

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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**Risk allocation
and force majeure
revisited against
the background
of climate change
and abnormal
weather**

**The drive to
decarbonise:
regulatory
shifts and their
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**Navigating
Zimbabwe's 2026
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A Committee publication from the IBA Energy, Environment, Natural Resources and Infrastructure Law Section

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Storm above a crane and scaffolding.
Credit: poco_bw/Adobe Stock

FROM THE EDITORS

Dear readers,

We are delighted to introduce the September 2026 issue of *Construction Law International* (CLInt). Two of its feature articles grew out of panels held at the IBA Annual Conference in Toronto in November 2025, and we are pleased to see that work now reaching a wider readership.

The country updates open with Canada, where Andrea Lee reviews the continued spread of adjudication and prompt payment legislation across the provinces and recent court decisions on adjudication and other forms of alternative dispute resolution. From Chile, Elina Mereminskaya examines an ad hoc arbitral award of May 2026 which denied the Santiago International Airport concessionaire compensation for Covid-19-related construction costs, on the basis that the Public Works Concessions Law allocates construction-phase risk to the concessionaire. From Vietnam, Vu Le Bang outlines the new Law on Construction, which has been in force since 1 July 2026, and its implications for projects involving foreign parties.

The features begin with the two Toronto panels. Michael Earwaker, Co-Chair, Project Execution Subcommittee, and Ana Candida De Melho Carvalho, Secretary, summarise a session on risk allocation and force majeure in an era of abnormal weather, while Zach Torres-Fowler, Membership Officer, Janet Walker, Hermann Knott, Projects Officer, Mediation Committee, and Piergiorgio Zettera consider how decarbonisation policies in Italy, Germany and the United States are reshaping the regulatory, social licence and financing landscape for energy infrastructure. Rudo Magundani guides investors through Zimbabwe's 2026 PPP Guideline, with particular attention to the lifecycle of unsolicited proposals and the bid-matching mechanism.

Isa Jeziah Dookie analyses the Privy Council's decision in *Uniform Building Contractors v The Water and Sewerage Authority of Trinidad and Tobago*, which reaffirms that FIDIC notice provisions operate as conditions precedent, that termination does not revive time-barred claims and that the engineer cannot amend the contract. Marianne C Ramey asks why delay experts so often differ and argues that the treatment of contemporaneous programme updates, rather than the choice of method, usually explains the divergence. Engin Ertuş proposes practical tools for building trust during EPC negotiations for power projects, and Pedro Felipe Eraso explains how convertible notes can bridge early-stage funding gaps in infrastructure projects.

In this issue's In-House Counsel Interview, Nick Cowie, General Counsel of WSP for the Middle East and Asia, speaks with Aarta Alkarimi, Co-Chair, about his career in the region and the challenges facing in-house teams on major projects.

We close with three book reviews: the second edition of *Arbitration of Commercial Disputes* by Andrew Tweeddale and Masood Ahmed, reviewed by Joanne Clarke; *Building Defects Law* by Darryl Royce, reviewed by Thayananthan Baskaran, Chair of the ICP Editorial Board, and Leezzie John; and the *Handbook on Construction Law and Arbitration*, edited by Krishan Singhania and Srishti Singhania, reviewed by Aleksander Godhe, Deputy Committee Editor.

We thank all our contributors for sharing their experience and insights. As always, we invite ICP members and all those interested in construction law to submit articles, updates, and news at any time to eric.franco@legaldelta.com.

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FROM THE CO-CHAIRS

As we look forward to the IBA Annual Conference in Copenhagen from 4 to 9 October 2026, the IBA International Construction Projects (ICP) Committee is preparing an active programme that should offer good variety and value to delegates.

This year, the Committee will contribute six panels to the annual programme. Together, these sessions will examine some of the most important legal and practical issues facing the international construction and infrastructure sector. They will bring together leading practitioners, in-house counsel, industry representatives and other specialists from different jurisdictions to exchange perspectives on challenges arising throughout the life cycle of major projects.

The breadth of our programme reflects the distinctive character of the ICP Committee. International construction projects sit at the intersection of law, engineering, finance, project management, technology and public policy. The issues that arise rarely fall neatly within a single discipline or jurisdiction. Our panels are therefore intended not simply to describe developments, but to encourage practical discussion and genuine engagement between speakers and delegates.

The Committee's own open business meeting will take place on Thursday 8 October, at 1545-1700 at the Bella Center. We very much hope that ICP members and all those interested in international construction and infrastructure will join us. The session will offer both substantive discussions including the mid-year working weekend, the biannual conference in London and other committee initiatives. It is also an opportunity to meet new colleagues working from around the world.

Of course, the Annual Conference is also about renewing friendships, welcoming new members and strengthening the professional relationships that make the ICP community so special.

Our Committee dinner will be held on Wednesday 7 October at Le Petit Rouge, 1900-2200. The dinner is always a highlight of our conference week: a relaxed evening in which members, speakers and friends of the Committee can reconnect away from the formal conference programme. We warmly encourage members to reserve their places early.

We will conclude the week on Friday 9 October, with a river and harbor cruise through Copenhagen. The excursion will combine views of the city from the water with a traditional Danish *smørrebrød* lunch. It should be a wonderful way to experience Copenhagen, continue the week's conversations and spend time together before delegates begin their journeys home.

Further information about the six panels and our social events is available through the IBA conference programme and social events calendar.

We are enormously grateful to all our session chairs, moderators, speakers and organising colleagues for the time, thought and enthusiasm they have contributed. Developing six panels alongside our dinner and excursion represents a considerable collective effort, and the quality of the programme reflects the commitment of the Committee's members.

We look forward to welcoming you to Copenhagen for a week of thoughtful discussion, new ideas, collegiality and, we hope, a little Danish *hygge*.

Aarta Alkarimi and Douglas Oles

Co-Chairs, IBA International Construction Projects Committee



COUNTRY UPDATE: CANADA

Andrea Lee
Glaholt Bowles, Toronto

Introduction

Canada's construction law landscape continues to evolve at a brisk pace, with significant legislative reform, new adjudication and prompt payment regimes, and judicial guidance shaping dispute resolution.

Adjudication and prompt payment

Adjudication and prompt payment legislation, first introduced in Canada following an expert review of the former Construction Lien Act in Ontario in 2019, has proven to be a success and continues to rapidly spread throughout much of the country. Adjudication and/or prompt payment are now in effect in Alberta, Manitoba, Saskatchewan, Ontario and the Northwest Territories. New Brunswick, Nova Scotia and British Columbia have all drafted legislation implementing them, but that legislation is not yet in force.

As for adjudication case law, there is a steady stream of decisions of interest out of Ontario, the most recent one being *Sayers Foods Ltd v Gay Company Ltd*.¹ In that case, the court clarified a number of issues, including the treatment of evidence on judicial review and the question of whether complexity proceedings can oust an adjudicator's jurisdiction.

The court stressed that a judicial review is not a new hearing, and that attempts to re-argue the adjudication rather than explaining why the adjudicator's findings were unreasonable in light of the record will not be successful. The facts in a judicial review are derived from the adjudicator's determination, just as on appeal the factual record is derived from the lower court decision, and to overturn facts as established by an adjudicator requires palpable, overriding error. The Divisional Court rejected an argument that a more permissive standard for the introduction of fresh evidence should apply for judicial reviews of adjudications. Sayers argued that the short time frames for adjudication caused unfairness, but the Divisional Court declined to relax the general standard. It found that the proposed fresh evidence would not have impacted the outcome in any event, and that if Sayers had complied with its contractual obligations in a timely manner, it would have had the evidence prior to the adjudication. The Divisional Court also declined to admit the evidence because it contained impermissible material, including factual and legal argument, inadmissible opinion evidence and hearsay.

Next, the court rejected the argument that claims should not be subject to adjudication because of complexity, since it would defeat the prompt payment provisions if an owner could deprive an adjudicator of jurisdiction by raising, as a matter of defence to a 'single matter' dispute, a defence that raises 'multiple and complex' issues of fact and/or law. The subject matter of the arbitration does not change because of a defence raised by an owner, although the focus of the arbitration may turn out to be on the defence, if the affirmative claim is otherwise uncontested.

Finally, an argument that adjudications are akin to injunctions

and the 'serious issue to be tried' standard should apply to defences was also rejected. A prompt payment determination is not an interlocutory injunction; it is a comprehensive scheme for prompt adjudication of construction payment disputes, with the goal of seeing that funds flow to, and through, the construction pyramid promptly, to reduce cascading losses and delays on construction projects. The evidentiary burden is on a balance of probabilities, and the determination is without prejudice to the position of the parties in subsequent litigation.

Arbitration

In *CIMIC Morningstar Investments Ltd v Chandos Construction Ltd*,² the British Columbia Court of Appeal confirmed the very narrow scope of judicial review of arbitral awards.

The arbitration proceedings arose from a project in which CIMIC engaged Chandos as the general contractor in the construction of a four-storey building under a fixed-price contract. The central issue in the arbitration was responsibility for delay in the completion of the project. In a partial award, the arbitrator awarded Chandos damages of some \$7,018,000 for failure to make progress payments, failure to release holdbacks, delay and financing costs, plus interest and costs. In a final award released a month later, the arbitrator adjusted the total amount of damages to \$6,470,275, plus costs of \$1,621,852 and interest of \$1,013,317.

The arbitrator largely agreed with the position advanced by Chandos. She found that construction was delayed by acts or omissions of CIMIC and its agents; determined that Chandos complied with the contractual notice requirements applicable to its delay claims; and found CIMIC liable for delay and financing costs. The arbitrator ruled that CIMIC was estopped from advancing the

position that Chandos was disentitled to delay damages based on its completion of contract change forms indicating zero days of additional delay. The arbitrator also rejected CIMIC's position that it was entitled to invoke a liquidated damages clause when Chandos failed to finish the work by the substantial completion date.

Under the British Columbia Arbitration Act, a party to an arbitration may appeal to the Court of Appeal under section 59 of the Arbitration Act on any question of law arising out of an arbitral award, with leave. CIMIC argued that the arbitrator had erred on four questions of law: the interpretation of the contractual notice provision; the acceptance of the estoppel argument; the application of the prevention principle; and the misinterpretation of evidence.

