a broader view of the underwater geology: the data should be sufficient to demonstrate the suitability of preferred design concepts. However, soil properties and profiles obtained with non-intrusive methods are an interpretation from the data collected and cannot be directly observed. Ground truthing with intrusive investigation of the seabed is still required for the validation of the geotechnical model.

Intrusive investigations require a deployment method. For depths under 20m, a standard rig from jack-up platforms or anchored barges can be used. In deeper or severe conditions, vessels with dynamic positioning are required. These deployment systems are exposed to harsh sea conditions such as strong currents and high waves, which can degrade data quality, delay the operations and endanger operational safety. In addition, maintaining the stability of survey vessels in such conditions is challenging, resulting in errors in positioning. Vessel selection is critical, since they are required to operate in the foreseen adverse weather. Use of an unsuitable ship can result in the termination of operations due to poor sea conditions.

Geotechnical site surveys for offshore wind projects typically require penetration to depths greater than 10m, achievable with drilling of boreholes. Depending on the ground conditions, some sampling methods are more suitable than others. For example, piston samplers are impractical for sand. In cases such as boulder clays and cemented soils, rock coring techniques may be necessary. Using the wrong technique can lead to poor sample quality or low recovery.

In situ tests allow direct measurements of specific soil properties. The cone penetration test (CPT) involves pushing an instrumented cone into the seabed using a rod. This method allows for direct measurement of specific soil properties, and it can be conducted from a platform or a vessel. However, the presence of boulders can cause early refusal, impacting the test's effectiveness.[8]

Offshore ground investigations frequently encounter delays when unsuitable equipment is used. For instance, deploying the wrong type of vessel can lead to operational inefficiencies. Employing incorrect sampling techniques can result in poor-quality samples, which may necessitate repeating the sampling process. These issues can significantly hinder the progress of the investigation and extend the overall timeline.

Use of new technologies

In response to various challenges, the offshore wind industry has proactively adopted new technologies to improve efficiency and the quality of investigations. This includes employing remotely operated vehicles (ROVs) that can be controlled from onshore, minimising the need for specialised personnel at sea. Additionally, the industry has adapted onshore technologies like sonic drilling that can allow a continuous sampling of soft soils and coring of rocks if encountered. This method is potentially suitable for all types of geological conditions. There has also been a push to integrate multiple operational techniques into a single seabed rig, thereby reducing the time and resources spent on offshore vessels.

Innovating in offshore construction carries inherent risks that can lead to increased costs and potential budget overruns and delays if the technologies fail to deliver

Innovating in offshore construction carries inherent risks that can lead to increased costs and potential budget overruns and delays if the technologies fail to deliver. The risks include technological reliability issues, where new tools may not perform as expected, due, for example, to inadequate testing or testing under unrepresentative conditions, or to particularly harsh conditions that were not factored into the technology's design. Implementing new

methods adds complexity, requiring specialised skills needed for new technologies. Finally, unforeseen safety risks and environmental impacts in sensitive marine ecosystems can also arise.

Addressing risk in the contract

To help prevent disputes, it is crucial to thoroughly assess the risks and incorporate appropriate treatment into the contractual framework, ensuring that expectations regarding quality, timing and costs are met.

Importantly, there is still no standard form contract available which specifically deals with offshore wind projects, although FIDIC has announced that it will be publishing such a contract near the end of 2025. Therefore, most contracts in this space are (often heavily) modified FIDIC or Leading Offshore Energy Industry Competitiveness (LOGIC) forms.

Importantly, there is still no standard form contract available which specifically deals with offshore wind projects

These modifications are unsurprising, given that offshore projects are typically procured in a disaggregated manner, where multiple contracts are awarded across a range of specialist contractors and equipment suppliers, with the project owner or developer managing the work distribution rather than an engineering, procurement and construction (EPC) contract serving this function.

Concerning bad weather risk for subsea activities, the FIDIC forms entitle the contractor to an extension of time for 'adverse climatic conditions' which are unforeseeable relative to the climatic data provided by the employer or published for the relevant location. However, typically more detailed provisions are set out, in the marine subsea survey contract, dealing with waiting on weather days and weather windows.

For example, marine survey service contracts can include a weather downtime risk share mechanism whereby the developer agrees to grant the contractor a certain number of days schedule allowance and a lump sum payment in the event of adverse weather which impedes operations (with proportionate reimbursement by the contractor should less than the allowance end up being required). Should the adverse weather exceed the schedule allowance, the developer agrees to issue a variation to the schedule, and to increase the contract price by a certain amount for each additional day of adverse weather. Where weather windows are used to delimit responsibility, it is important to clearly define the windows and the criteria for time extension relief as well as how knock-on delays are dealt with. Clauses that seek to impose liability (such as delay liquidated damages) on one contractor due to non-concurrent delay of an interface contractor may be unenforceable as a penalty depending on the jurisdiction.

As regards subsea condition risk, marine survey contracts typically contain a clause deeming the contractor to have informed itself of those conditions, at least to the extent the information has been provided by the developer. In the case of cable-laying contracts (ie, where separate to the route survey contract), they typically contain clauses which provide for an allowance should subsea conditions necessitate cable rerouting, though this will of course be limited. The contractor also typically provides an indemnity in respect of any damage the contractor causes to the subsea environment.

In offshore site investigation contracts, it is vital to ensure that the explorations adhere to specified quality standards. Performance criteria should be clearly defined for both the quality of the outcomes (such as sample recovery rates) and the capabilities of the subsea rigs and vessels (including force and torque specifications, as well as the vessel's resilience to adverse weather conditions). In a highly innovative environment, developers should consider whether they want to be prescriptive about the type of drilling methods and vessels used, or if they would rather transfer that risk to the market and concentrate on being restrictive with the expected results.

Notes

1 Adnan Memija, 'Mingyang Rolls Out "World's Largest" Offshore Wind Turbine in Capacity and Rotor Diameter' (Offshorewind.biz, 13 December 2023), see www.offshorewind.biz/2023/12/13/mingyang-rolls-out-worlds-largest-offshore-wind-turbine-in-capacity-and-rotor-diameter, accessed 1 October 2024.

2 A Muir Wood and P Knight, 'Site investigation and geotechnical design strategy for offshore

wind development', in *Proceedings of the 18th International Conference on Soil Mechanics and Geotechnical Engineering* (International Society for Soil Mechanics and Geotechnical Engineering, 2013).

3 S Bhattacharya, *Design of Foundations for Offshore Wind Turbines* (1st edn, John Wiley & Sons, 2019). See https://doi.org/10.1002/9781119128137, accessed 1 October 2024.

4 Offshore Wind in Europe: key trends and statistics 2020 (WindEurope, 2020), see https://proceedings.windeurope.org/biplatform/rails/active_storage/blobs/redirect/eyJfcmFpbHMiOnsibWVzc2FnZSI6IkJBaHBBcDhDIiwiZXhwIjpudWxsLCJwdXIiOiJibG9iX2lkIn19–652a2d205034a95011d035451622eca84378db37/WindEurope-Offshore-wind-in-Europe-statistics-2020.pdf, accessed 1 October 2024.

5 *Guidance Notes for the Planning and Execution of Geophysical and Geotechnical Ground Investigations for Offshore Renewable Energy Development* (Society of Underwater Technology, May 2014), see https://sut.org/wp-content/uploads/2014/07/OSIG-Guidance-Notes-2014_web.pdf, accessed 1 October 2024.

6 Cerfontaine et al, 'Anchor geotechnics for floating offshore wind: Current technologies and future innovations' (2023), 279, *Ocean Engineering*.

7 Claire Smith 'Renewables demand results in new guidance for offshore ground investigation' (*New Civil Engineer*, 15 July 2024), see www.newcivilengineer.com/archive/renewables-demand-results-in-new-guidance-for-offshore-ground-investigation-15-07-2014/, accessed 1 October 2024.

8 ETR Dean, *Offshore Geotechnical Engineering: Principles and Practice* (Thomas Telford, 2010).

Hospitality & Construction Disputes Post-Covid

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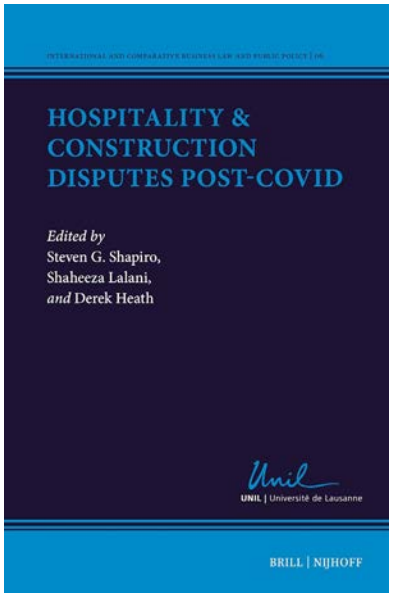

This book is a collection of 11 essays on disputes arising in the hospitality and construction industry in the wake of the Covid-19 pandemic. The book is divided into two parts. The first, comprising six essays, is focused on the hospitality industry. The second, comprising five essays, looks at the construction industry. To review this book, I have looked at an essay in each part.