The court found that none of those alleged errors rose to the level of an error in law. The interpretation of the notice provision was 'at best, a question of finding of mixed fact and law'. The findings on the estoppel argument, while framed as a question of law, were, in reality, a complaint about how the arbitrator applied the legal test for promissory estoppel to the facts of the case, as was the arbitrator's mixed fact and law finding that Chandos successfully engaged the extension provision in the contract. Finally, with respect to the misinterpretation of evidence, the court held that 'what CIMIC describes as a misapprehension of evidence amounting to an error of law is, in reality, a challenge to the arbitrator's weighing of the evidence. It follows that this ground of appeal does not raise a question of law'. This case is therefore the latest example of British Columbia courts finding that a mistake in weighing evidence does not amount to an error of law.

In *Aroma Franchise Company, Inc v Aroma Espresso Bar Canada Inc*,³

the Ontario Superior Court of Justice (Commercial List) addressed the grounds on which a court may set aside an international commercial arbitral award under Article 34 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, as adopted in Ontario through the International Commercial Arbitration Act, 2017.⁴

The court had to consider, among other matters, the consequences of the arbitrator's finding that Earl Gorman, the interim managing partner of Aroma Canada and an individual respondent in the arbitration, was not a proper party to the arbitration. With respect to procedural fairness, the applicants argued that they had been denied the opportunity to present their case when the arbitrator determined, without submissions from the parties, that Mr Gorman was not a proper party to the arbitration. The court accepted that this finding engaged Article 34(2)(a)(ii), as neither party had been afforded the opportunity to address the issue prior to the arbitrator making the determination.

While the court accepted that a breach of procedural fairness occurred when the arbitrator made a finding regarding the personal respondent's status without hearing submissions from the parties, it nonetheless declined to set aside the award because the breach was not material to the outcome. The court considered the significance of that breach in the context of the arbitral award as a whole, emphasising that not every procedural defect warrants setting aside an award. The arbitrator had already made substantive findings rejecting any basis for personal liability on the part of Mr Gorman, including findings that there was no oppression and no justification for piercing the corporate veil. In those circumstances, the additional statement that Mr Gorman was not

a proper party to the arbitration did not affect the outcome and was characterised as 'superfluous'.

The recent Quebec Superior Court decision in *Association des ressources intermédiaires d'hébergement du Québec (ARIHQ) c Santé Québec*⁵ is the first (at least in Canada) case in which an arbitral award was set aside because the award was written by artificial intelligence (AI).

The case concerned a dispute between a healthcare provider and the provincial health network about payments allegedly due under an agreement. The agreement stipulated a strict 90-day deadline for any notices of disagreement. The notice was not given within that time. The main issue before the arbitrator was whether the provider's claim was time-barred. The arbitrator held that it was.

In support of that finding, the arbitrator relied on an article allegedly published by the Québec Bar Association. That article did not exist. The arbitrator further relied on three decisions, two by the Court of Appeal and one by the Superior Court. None of those decisions existed either. Nor did another arbitral award that was cited. These 'authorities' were at the very core of the decision and were the only authorities cited for the main conclusion.

The court found that 'the preponderance of evidence therefore leads to the conclusion that the Arbitrator's authority was delegated and that he abdicated his role in reviewing the result. This conclusion is inescapable given that all the doctrinal and jurisprudential references on which the Arbitrator relies are non-existent and "hallucinatory"'.

While in Québec, an error of law, even on a matter of public policy, is not grounds for annulment, the court annulled the award on the basis that the arbitrator had failed to follow the agreed-upon arbitration procedure in delegating his decision-making function to AI.

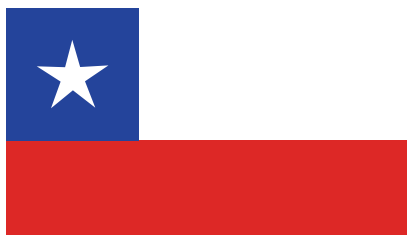
Conclusion

These recent court decisions give a glimpse into the otherwise confidential realm of alternative dispute resolution (ADR) in Canada. In Ontario, recent legislative amendments have resulted in the requirement that statutory adjudication decisions be published, albeit with identifying information anonymised. While adjudication decisions are not to serve as binding precedent, the move is meant to provide greater transparency to the public.⁶ These trends show that the construction industry has embraced and continues to rely on ADR as an efficient means of achieving resolution.

Notes

- 1 2026 ONSC 918 (Div Ct).
- 2 2026 BCCA 2.
- 3 2026 ONSC 768.
- 4 SO 2017, c 2, sch 5.
- 5 2026 QCCS 1360.
- 6 As pointed out in the review leading to the most recent amendments: 'The suggestion is not that prior determinations be in any sense binding or even persuasive. The suggestion is that to be credible, the adjudication system must be transparent.' See D W Glaholt, *2024 Independent Review: Updating the Construction Act*, <https://ontarioconstructionactreview.ca/final-report/> accessed 14 August 2026.

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COUNTRY UPDATE: CHILE

Compensation for Covid-19-related construction costs denied to the Santiago International Airport concessionaire

Elina Mereminskaya
Arbitra International, Santiago

On 22 May 2026, an ad hoc arbitral tribunal rendered an award resolving a dispute between the concessionaire of Santiago's Arturo Merino Benítez International Airport and the Chilean Ministry of Public Works concerning the recovery of additional costs allegedly incurred by the claimant during the construction of the airport expansion works as a result of the Covid-19 pandemic.

Although the dispute was, as a matter of law, a domestic arbitration, the concessionaire's shareholders are foreign companies, giving the case broader international significance. The shareholders of the claimant Nuevo Pudahuel SA (the 'Concessionaire') are Aéroports de Paris Management SA (45 per cent), VINCI Airports SAS (40 per cent) and Astaldi Concessioni SpA (15 per cent).

Parties' main arguments

The Concessionaire brought a claim for damages against the Chilean Ministry of Public Works (the 'MOP'). It requested the arbitral tribunal to declare that the measures

adopted by the MOP in response to the Covid-19 pandemic had adversely affected the execution of the construction works under the Concession Agreement, rendering their performance significantly more costly and causing the Concessionaire to suffer losses exceeding US\$40m, and to order the MOP to compensate for those losses.

The Concessionaire's central argument was that the MOP had instructed it to continue the construction works throughout the pandemic, despite the numerous restrictions and public health measures that substantially increased construction costs, while also giving rise to additional prolongation costs and losses of productivity. The MOP's Contract Administrator (Inspector Fiscal), however, granted only a 66-day extension of time on account of the pandemic and rejected any entitlement to monetary compensation.

In its Statement of Claim, the Concessionaire expressly denied that the Covid-19 pandemic constituted a force majeure event. Instead, it argued that the Concession Agreement had been affected by extraordinary circumstances which, although they did not render performance impossible, made it substantially more onerous. On that basis, it contended that it was entitled to financial compensation.

In response, the MOP argued that Article 22 of the Chilean Public Works Concessions Law (Supreme Decree No 900 of the Ministry of Public Works) (the 'Concessions Law') allocates the entire construction risk to the concessionaire during the construction phase. It further submitted that it was the Concessionaire itself that had sought the classification of the airport construction works as a critical activity, thereby enabling the project to continue notwithstanding the restrictions imposed during the pandemic.

Tribunal's analysis of the contractual liability requirements

The arbitral tribunal began by examining the legal characterisation of the Concessionaire's claim, emphasising that it was a claim for contractual damages. Accordingly, the tribunal considered it necessary to determine whether the legal requirements for contractual liability under Chilean law had been established.

The tribunal observed that the first requirement for contractual liability under Chilean law is the existence of a breach of a contractual obligation. It concluded that the Concessionaire had neither identified nor proven any contractual obligation owed by the MOP whose breach could justify the damages sought. As the tribunal stated: 'All the arguments advanced by the Concessionaire in support of its claim seek to explain why it incurred additional costs in carrying out the works and why those costs should be borne by the State rather than by the Concessionaire itself. Nowhere, however, does it identify – or even refer to – any contractual obligation (or statutory obligation incorporated into the Contract) binding upon the MOP that was breached and could therefore justify the damages claimed.'

The tribunal also expressly rejected the argument that the alleged breach could consist of the MOP's refusal to compensate the Concessionaire. In its view, the legal basis of the claim (the alleged breach of a contractual obligation) cannot be conflated with the remedy sought (an award of damages).

The tribunal further emphasised the fundamental distinction between compensation for additional costs and an award of damages. Whereas the recovery of additional costs does not depend on the other party having

breached the contract, an award of contractual damages necessarily presupposes a contractual breach. In the tribunal's view, damages constitute a civil remedy flowing from contractual liability and therefore require proof of an unlawful act, namely the breach of a pre-existing contractual obligation. By contrast, compensation for additional costs is based on the different rationale of restoring the contract's economic and financial equilibrium, irrespective of fault or breach.

Since the Concessionaire had failed to establish that the MOP had breached any contractual obligation, the tribunal held that the first requirement for contractual liability had not been satisfied.

The tribunal then turned to the second requirement, namely that the breach must be attributable to the debtor's fault or wilful misconduct. In this regard, it observed that: 'Fault and wilful misconduct are not abstract concepts; they necessarily relate to a particular course of conduct, namely the breach of a pre-existing obligation.'

The tribunal went on to conclude that: 'Since no contractual or statutory obligation breached by the MOP has been identified, any inquiry into negligence or intentional wrongdoing is devoid of purpose.'

Accordingly, the tribunal found that the second requirement for contractual liability was likewise absent, making it unnecessary to examine the remaining requirements under Chilean law.

Having concluded that the Concessionaire had brought a claim for contractual damages, the tribunal held that it could not recast that claim as one seeking compensation for additional costs, even by invoking the principle of *iura novit curia*. While that principle allows a tribunal to apply the law independently of the parties' legal arguments, it does not permit the tribunal to disregard the legal nature of the claim before it or to alter the relief sought.

Risk allocation under the Concessions Law

Without prejudice to its foregoing analysis, the tribunal considered it appropriate to assess the Concessionaire's claim as though it had sought compensation for additional costs rather than contractual damages.

In doing so, the tribunal recalled that, in a previous arbitration between the same parties concerning the effects of the Covid-19 pandemic on the airport's operational phase, it had accepted the Concessionaire's own characterisation of the pandemic as a 'supervening natural event', that is, an event of force majeure. Consequently, the tribunal held that the Concessionaire's present contention that Covid-19 did not constitute a force majeure event was inconsistent with its previous position and therefore contrary to the doctrine of *venire contra factum proprium*.

The tribunal was not persuaded by the Concessionaire's attempt to distinguish between the construction and operational phases by arguing that the pandemic qualified as force majeure only in the latter. On the contrary, it observed that the Concessionaire's own reasoning – that, during the construction phase, performance had not become absolutely impossible – could equally be applied to the operational phase. The pandemic had not rendered airport operations absolutely impossible; rather, it had merely reduced passenger traffic and the frequency of flights.

The tribunal then turned to Article 22 of the Concessions Law, which, insofar as relevant, provides:

'The legal regime governing the concession during the construction phase shall be as follows:

(2) The works shall be carried out entirely at the concessionaire's risk, and the concessionaire shall bear all expenditures necessary

for their completion, whether arising from force majeure, *caso fortuito*, or any other cause. The State shall not be liable for any consequences arising out of contracts entered into by the concessionaire with contractors or suppliers. The State shall, however, contribute to the payment of losses caused by *caso fortuito* or force majeure¹ where the tender documents so provide.’

The tribunal attached particular significance to the breadth of this statutory risk allocation:

‘In light of the foregoing, it is evident that, by providing that the works are to be carried out entirely at the concessionaire’s risk, and that the concessionaire must bear all expenditures necessary for their completion, whether arising from *caso fortuito*, force majeure, or any other cause [emphasis in the award], the statute renders moot the Concessionaire’s argument as to whether the pandemic and its effects on the performance of the Contract constitute a *caso fortuito*. It is sufficient that the expenditures or additional costs arise from “any other cause” for them to fall upon the Concessionaire. This conclusion is reinforced both by the disjunctive conjunction “or”, which follows the reference to *caso fortuito* and force majeure, and by the statutory requirement that the works be carried out ‘entirely’ at the concessionaire’s risk.’

The tribunal further characterised the Concessionaire’s position as being ‘inconsistent with the principle of good faith’. In its view, the Concessionaire could not, on the one hand, argue that the measures adopted by the public authorities in response to the pandemic did not constitute a force majeure event while, on the other, rely on the MOP’s characterisation of those same circumstances as force majeure to obtain a 66-day extension of the construction period.

The tribunal also emphasised that Article 22(2) of the Concessions Law applies exclusively to the

construction phase of the concession and not to its operational phase. It was for this reason, among others, that the same arbitral tribunal had previously upheld the Concessionaire’s claim arising out of the impact of the pandemic on the operation of the airport.

Finally, the tribunal rejected the Concessionaire’s reliance on the principle of legitimate expectations. Having examined the evidentiary record, it found no proof that the MOP had encouraged or promoted the acceleration plans and other measures that allegedly gave rise to the additional costs claimed by the Concessionaire. Rather, the evidence showed that those initiatives had originated with the Concessionaire itself. The tribunal considered this course of conduct entirely unsurprising in light of the Concessionaire’s statutory obligation to complete the works and place them into service within the contractual deadlines, coupled with the absence of any legal or contractual entitlement to compensation from the MOP for the resulting additional costs.

Finally, the tribunal held that the Concessionaire could not invoke the principle of good faith as a basis for restoring the economic and financial equilibrium of the Concession Agreement in the face of an express statutory provision allocating the entirety of the construction risk to the Concessionaire during the construction phase.

For all of these reasons, the arbitral tribunal dismissed the Concessionaire’s claim in its entirety. This arbitral award is now final and binding.

The same tribunal recognised the pandemic’s effects on the operational phase of the concession

This decision provides an interesting contrast with the tribunal’s earlier award, rendered on 15 May 2024,

in which it partially upheld the Concessionaire’s claim concerning the effects of the Covid-19 pandemic on the airport’s operational phase.

In that earlier award, the tribunal found it beyond dispute that the Covid-19 pandemic had fundamentally disrupted the economic equilibrium of the concession contract, even placing the Concessionaire’s financial viability at risk. It further held that the pandemic constituted an event of *caso fortuito* or force majeure whose allocation had not been contemplated by the contract or by the applicable statutory and regulatory framework. In those circumstances, the contract could be adapted in order to restore its economic and financial equilibrium consistently with the requirements of good faith and the parties’ reciprocal duty of contractual cooperation.

Against that background, the tribunal concluded that the MOP’s refusal to agree to any form of compensation for the consequences of the pandemic was both legally and economically misguided. In its view, that position was contrary to the duties of loyalty and cooperation arising from the principle of good faith, as enshrined in Article 1546 of the Chilean Civil Code, and was likewise incompatible with the reciprocal and onerous nature of the concession contract.

According to the tribunal, the pandemic gave rise to a risk that had not been allocated under the contract. In such circumstances, the parties were under a duty to adapt the contract so as to restore the economic equilibrium inherent in a reciprocal contract. Contract adaptation was therefore intended to give effect to the parties’ original bargain by ensuring that each party continued to bear only those risks falling within the scope of the ‘ordinary contractual risk’ (*alea normal*) assumed when they entered the contract. In this way, the adaptation of the contract would correct the substantial imbalance produced by

circumstances that were both unforeseeable and irresistible, such as the Covid-19 pandemic.

The tribunal further held that the MOP was under a genuine contractual obligation to restore the economic and financial equilibrium of the contract. That obligation arose, inter alia, from Article 1546 of the Chilean Civil Code, which enshrines the principle of contractual good faith, and required the parties – acting in accordance with the duties of loyalty, good faith and mutual cooperation – to restore the reciprocal balance of the contract that had been disrupted by the effects of the pandemic.

The tribunal was ultimately unable to conclude that any of the Concessionaire's principal proposals represented the appropriate means of restoring that equilibrium. It therefore granted the Concessionaire's alternative claim and ordered the parties to negotiate in good faith with a view to agreeing upon the most appropriate means of adapting the contract, consistently with the rights, obligations and risk allocation originally assumed by them.

The practical significance of the 2024 award is underscored by subsequent events. Following the tribunal's order that the parties negotiate in good faith, the MOP and the Concessionaire established a joint task force that ultimately resulted in a formal amendment to the contract.² The parties agreed to extend the concession term by 36 months and to adjust the revenue-sharing mechanism for the extension period (reducing the revenue percentage for the state from 77.56 per cent to 73 per cent).³ In exchange, the Concessionaire withdrew both its related domestic claims and the parallel International Centre for Settlement of Investment Disputes (ICSID) proceedings brought by its shareholders. Thus, the 2024 award produced concrete

contractual adjustments rather than remaining a purely declaratory ruling.

Final remarks

Read together, the two awards point to a clear conclusion. Under the express terms of Article 22(2) of the Chilean Public Works Concessions Law, a concessionaire operating in Chile bears the entirety of the financial risk associated with the construction phase, even where the additional costs result from an event as extraordinary and unforeseeable as the Covid-19 pandemic. In this context, the characterisation of the pandemic as an event of *caso fortuito* or force majeure is ultimately immaterial, since the statute allocates to the Concessionaire the risk of additional costs arising from 'any other cause'.

A different outcome may, however, arise where a force majeure event affects the operational phase of a concession. If the event is so extraordinary that it falls outside the contractual allocation of risk originally agreed by the parties, the Concessionaire may be entitled to seek the restoration of the contract's economic and financial equilibrium. In this scenario, the parties may be under a duty to negotiate in good faith the appropriate contractual adjustments necessary to restore that equilibrium, and the Chilean Ministry of Public Works is willing and capable of negotiating in good faith when ordered to do so by a tribunal.

Notes

1 The Concessions Law refers separately to *caso fortuito* and force majeure. Under Chilean law, however, the two expressions are synonymous. Article 45 of the Chilean Civil Code defines *caso fortuito* or force majeure as 'an unforeseen event that cannot be resisted', using both terms interchangeably. For that reason, this article preserves the wording of the statute without suggesting that Chilean law recognises different legal regimes for the two concepts.

2 See <https://concesiones.mop.gob.cl/mop-y-nuevo-pudahuel-alcanzan-acuerdo-que-pone-fin-a-controversia-por-efectos-de-la-pandemia/> accessed 14 August 2026.

3 See www.biobiochile.cl/noticias/nacional/region-metropolitana/2026/02/18/nuevo-pudahuel-y-mop-celebran-acuerdo-para-modificar-contrato-de-concesion-del-aeropuerto-de-santiago.shtml accessed 14 August 2026.

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COUNTRY UPDATE: VIETNAM

Vietnam's new law on construction: key changes for international construction projects

Vu Le Bang

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Vietnam's new Law on Construction No 135/2025/QH15 (the 'New LOC') took effect entirely on 1 July 2026. The New LOC comprehensively overhauls the legal framework governing construction activities within the country's territory, streamlines administrative procedures and, most significantly, introduces advanced regimes applicable to international construction projects. This article outlines key reforms and notable considerations for implementing construction projects involving foreign elements (also known as international construction projects) in Vietnam.

Background information on the New LOC

Vietnam's construction sector has developed significantly in recent years, driven by major infrastructure projects that have attracted active participation from both domestic and foreign investors.¹ Dispute resolution statistics also reflect this trend. In 2025, construction disputes were the second-most

prevalent type of dispute handled by commercial arbitration, accounting for 23 per cent of the caseload, second only to sale-of-goods disputes.²

Against this backdrop, there is a need to enhance the legal framework to better align with international standards and contracting practices, including those of the International Federation of Consulting Engineers (Fédération Internationale des Ingénieurs-Conseils or FIDIC). This requirement is further underscored by the limitations and shortcomings of Vietnam's current Law on Construction No 50/2014/QH13 (the 'Current LOC').³ In this context, the enactment of Vietnam's new Law on Construction No 135/2025/QH15 (the 'New LOC') represents a necessary step towards comprehensive reform and harmonisation of Vietnam's construction legal framework, including the adoption of new decrees and circulars that provide detailed implementing rules and guidance.