The fourth essay in Part 1 is entitled 'Navigating Hotel Management Agreements in Times of Crisis'. The authors begin by setting out the elements of hotel management agreements, and explaining their purpose and nature. The authors then highlight the clauses that become focal points during times of crisis.

The authors then focus on force majeure and frustration claims, which are particularly significant in light of the Covid-19 pandemic. The authors consider the challenges posed by general force majeure clauses that may not specifically address events like pandemics, leading to potential disputes over their enforceability. The authors explore the differences in interpretation of force majeure provisions across common and civil law jurisdictions, emphasising the need for parties to carefully consider the governing law of their agreements.

The first essay in Part 2 is entitled 'Abeyance to Resuscitation – Construction Arbitration in the Post-Covid Era'. The authors begin by explaining the diverse lockdown measures implemented in various countries, shedding light on how construction projects were compelled to navigate stringent social distancing rules and screening protocols to resume operations.

Next, the authors explore legal remedies such as change in law clauses, adaptation mechanisms, hardship clauses, and force majeure provisions commonly found in construction contracts. The authors consider the application and effectiveness of these clauses.

The authors also consider the challenges associated with interpreting and invoking these contractual provisions. The authors look at the nuances of change in law clauses, particularly in distinguishing between binding legal restrictions and non-binding guidelines imposed by governments during the pandemic.

In conclusion, this book provides invaluable insights into navigating legal challenges in the hospitality and construction industries post Covid-19. Each chapter offers a comprehensive analysis of the legal frameworks, contractual obligations and practical challenges faced by stakeholders. By highlighting deficiencies in current practices and advocating for proactive measures to address unforeseen events, this book serves as an indispensable resource for industry professionals, scholars and legal practitioners.

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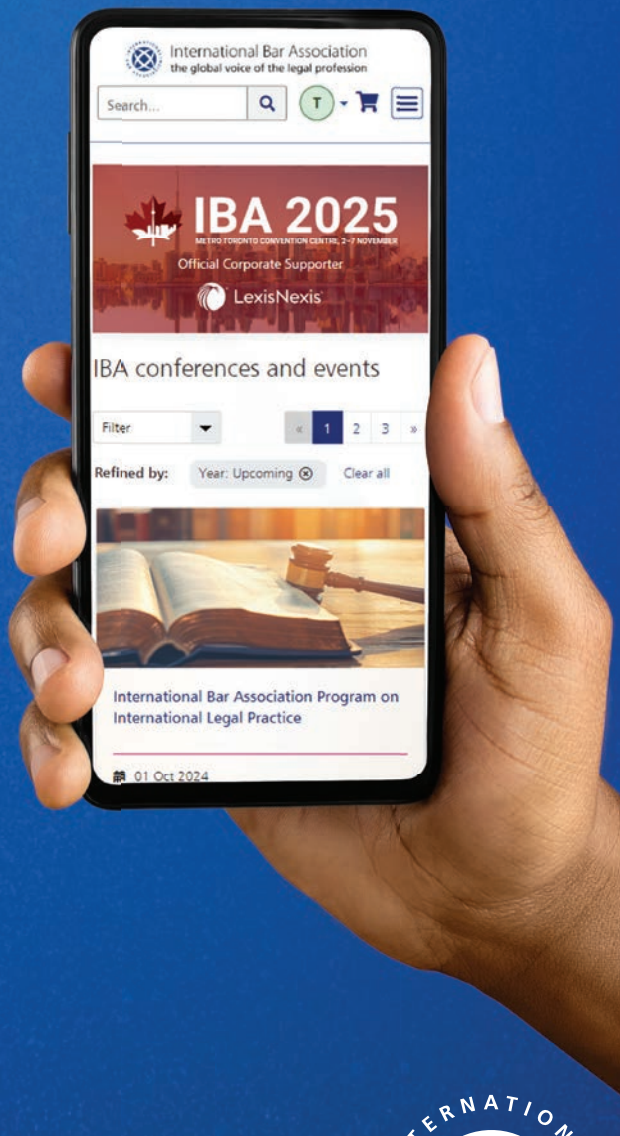

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