Key changes for international construction projects

Applicable law for construction contracts: a clearer hierarchy under domestic law

The first significant development under the New LOC is the clarification of the applicable legal framework governing construction contracts where the Current LOC is silent. Under the Current LOC, the determination of applicable law for matters not governed by construction regulations was controversial, as it led to differing interpretations of the interaction between civil law, commercial law and construction law. In some cases, this uncertainty led the courts to take different approaches in the same dispute. For instance, in one specific case, the first instance

and appellate courts applied commercial law. By contrast, the Supreme People's Court, in reviewing such a case, held that the dispute related to construction activities and should therefore be resolved under construction law and, where construction law was silent, the Civil Code.⁴

The New LOC addresses this issue by expressly providing the rule that construction contracts are subsequently governed by the Civil Code, unless construction instruments contain specific provisions governing those matters. This approach clarifies the relationship between the general substantive framework and sector-specific rules, thereby ensuring a consistent interpretation and application of the relevant legal framework.⁵

Language for construction contracts: greater freedom to agree on controlling language

The New LOC permits contracting parties to agree on the priority order of the languages used in a construction contract involving foreign parties. In particular, according to Article 80.3 of the New LOC, the contract shall be drafted in Vietnamese and another language as agreed, and the parties may designate the foreign language as the prevailing language. In the absence of such an agreement, the Vietnamese version prevails. This represents a meaningful refinement of Article 138.4 of the Current LOC, which requires the use of Vietnamese and permits an additional foreign-language version, but does not expressly address which version prevails.

With this change, for international construction projects, the parties may therefore designate the foreign-language version, often based on international model wording, as the prevailing text. This reduces the risk that translation discrepancies distort the parties' allocation and

performance of rights and obligations, helps avoid disputes and retains a Vietnamese version for domestic administrative, regulatory and dispute-resolution purposes.

Contractual construction risk allocation: liquidated damages and performance security mechanisms

Historically, Vietnamese law explicitly recognised only two forms of monetary remedies for breach of contract: compensation for actual damages and contractual penalties. Vietnamese courts have often declined to enforce pre-agreed damage amounts, that is, liquidated damages, and claims based on such amounts have generally been dismissed⁶ or treated as unenforceable penalties.⁷

First, the New LOC introduces a landmark reform by recognising liquidated damages in construction contracts. According to Article 86.2 of the New LOC, three elements now determine compensation for damage: (1) the actual damage incurred; (2) the rate of predetermined damages corresponding to the breached contractual obligation; and (3) the degree of breach. While this provision represents a significant step towards recognising liquidated damages in Vietnamese construction law, several interpretive issues remain, including divergent interpretations of the term ‘degree of breach’ and the possibility that predetermined damages may coexist with contractual penalties or other traditional remedies.⁸ Despite these uncertainties, the reform brings Vietnam’s construction contract regime closer to internationally accepted standards, particularly those commonly found in FIDIC contracts, where liquidated damages for delay are standard practice.

Second, performance security and payment security for construction contracts are currently regulated in Articles 16 and 17 of Decree No

37/2015/ND-CP detailing the construction contracts (‘Decree 37’), which guides the Current LOC, and adopts a relatively restrictive approach to its formulation and implementation. In particular, concerning performance security for the contractor’s obligations, Decree 37 limits the permissible forms of performance security to three instruments, which are: (1) deposit; (2) escrow; or (3) guarantee, without any guidance for those applications, while the payment security for the employer’s obligation requires a guarantee from a credit institution. Furthermore, the value of performance security is statutorily set at two to ten per cent of the contract price. It may be increased to 30 per cent for high-risk projects, but the payment security thresholds remain silent. Compared with the more flexible regime under FIDIC Red Book 2017, these statutory thresholds for performance security significantly constrain party autonomy in structuring performance security. By contrast, the payment security appears to align with the employer’s obligations under the FIDIC Red Book 2017 regarding financial arrangements.

The New LOC elevates such provisions on performance security and payment security under Decree 37 to the level of statutory law. Concerning performance security, although the New LOC does not specify a statutory threshold, Article 13.2 (dd) of Decree No 210/2026/ND-CP (‘Decree 210’), which shall replace Decree 37 and provide guidance on the implementation of the New LOC as from 1 July 2026, retains the statutory thresholds of two per cent to ten per cent, consistent with Decree 37.

Dispute resolution mechanisms for construction contracts: permission of models under international practices

The New LOC takes a big dispute resolution step forward compared to

the construction dispute resolution methods under the Current LOC. Article 86.5 of the New LOC officially recognises a variety of dispute resolution models as forming part of ‘international practices’. This provision also removes the requirement for negotiation as a mandatory precondition under Article 146.8 of the Current LOC. Specifically, the new framework’s explicit reference to ‘dispute resolution models under international practices’ creates statutory space for mechanisms such as dispute avoidance/adjudication boards (DAABs) and multi-tier procedures, including arbitration models as found in the FIDIC Red Book 2017. In this regard, Article 17.3 of Decree 210 further affirms that such ‘international dispute resolution models’ include DAABs.

Although Article 17.3 of Decree 210 does not prescribe detailed procedures for DAAB proceedings, it establishes an effective legal framework for adopting internationally recognised DAAB practices, including those under the FIDIC Red Book 2017. Accordingly, the parties may agree on: (1) the timing for establishing a DAAB; (2) the selection process and composition of its members (including number, qualifications and expertise); (3) the binding effect of its decisions or recommendations; and (4) subsequent steps in the event of dissatisfaction. This flexibility enables parties to align their agreed framework closely with the FIDIC DAAB mechanism. Furthermore, under parties’ agreement, the interim binding effect of DAAB decisions or recommendations can be recognised, thereby facilitating the practical application of the ‘pay now, argue later’ principle. This addresses a key shortcoming under Decree 37, pursuant to which dispute boards were characterised as mediation mechanisms, lacked a basis for interim binding effect, and did not fully align with FIDIC standards.

Notably, for public investment and public-private partnership projects,

a more cautious approach applies: (1) the parties should prioritise domestic arbitration; and (2) international dispute resolution models may only be used where required by international treaties or approved by the investment decision-maker. Dispute resolution costs may now be included in the project's total investment capital.

Conclusion

The New LOC is an important step in improving Vietnam's legal framework for construction projects involving foreign elements. Its reforms on applicable law, contract language, security, predetermined damages and dispute resolution should provide greater certainty for foreign investors and international contractors. Beyond these technical improvements, the New LOC also signals Vietnam's broader policy effort to align with international practice, especially in a period when foreign investment, international contracting structures and cross-border project financing increasingly shape major construction and infrastructure projects.

However, the New LOC is only the beginning of the next phase of reform. Implementing decrees and circulars will be critical, and some provisions will need to be tested in court and arbitral practice. For now, parties preparing projects in Vietnam should review their contract templates, bilingual drafting practices, security packages and dispute resolution clauses to ensure they make the most of the new framework.

Notes

- 1 Press conference on the inauguration and commencement ceremonies for projects and works marking the 80th anniversary of Vietnam's National Day (14 August 2025) <https://baochinhphu.vn/hop-bao-thong-tin-ve-le-khanh-thanh-khoi-cong-cac-du-an-cong-trinh-nhan-80-nam-quoc-khanh-102250814155733205.htm> accessed 17 August 2026.
- 2 Vietnam International Arbitration Centre (VIAC), *Annual Report 2025* <https://viac.vn/en/statistics/statistics-on-dispute-resolution-activities-in-2025-s49.html> accessed 17 August 2026.
- 3 Hien Trang and Vu Hieu, *Improving the legal framework: Creating new momentum for the construction sector*, (16 October 2025) <https://quochoi.vn/tintuc/Pages/tin-hoat-dong-cua-quoc-hoi.aspx?ItemID=96124> accessed 17 August 2026.
- 4 Decision No 12/2019/KDTM-GDT dated 24 September 2019 on a dispute over damages arising from a rock-drilling and blasting contract (The Supreme People's Court) <https://thuvienphapluat.vn/banan/ban-an/quyet-dinh-gdt-ve-tranh-chap-boi-thuong-thiet-hai-hop-dong-khoan-pha-da-so-122019kdtmgdt-347688> accessed 17 August 2026.
- 5 Vu Le Bang, Cao Tran Nghia and Nguyen Thi Tuyet Diem, Key Changes in the New Law on Construction (Vietnam), Lexology www.lexology.com/library/detail.aspx?g=f3cd453c-0278-4a9d-b75f-7db75421a075 accessed 17 August 2026.
- 6 Judgment No 26/2018/KDTM-PT dated 5 November 2018, on a Dispute over a Service Contract (People's Court of Dong Nai Province) <https://thuvienphapluat.vn/banan/ban-an/ban-an-262018kdtmpt-ngay-05112018-ve-tranh-chap-hop-dong-dich-vu-60648> accessed 17 August 2026.
- 7 Decision No 15/2016/KDTM-GDT on a construction contract dispute (The Supreme People's Court) <https://thuvienphapluat.vn/banan/ban-an/quyet-dinh-giam-doc-tham-ve-tranh-chap-hop-dong-xay-dung-so-152016kdtmgdt-1676> accessed 17 August 2026.
- 8 Vu Le Bang, Internationalization of Vietnam's Construction Contracts under the New Construction Law Framework, 2026 Ho Chi Minh City International Construction Arbitration Conference hosted by the Society of Construction Law – Vietnam (SCLVN).

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Risk allocation and force majeure revisited against the background of climate change and abnormal weather

On 5 November 2025 at the IBA Annual Conference in Toronto, Canada, a panel presented on the topic: 'Risk allocation and force majeure revisited against

the background of climate change and abnormal weather.' This article summarises the presentations of the speakers.

Chris Bereise: Accuracy

The premise of Chris Bereise's paper was that the effects of climate change on construction projects are no longer isolated or exceptional, but reflect a structural shift in the climate regime. While annual precipitation volumes may appear relatively stable over several decades, the data shows a marked increase in extreme events, with a clear acceleration since the 1980s, and major climate events – particularly floods – having more than doubled since the 1960s. These shifts have direct operational consequences for construction sites, including shutdown days, extended recovery periods, and systemic disruption to workforce availability, logistics and critical resources.

Bereise argued that historical references used to define what is 'normal', 'foreseeable' or 'exceptional' are losing their relevance, and that traditional contractual frameworks are increasingly ill-equipped to absorb repeated climate shocks.

In response, Bereise advocated for a structured, data-driven approach to risk allocation, encompassing the redefinition of what constitutes a qualifying event, the integration of predictive climate models and probabilistic approaches as contractual references, the transformation of mitigation into an enforceable operational framework, and the treatment of causation as a contractual object grounded in admissible data.

This approach, Bereise concluded, is a prerequisite for ensuring that projects remain executable, financeable and legally robust in an environment where uncertainty has become the norm.

Katherine Bell: Schellenberg Wittmer

After introducing the topic with an overview of in which ways extreme adverse weather may impact construction sites, Katherine Bell provided a comparative assessment of the extension of time and force majeure relief provisions in two standard form contracts and a third, bespoke contract.

The two standard forms considered were the FIDIC Red Book 2017 and American Institute of Architects (AIA) Contract A201-2017. Both have provisions that give relief to the contractor in the event of certain events, with the FIDIC provisions referring specifically to 'exceptional

adverse climatic conditions' (in the extension of time clause) and 'natural catastrophes' (in the force majeure or 'exceptional events' clause). While the drafting of the provisions in the separate contracts was quite different, there were certain common themes in the drafting.

Key themes were the requirements of exceptional weather conditions, unforeseeability, causation, notice and mitigation. This necessarily posed the question, how do these clauses operate in the context of weather, which is the 'new normal' and what relief mechanisms should be in contracts which adapt to these circumstances.

To help address this question, Bell concluded by examining a bespoke contract that prescribed with precision what weather and other conditions would need to occur in order for the contractor to be granted relief. Bell asked the audience to consider if contracts should be targeted towards these issues so as to give parties greater certainty of which risks they have assumed.

Angus Rankin: Vinson & Elkins

Angus Rankin's presentation addressed the seminar topic by reference to the specific issues confronting offshore wind projects. The weather dependency of these projects demands special consideration from the parties to allocate risk.

For weather, a typical approach is for the contract to set a baseline that is probability driven, with a 50 per cent probability (P_{50}) being a common baseline. However, in some negotiations, contractors are being asked a price a P_{100} risk. Rankin said it was an open issue as to what level of specificity in these clauses contractors would accept.

the effects of climate change on construction projects are no longer isolated or exceptional, but reflect a structural shift in the climate regime

Another issue that can arise is the propensity of excusable delay to shift the working time into unfavourable weather periods and/or jeopardise the availability of key vessels. The loss of a vessel slot is usually a ground for suspension by the contractor.

These unique risk allocation provisions are in addition to those more commonly

found in construction contracts, such as generic force majeure clauses, health and safety, and mitigation provisions.

As a final observation, Rankin posed the question as to what relief an offshore wind developer may be able to secure in the event of long-term weather patterns affecting the financial viability of the project.

José María Pérez: Bredin Prat

José María Pérez presented a speculative reflection on how emerging international public law obligations on states may influence risk allocation in infrastructure projects. He noted that positive obligations on states to anticipate, prevent and mitigate the effects of climate change are increasingly recognised by international and European courts. What began as policy expectations is gradually being transformed into enforceable legal duties:

- In 2024, the European Court of Human Rights in the case *Klimaseniorinnen v Switzerland* found Switzerland in breach of the European Convention on Human Rights for failing to protect individuals from serious climate-related risks, notwithstanding the existence of sufficiently reliable indications that anthropogenic climate-change exists.
- In 2024 and 2025, three major international courts (the International Tribunal for the Law of the Sea, the Inter-American Court for Human Rights and the International

Court of Justice), each held that states are under a duty, under both treaty law and customary international law, to prevent and remedy climate-related harm.

Pérez explained that while these obligations are directly incumbent upon states, not private actors, they could have an impact on risk allocation mechanisms in the infrastructure/construction sector on at least two intersecting levels:

- a ‘vertical, top-down’ level, where, as states adjust and reinforce environmental policies and planning, permitting standards and impact-assessment requirements, the wide margin of appreciation left to states in respect of the choice of means to address these new obligations could furthermore be a source of regulatory uncertainty/unforeseeability; and
- a ‘horizontal, contracting parties’ level, where private parties may seek to ‘contractualise’ the consequences of these new state duties through climate-action related representations, information-sharing duties on environmental baselines and adaptive/relief clauses covering future regulatory measures, particularly as the unforeseeability element of force majeure becomes harder to invoke.

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The drive to decarbonise: regulatory shifts and their impact on energy infrastructure projects

Introduction

The global imperative to decarbonise energy production has emerged as a significant driver of infrastructure development. Climate change concerns and energy security considerations, heightened by

geopolitical instability, have prompted governments to pursue ambitious renewable energy targets while grappling with the challenges of maintaining reliable power supplies to meet domestic demand. This tension between sustainability and

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energy pragmatism has produced a complex, rapidly evolving regulatory landscape, creating opportunities and risks for infrastructure projects across the energy sector.

Progress towards decarbonisation has been neither linear nor uniform. Jurisdictions have pursued strategies based on their distinct geographic characteristics, existing energy infrastructure, political considerations and available natural resources. For example, Italy utilises solar and biomethane technologies that can be integrated with its agricultural sector; Germany and the European Union have invested in wind energy; and the United States has witnessed a remarkable resurgence of interest in nuclear power, driven by strong energy demands from data centres and artificial intelligence infrastructure.

The US is experiencing a nuclear renaissance – not so much to meet energy self-sufficiency as to serve the extraordinary energy requirements of data centres and artificial intelligence infrastructure

This article arises out of a panel presentation at the International Bar Association Annual Conference in Toronto in November 2025.¹ It examines how the regulatory shifts across these energy technologies and jurisdictions are shaping infrastructure project development. We identify key regulatory shifts and their impact on projects, including evolving social licence and financial considerations.

Emerging issues in regulating energy technology

Solar and biomethane in Italy

Italy has recently implemented legislative and regulatory changes to accelerate the development of renewable energy, particularly solar and biomethane. These measures are driven by EU targets and the country's National Recovery and Resilience Plan (Piano Nazionale di Ripresa e Resilienza or PNRR).² Key focus areas include simplifying authorisation procedures, introducing new incentives and defining rules for end-of-life management of these plants.

One important driver is the need for energy independence, which became critical with the Russia–Ukraine War, when Italy's

dependence on Russian gas had been approximately 43 per cent.³ To strengthen local sources, Italy has developed technologies integrating energy production and agriculture, which combine agriculture and solar plants in 'agri-photovoltaic' projects, fuel biomethane plants with digested agricultural waste and reuse bio-products as fertiliser.

Wind energy in Germany and the EU

Wind energy stands at the heart of the EU's energy and climate agenda. After nuclear energy, which provides 25 per cent of the EU's electricity, wind is the largest energy source, providing 20 per cent of all electricity consumed across Member States.⁴ It is indispensable to decarbonising the European economy. However, despite stable long-term output, the pace of producing new capacity falls short of what is required for the EU's 2030 binding targets. Only 13 gigawatts of new wind capacity was added in 2024 and 19.1 gigawatts in 2025, making it necessary to increase capacity by more than 30 gigawatts annually in the coming years.⁵ The need to double the growth in capacity heightens both the regulatory urgency and the commercial stakes in the wind energy debate in Europe today.

The challenges are threefold: navigating new EU permitting requirements, overcoming persistent delays in grid connection and stimulating demand-side uptake of renewable electricity among end-users. Each dimension has distinct legal requirements and commercial logic. All have generated regulatory issues at the EU level and in the German domestic regulatory framework that enforces EU standards.

Nuclear power in the US

The US is experiencing a nuclear renaissance – not so much to meet energy self-sufficiency as to serve the extraordinary energy requirements of data centres and artificial intelligence infrastructure.⁶ Technology companies operating large language models require enormous quantities of reliable, baseload power, with large data centres consuming as much electricity as a small city.⁷

Nuclear power is uniquely attractive to this industry. Unlike solar and wind, nuclear plants

produce consistent baseload power, regardless of weather conditions. This reliability is essential for data centre operation, which cannot tolerate service interruptions caused by intermittency. Moreover, nuclear power produces no direct carbon emissions during operation, allowing technology companies to satisfy operational requirements and corporate sustainability commitments – although nuclear waste storage remains a politically sensitive issue.⁸

The US nuclear regulatory environment has been very stringent, particularly after the Three Mile Island disaster in 1979, when the US Nuclear Regulatory Commission implemented extensive safety requirements significantly increasing construction and operation costs. Recent policy shifts signal meaningful change, with the current administration aiming to significantly expand capacity by 2050.⁹

The current nuclear resurgence departs from the traditional approach of constructing massive new plants like the Vogtle nuclear facility in Waynesboro, Georgia.¹⁰ Rather, driven by commercial interest in increasing available electricity, the industry is proceeding along two tracks: recommissioning previously shuttered plants and developing small modular reactor (SMR) technology.

The immediate path to increased capacity involves recommissioning plants closed for economic rather than safety reasons. This eliminates the lengthy process of site selection, environmental review and initial licensing of new construction. Technology companies have entered power purchase agreements (PPAs) with nuclear operators, providing the revenue certainty needed to justify investments.¹¹ However, SMRs are also being introduced. The output of SMRs is typically below 300 megawatts, in contrast with traditional plants, which exceed 1,000 megawatts.¹² Their modular design allows factory fabrication and transport to installation sites, potentially reducing costs and timelines. However, SMR technology remains largely unproven at commercial scale and regulatory procedures designed for large light-water reactors do not translate seamlessly to novel designs.¹³

Impact of regulatory changes

Having identified several trends in the development of carbon-reduced energy sources,

we now turn to some emerging regulatory issues that shape that development.

Wind energy in Germany and the EU

The Renewable Energy Directive (RED), the primary legal instrument governing the EU's approach to wind and other renewable energy, has undergone successive revisions. The core logic – that Member States bear individual responsibility for achieving national targets through support schemes and mechanisms – has remained constant.

However, the current generation of the framework, RED III,¹⁴ sets a binding target of 42.5 per cent renewable energy in the EU energy mix by 2030, with an aspiration to reach 45 per cent. To increase available renewable sources rapidly, RED III has raised the headline target and introduced binding permitting timelines and streamlined procedures. It designates renewable energy deployment as 'overriding public interest' – a classification of direct consequences for weighing competing interests in planning and environmental impact assessment (EIA) proceedings. This resonates with the German approach, where the Renewable Energy Act 2023 (Erneuerbare-Energien-Gesetz) declares electricity generation from renewable sources to be of 'overriding public interest' and a matter of 'public security', with renewables to be treated as a priority consideration.

RED III also introduces provisions on 'Renewable Acceleration Areas' – pre-designated zones where simplified, time-limited permitting applies and where environmental assessment is carried out at the planning stage rather than for individual projects. According to Article 15(c)(1) of RED III, by 21 February 2026, Member States should have ensured that competent authorities adopted one or more plans to meet at least their national contributions towards the overall EU 2030 target.

Solar and biomethane in Italy

Similarly, Italy has introduced legislative and regulatory changes to boost the development of solar and biomethane projects. These measures are driven by EU targets and the PNRR. As in Germany, the key focus areas in Italy include simplifying authorisation

procedures and introducing new incentives. Italy has also regulated end-of-life management in solar and biomethane projects.

SOLAR ENERGY

Italy has streamlined the administrative processes for solar photovoltaic (PV) plants to accelerate their deployment. The recent Renewable Energy Consolidated Act (Testo Unico per le Energie Rinnovabili)¹⁵ reorganises the legal framework to reduce bureaucratic hurdles. For large-scale plants, Single Authorisation¹⁶ consolidates all necessary permits into a single process with stricter deadlines. For smaller-scale projects, the Simplified Administrative Procedure¹⁷ streamlines approval. Further, authorities are defining 'Suitable Areas'¹⁸ for renewable energy installations to simplify permitting.

Three incentives support solar projects from utility-scale to small residential systems. The 'Bonus Fotovoltaico' (Photovoltaic Bonus) provides a tax deduction of up to 50 per cent on installation costs for residential and commercial systems, including storage batteries. The temporary FER X Decree (Transitional) provides incentives for electricity from renewable sources, including solar, with a focus on market-competitive projects. Finally, PNRR Measures¹⁹ allocate significant funds to the development of solar energy, with a focus on agrivoltaics, and the deployment of PV panels on agricultural and industrial buildings, often through capital contributions.

Nuclear power remains significantly more expensive than solar, wind and natural gas generation

To address solar panel end-of-life management, the EU's Waste Electrical and Electronic Equipment (WEEE) Directive has been transposed into Italian law.²⁰ The Gestore dei Servizi Energetici (GSE),²¹ Italy's energy services manager, manages the financial aspects of decommissioning. For plants that receive incentives, the GSE may retain a portion of the incentive payments to cover future disposal costs.

BIOMETHANE ENERGY

Biomethane regulation in Italy incentivises production from agricultural, livestock and

organic waste, promoting a circular economy. The Ministerial Decree of 15 September 2022²² incentivises the production of biomethane for transportation, heating and industrial processes, and simplifies the complex regulatory requirements related to energy, agriculture and waste management, creating a 'Single Authorisation' or similar procedure that involves multiple public entities.

The PNRR also targets the development of biomethane infrastructure. PNRR investments are designed to streamline the administrative process and allocate funds, including capital contributions of up to 40 per cent of eligible investment costs, to convert existing biogas plants and construct new ones. The PNRR also has an incentive tariff on net biomethane production for 15 years. The tariff amount varies based on the plant's production capacity and feedstock type. Incentives are granted through competitive procedures managed by the GSE, with specific deadlines for plant commissioning aligned with PNRR goals.

The decommissioning of biomethane plants follows general environmental and waste management regulations. Key concerns include the safe disposal of all materials and equipment, anaerobic digesters and any associated waste products. The closing and dismantling of biomethane plants must comply with environmental permits and authorisations, and ensure proper soil and water protection. Operators must ensure the safe and environmentally sound disposal of all plant components, and restore the site to its original condition.

NUCLEAR POWER IN THE US

Nuclear power remains significantly more expensive than solar, wind and natural gas generation.²³ This cost disadvantage reflects high capital costs; lengthy construction timelines; and extensive safety systems, redundant components, specialised materials and documentation required by the regulations governing nuclear development and operation – compliance burdens that competing technologies do not face to the same degree.²⁴

The capital requirements for traditional nuclear projects create financing challenges. Large plants can cost tens of billions of dollars and take over a decade to construct. The Vogtle expansion in Georgia, originally estimated to cost US\$14bn, exceeded

US\$30bn as regulatory changes forced expensive modifications.²⁵

The US Nuclear Regulatory Commission's licensing process imposes substantial costs, with the average licensing timelines historically extending well beyond those of other countries.²⁶ More significantly, the US approach lacks fixed timelines and permits requirements to evolve during construction, creating uncertainty that compounds project risks.²⁷ The central question is whether the regulatory framework can adapt quickly enough to support the current window of opportunity created by the surging commercial demand.

Evolving social licence considerations

Despite the powerful drivers to develop carbon-neutral energy sources, every infrastructure project has the potential to affect the local community in which it is built. This section examines features that require community engagement and support, and their corresponding effect on the regulatory environment.

Wind energy in Germany and the EU

Permitting remains the primary bottleneck for wind energy deployment across the EU. Although RED III introduces binding timelines and an 'overriding public interest', implementation at national and subnational level is uneven. EIA requirements,²⁸ directives for species protection obligations²⁹ and habitats,³⁰ and the integration of wind turbines with spatial planning frameworks – all products of the regulatory interest in sustaining social licence – create procedural complexity and lead times of five to ten years for large-scale projects.

In Germany, the Onshore Wind Energy Act 2022 (*Wind-an-Land-Gesetz*) shifts from a negative exclusion planning model to a positive area target system, requiring each state to designate minimum percentages of territory for wind by 2027 and 2032, with a sanction of full outer-zone privilege applying automatically if targets are missed. Priority zones³¹ must simultaneously be designated as acceleration zones, with streamlined environmental rules under the Federal Spatial Planning Law (*Raumordnungsgesetz*).

These initiatives have boosted onshore wind expansion, leading to record-level

licensing in 2024 and 2025. Designating two per cent of Germany's land for wind and streamlining environmental assessments has reduced bureaucratic hurdles and accelerated project planning, but challenges remain at the state level.

In 2024, approximately 14 gigawatts of wind power was approved, a record exceeding the combined approvals of 2017–2020, signalling that acceleration measures are reducing red tape. In 2025, this increased to 20.8 gigawatts. Projects in designated acceleration areas have benefited from reduced EIAs, with authorities conducting reviews using existing data. This has reduced average approval times by 10–20 per cent as of early 2025. Nevertheless, grid connection delays are a structural commercial risk for wind energy operators across the EU. In Germany's offshore sector, the obligation to connect lies with the transmission system operator. Failures to meet the agreed connection date trigger compensation claims.³²

Litigation over the calculation of compensation – including the measurement of wind speed for estimating lost generation, the treatment of shadow effects between turbines and the scope of the grid operator's duty to minimise damages – has generated substantial German case law.³³ More broadly, the pace of onshore grid reinforcement and extension – required to transport wind-generated electricity from production-intensive northern regions to consumption-intensive southern regions – lags behind both onshore and offshore wind installation rates.

A third challenge is demand: despite the need for expanded sources of carbon neutral energy, industrial and domestic energy users are transitioning their consumption to electrified, renewable-sourced supply chains slower than anticipated. This dampens the commercial incentive for accelerated wind investment and makes it harder to justify infrastructure costs.

PPAs between wind energy developers and large corporate buyers have emerged as a partial market-based solution, reducing dependence on public support schemes and creating long-term revenue certainty. However, PPA markets remain underdeveloped in several EU Member States due to regulatory barriers and the difficulty of pricing long-term renewable risk.

Solar and biomethane in Italy

Any new energy infrastructure, including solar and biomethane plants, must face the so-called ‘not in my backyard’ (NIMBY) syndrome. For permitting procedures involving local communities, whether towns/municipalities or regions, community support often requires ‘mitigating measures’, including allocating a budget for public works, renovation of streets, public buildings, schools, public gardens or hospitals, including energy efficiency initiatives.

By designating renewable energy infrastructure projects as projects ‘of public interest’,³⁴ the need to make these commitments for additional public infrastructure to secure the necessary permitting has developed from maintaining community goodwill to essential requirements for project planning.

Nuclear power in the US

Nuclear power has historically faced the most severe social licence challenges of any energy technology. The Yucca Mountain experience illustrates how social licence issues can derail initiatives, even when technical and regulatory requirements are satisfied – despite billions invested in the Nevada waste repository, political opposition prevented the facility from ever opening.³⁵

Nuclear power has historically faced the most severe social licence challenges of any energy technology

Despite this history, recent polling indicates increasing public support for nuclear power, reflecting growing recognition that decarbonisation requires zero-emission baseload generation, concerns about grid reliability and increased confidence in the safety of nuclear energy.³⁶ Corporate endorsements from leading technology companies may also be influencing attitudes, as prominent firms announce nuclear commitments to power data centres. SMRs may offer further social licence advantages through reduced footprints, enhanced passive safety features and the possibility of locating facilities on former coal plant sites.

Financial implications

Regulatory shifts and evolving social licence considerations have contributed to a complex environment for the design and delivery of renewable energy projects, thus increasing the complexity of the financial foundation on which they must proceed.

Wind energy in Germany and the EU

In Germany and the EU, wind energy has grown from a niche technology into a core power generation sector. Offshore wind involves some of the largest infrastructure investments in Europe. The commercial model for onshore and offshore wind in most EU Member States now is based on competitive auctions: developers bid for a support rate (contract for difference or premium tariff), receive a grid connection entitlement upon winning and must commission the facilities within a defined period or face penalties.

In Germany, EEG auctions impose 24-month commissioning deadlines and 30-month deadlines for the lapse of subsidy entitlement, with penalties (*Pönalen*) accruing for delays. Commercial viability remains exposed to risks beyond auction outcomes: supply chain disruptions, grid connection delays causing outages and compensation claims, and costs from complex environmental and planning procedures.

EU wind energy investors must contend with frequently and abruptly changing regulations. In Germany, fundamental legal reforms pose systemic challenges.³⁷ In Spain, Italy and Czechia, retroactive reductions in renewable energy support schemes led to a wave of investor-state arbitrations under the Energy Charter Treaty (ECT). Following the Court of Justice’s judgment in *Achmea* (C-284/16) and *Komstroy* (C-741/19), intra-EU arbitration clauses in the ECT were deemed inapplicable as between EU Member States and EU investors, resulting in another shift in the prospect of a secure basis for financing projects. The German Constitutional Court has confirmed this position from a domestic law perspective.³⁸

Solar and biomethane in Italy

In Italy, regulatory changes have resulted in recalculations of incentives to be awarded on certain plants, and permit and authorisation requirements, disrupting business plans on which investors and their financiers have relied. This has prompted investors and financing banks to consider the risk and mitigate the related disruption to timelines and other features of the project.

Nuclear power in the US

Regulatory uncertainty drives the cost of capital for US nuclear projects above comparable jurisdictions, reflecting perceived risks, including regulatory changes during construction, licensing delays and political shifts that could undermine project economics.³⁹ SMRs face the compounded regulatory uncertainty of unproven technology. The cancellation of the NuScale Carbon Free Power Project – which would have been the first utility-scale US SMR – illustrated these difficulties when cost estimates rose from US\$55 per megawatt-hour to US\$89 per megawatt-hour, undermining the economic case and leaving the project without sufficient subscriber support to proceed.⁴⁰

Achieving financial viability is likely to require regulatory reform; policy support through mechanisms like production tax credits or loan guarantees; and innovative commercial arrangements that transfer risk to creditworthy offtakers. The current environment of strong demand, corporate buyers, political support and reform momentum presents unusual conditions favourable to nuclear expansion. However, whether those factors are sufficient to overcome historical financial obstacles remains an open question.

Conclusion

The drive to decarbonise has produced a complex regulatory landscape for energy infrastructure projects worldwide. Across the three jurisdictions examined, regulatory uncertainty emerges as a central concern – when rules can change during development and construction, investors demand risk premiums that increase costs and slow deployment.

Energy transition will continue to generate novel challenges for infrastructure developers, regulators and host communities. What remains constant is the fundamental tension between the urgency of decarbonisation and the practical difficulties of transforming the systems that power modern economies – a tension that will shape infrastructure development for decades to come.

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Uptown Harare, Zimbabwe. Credit: Edwin/Adobe Stock

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Navigating Zimbabwe's 2026 framework for unsolicited PPPs

Public-private partnerships (PPPs) have assumed a central role in Zimbabwe's approach to infrastructure development and public service delivery. This policy direction is anchored in the National Development Strategy 2 (NDS 2), Zimbabwe's second five-year national development plan covering the period 2026–2030, which provides the overarching framework for economic reform, infrastructure investment and private sector participation in pursuit of Vision 2030.¹ Under NDS 2, large-scale investments in transport, energy, water, sanitation and housing are prioritised, with PPPs identified as an essential mechanism for leveraging private sector financing in the delivery of capital-intensive projects.

Introduction

In March 2026, the Government of Zimbabwe approved the Zimbabwe Public–Private Partnership Guideline 2026 (the ‘PPP Guideline’),² published in terms of the Zimbabwe Investment and Development Agency Act (the ‘ZIDA Act’).³ The approval of the PPP Guideline marked a significant development in Zimbabwe’s public–private partnership (PPP) regulatory framework. While the ZIDA Act provided the legislative foundation for PPPs, and established the institutional framework for their development and approval, the practical implementation of PPP projects had long been hampered by the absence of a comprehensive operational framework. There was no single consolidated instrument governing the entire PPP project cycle, from project identification and appraisal to procurement, implementation, monitoring and exit. As a result, contracting authorities, private investors and sector regulators operated in an environment of procedural uncertainty. The PPP Guideline addresses this gap. It is the first dedicated and comprehensive operational instrument governing PPPs in Zimbabwe and provides a structured framework for the development, procurement, approval and implementation of PPP projects. Its legal significance is considerable: the PPP Guideline provides that it ‘shall be the primary source document guiding the implementation of PPPs in Zimbabwe as read with the ZIDA Act’ and ‘shall have the same force of application and legal effect’ as the Fourth Schedule to the ZIDA Act.⁴

Building on the legislative foundation established by the ZIDA Act, the PPP Guideline provides the operational framework that was previously absent. It was developed in accordance with the PPP procedures set out in the ZIDA Act and the Public Procurement and Disposal of Public Assets Act (the ‘PPDPA Act’), which governs public procurement by state entities in Zimbabwe. The PPP Guideline also draws on international best practices, including the Common Market for Eastern and Southern Africa (COMESA) Model PPP Law and Guidelines.⁵ The PPP Guideline regulates the entire PPP project cycle, covering project identification, preparation, appraisal, procurement, approval, implementation, monitoring and exit. Importantly, compliance with the PPP

Guideline is mandatory. Accordingly, all contracting authorities and private counterparties seeking to enter into PPP arrangements in Zimbabwe are required to adhere to its provisions.

It is within this new and materially significant legal landscape that this article focuses specifically on *unsolicited PPP proposals*. The choice of focus is deliberate – the majority of proposals received by the Zimbabwe Investment and Development Agency (ZIDA) are unsolicited.⁶ This pattern reflects a broader reality in emerging markets: private investors frequently identify infrastructure opportunities before governments do, particularly in capital-constrained economies where public project pipelines are thin. For investors and their advisers, understanding how Zimbabwe’s new framework regulates unsolicited proposals is therefore of immediate practical importance.

What is an unsolicited PPP proposal?

The PPP Guideline defines an unsolicited PPP proposal as one ‘initiated by a private party (Counterparty) and submitted to a public entity (Contracting Authority) without the public entity asking for it’, typically to suggest a project, idea or innovation the private party believes could benefit the public entity.⁷ One condition matters most at the outset: ‘such a project should not be in the public entity’s project pipeline or short to medium term strategic plan’. If it already is, it is not a genuine unsolicited proposal for the purposes of the PPP Guideline.

Unsolicited proposals within a competitive framework

The PPP Guideline is unambiguous. An unsolicited proposal confers no entitlement on the investor to exclusive negotiation, sole source contracting or automatic project award. Its stated overarching principle is that ‘all unsolicited proposals are channelled into a transparent, competitive process where challengers have a fair chance of winning the tender’.⁸ Unsolicited proposals are subjected to the same rigorous appraisal as solicited proposals, including independent feasibility assessment and full competitive bidding for price discovery.

Origination of the idea earns the unsolicited bidder a specific procedural advantage at the bid evaluation stage, that is, the opportunity to match the winning bid, a mechanism commonly known internationally as a Swiss challenge or bid-matching mechanism.

The lifecycle of an unsolicited proposal

Step 1: Submission and initial assessment

An unsolicited proposal is initiated by a private party and submitted to the relevant contracting authority. The contracting authority must first ensure that the expression of interest satisfies the criteria for a Project Concept Note (PCN):⁹ it must clearly identify the problem to be addressed, outline the proposed solution, demonstrate alignment with national priorities and the contracting authority's mandate, demonstrate the project's capacity to generate sufficient revenue and demonstrate user affordability. No commercial terms are negotiated at this stage. The assessment is limited to strategic alignment and to securing the contracting authority's own internal approvals, such as board or council resolutions and line ministry support, before the project proceeds further.

Origination of the idea earns the unsolicited bidder a specific procedural advantage at the bid evaluation stage, that is, the opportunity to match the winning bid

Step 2: Pre-feasibility study (14 working days)

If the concept is approved, the contracting authority develops a Pre-Feasibility Study (PFS), a preliminary assessment of the project's technical, economic, legal, institutional and financial viability, and its impact on public finances. The PFS, the PCN, the internal approvals and a line ministry support letter are submitted to ZIDA, which must complete its review within 14 working days of receiving a complete and compliant submission.¹⁰ That clock only starts once the submission is complete, so investors should plan for longer in practice.

Step 3: PPP Committee approval of the project and investor

This step applies only to unsolicited proposals. Before a Full Feasibility Study (FFS) may be commissioned, the PPP Committee – the Cabinet-level body established under the ZIDA Act to appraise every proposed PPP project before it reaches Cabinet – must approve both the project and the investor.¹¹ It is chaired by the Secretary of the Ministry responsible for Finance and includes the secretaries responsible for industry and commerce, transport and infrastructural development, energy and power development, local government, justice and economic planning, together with a representative of the Attorney-General at director level and the chief executive officer (CEO) of ZIDA. A representative of the contracting authority whose project is under consideration may attend but has no vote.¹² The Committee checks that a project complies with the ZIDA Act, the PPP Guideline and the PPDPA Act, and is consistent with national priorities, before making its recommendation to Cabinet, and it also receives ongoing monitoring and evaluation reports once a PPP project is under implementation. This early check reduces the risk of the process being shaped entirely by the proponent's own assumptions before independent assessment occurs.

Step 4: FFS, at the investor's cost

Once approved, the contracting authority commissions an FFS, a comprehensive evaluation of technical, financial, economic, legal, environmental and social viability, and the basis on which Cabinet ultimately decides to approve or reject the project.¹³ For unsolicited proposals, the PPP Guideline is explicit that the cost of the FFS is borne by the unsolicited bidder.¹⁴ This is the largest financial commitment an investor makes before knowing whether it will win the project and should be budgeted as an at risk cost. The FFS must, at minimum, confirm alignment with national priorities, assess affordability, evaluate the economic case, allocate risk across the project life, include an Environmental and Social Impact Assessment, record stakeholder consultations and present a detailed financial model for the project.

Step 5: ZIDA review of the FFS (28 working days)

ZIDA reviews the FFS to confirm that it meets the PPP Guideline's requirements and that the project is viable as a PPP. ZIDA is allowed 28 working days to complete the review.¹⁵ Where it falls short, ZIDA advises the contracting authority of the gaps to be addressed. Once satisfied, ZIDA directs the contracting authority to proceed to tender.

Step 6: Competitive tender and bid matching (the Swiss challenge)

The procurement process largely mirrors that used for solicited PPP projects. The key distinction is that where the unsolicited investor's proposal is not ranked first, it must be given an opportunity to submit a revised proposal matching the best bid received.¹⁶ If it matches the best bid, it is selected as the counterparty; if it does not, the higher-ranked bidder is awarded the project. The Request for Proposals (RFP), evaluation criteria and draft PPP agreement must be based on the FFS, comply with the PPDPA Act, and be approved by both ZIDA and the Procurement Regulatory Authority of Zimbabwe (PRAZ), the statutory regulator responsible for public procurement.¹⁷ PRAZ must also approve the bid evaluation report before the procurement outcome is confirmed.

Investors should not treat PRAZ approval as a procedural formality. Before committing to financial close, they should conduct thorough legal due diligence on the procurement process. A failure to comply with the PPDPA Act may expose an otherwise ZIDA-approved project to challenge, delay or even invalidation.¹⁸

ALLOCATION OF FEASIBILITY STUDY COSTS AND ASSOCIATED RISKS

Where the unsolicited investor fails to match the best bid and another bidder is selected, the successful bidder must reimburse the investor for the costs incurred in preparing the FFS.¹⁹ The unsolicited bidder's involvement in the project then comes to an end.

Different cost consequences apply in two other scenarios. If the unsolicited investor is selected as the successful bidder, it bears its own FFS costs and is not entitled to reimbursement. Likewise, where the tender

is unsuccessful or terminated by the contracting authority, the investor remains responsible for its FFS costs.²⁰

While this framework seeks to encourage private sector innovation without compromising competitive procurement, a number of practical uncertainties remain. The PPP Guideline does not prescribe a methodology for valuing or verifying FFS costs, provide a dedicated dispute-resolution mechanism for reimbursement claims or address confidentiality concerns where competing bidders may gain access to the originating investor's feasibility assumptions during the tender process. Investors should therefore address these issues through careful contractual and procedural protections rather than relying on the PPP Guideline alone.

Step 7: Final proposal, PPP Committee and Cabinet

Once the procurement process has been completed, the contracting authority submits the Final PPP Project Proposal, the PRAZ-approved bid evaluation report and the draft PPP agreement to ZIDA. ZIDA reviews the submission and presents it to the PPP Committee, which assesses compliance with the ZIDA Act, the PPP Guideline, the PPDPA Act and national development priorities. If satisfied, the Committee recommends the project to Cabinet.

From an investor's perspective, a successful bid does not guarantee award of the project

For PPP projects valued at more than US\$5m, Cabinet is the final decision-maker.²¹ Cabinet may:

- approve both the project and the selected investor;
- approve the project, but reject the selected investor;
- reject the project and provide reasons; or
- grant approval subject to specified conditions.

From an investor's perspective, a successful bid does not guarantee award of the project. The project only proceeds once the requisite government approvals, including Cabinet approval for larger projects, have been obtained.

Step 8: Agreement, investor licence and financial close

Once Cabinet approves the project, a negotiation team, comprising the contracting authority's accounting officer and legal counsel, a technical expert, the Attorney-General's Office, the Ministry of Finance's Debt Management Office, the relevant line ministry and ZIDA,²² finalises the PPP agreement, which is filed with ZIDA and the Attorney-General's Office within 48 hours of signature.

The investor must then obtain a project-specific PPP Investor Licence from ZIDA at a cost of US\$50,000. For unsolicited proposals, 20 per cent of the licence fee, which is non-refundable, becomes payable once ZIDA's preliminary assessment confirms that the project may proceed as a PPP. The remaining 80 per cent is payable following Cabinet approval.²³

The project then proceeds to financial close, which occurs once financing agreements have been executed and all conditions precedent have been satisfied. Thereafter, implementation is overseen by a Joint Implementation Committee comprising representatives of both parties, which reports to ZIDA throughout the life of the project until eventual asset handback.

Practical risks to plan for

The practical risks that should be planned for are as follows:

- cost disputes: with no set methodology for verifying FFS costs or resolving disagreements over quantum, investors should agree cost verification and payment timelines contractually up front;
- confidentiality and intellectual property: once a project reaches competitive tender, the investor's technical and financial data becomes accessible to the contracting authority and, to some degree, to competing bidders, so the protection of proprietary information should be addressed before submission;
- realistic timelines: a realistic timeline for a well-prepared, large-scale project, from submission to Cabinet approval, is 18–36 months, considerably longer than the individual statutory review periods suggested once every stage is taken into account; and

- correct classification: confirm that the project genuinely qualifies as unsolicited, is not already in the contracting authority's pipeline and is not a straightforward procurement or excluded arrangement dressed up as a PPP, since misclassification exposes the process to challenge.

Conclusion

The PPP Guideline 2026 is an important milestone in Zimbabwe's efforts to create a more predictable and investor-friendly framework for infrastructure investment. By establishing clear procedures for the development, appraisal, procurement and implementation of PPP projects, it provides greater certainty for both public entities and private investors. For unsolicited PPP proposals in particular, the PPP Guideline creates a structured pathway through which private sector innovation can be translated into bankable projects, while preserving transparency and competition.

For investors, the opportunities are significant, but success will depend on careful preparation and rigorous compliance. The ability to originate projects and participate in the bid-matching process offers a meaningful advantage, but unsolicited proposals remain subject to extensive scrutiny by ZIDA, PRAZ, the PPP Committee and, in larger projects, Cabinet. Compliance with both the PPP Guideline and the PPDPA Act is therefore critical at every stage of the process.

Investors who approach the framework with a well-developed project concept, a robust feasibility study and appropriate legal and procurement support are likely to be best placed to navigate the approval process and bring projects to financial close. While the process is demanding, the PPP Guideline provides a clearer and more transparent route for private participation in Zimbabwe's infrastructure development than has previously existed, offering a stronger foundation for long-term investment and public-private collaboration.

Notes

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- 4 PPP Guideline, Preamble: the PPP Guideline 'shall have the same force of application and legal effect' as the Fourth Schedule to the ZIDA Act.
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Contractual discipline in FIDIC projects: the Judicial Committee of the Privy Council's decision in *Uniform Building Contractors*

The Judicial Committee of the Privy Council's¹ decision in *Uniform Building Contractors Ltd v The Water and Sewerage Authority of Trinidad and Tobago*, [2026] UKPC 2 (22 January 2026), offers a clear reaffirmation of contractual discipline in FIDIC projects. Although the Privy Council's judgments are only binding in jurisdictions for which it is the ultimate appellate court, the reasoning will be persuasive for courts and arbitral tribunals worldwide. The case underscores that parties will be bound to the design-build, lumpsum contract they entered into; that 'variations' are defined by the contract rather than by site practice; that FIDIC SubClause 20.1 [Contractor's Claims] operates as a true condition precedent; and that termination does not revive time-barred claims. Arguments based on 'fairness', waiver or estoppel require proper pleading and evidence, and cannot be conjured when before an appellate court. Crucially, the FIDIC engineer has no authority to amend the contract or relieve either party of its notice obligations.

Background

The Water and Sewerage Authority of Trinidad and Tobago ('WASA') engaged Uniform Building Contractors Ltd ('UBC')

in 2007 to design, supply and install a pipeline. The contract incorporated the FIDIC Design-Build (Yellow Book) general conditions,² together with bespoke particular conditions, and it was priced on a

lumpsum basis. As Clause 4.11 [Sufficiency of the Accepted Contract Amount] puts it, ‘Unless otherwise stated in the Contract, the Accepted Contract Amount covers all the Contractor’s obligations under the Contract... and all things necessary for the proper design, execution and completion of the Works and the remedying of any defects’.

Following disputes, WASA terminated the contract in 2009. In 2013, UBC sued for approximately TT\$13.9m (about CA\$2.8m), advancing four items as payable ‘variations’: (1) laying pipework in the roadway itself rather than in verges; (2) removing unsuitable backfill; (3) importing backfill; and (4) undertaking night work. UBC said these had effectively been instructed on site by the FIDIC engineer. It had not, however, followed the contractual variation procedure or given any notice of claim during the course of the project.

At first instance, the Trinidad and Tobago High Court held UBC to the contract and rejected the claim. The Trinidad and Tobago Court of Appeal took a different view, placing weight on the FIDIC engineer’s evidence about how the project was ‘actually operated’ and concluding that the contractual notice machinery had effectively been waived. The highest court of appeal, the Judicial Committee of the Privy Council, allowed WASA’s further appeal, restored the trial outcome and dismissed UBC’s claim.

Variations are what the contract says they are

The Privy Council emphasised a simple but often overlooked proposition: a ‘variation’ is defined by the parties’ agreement, not by the parties’ conduct on site in dealing with changes of scope.

The contract defined ‘Variation’ by reference to changes instructed or approved under Clause 13 [Variations and Adjustments]. As the Conditions state, “‘Variation’ means any change to the Employer’s Requirements or the Works, which is instructed or approved as a Variation under Clause 13 [Variations and Adjustments]”. Upon instructing or approving a Variation, ‘the Engineer shall proceed in accordance with SubClause 3.5 [Determinations] to agree or determine adjustments to the Contract Price and the Schedule of Payments’.

The Privy Council concluded that none of the four disputed items satisfied that definition. Two features drove that conclusion. First, the overall risk allocation in the FIDIC general conditions and the project-specific conditions required UBC to comprehensively price the works under a lumpsum contract. Second, the technical documents and specifications expressly contemplated the categories of work UBC later sought to characterise as extras; the work was part of the original contract scope of work, not a change. The fact that the FIDIC engineer considered the items to be variations, and said payment would be sorted out later, did not change the contractual analysis. In a lumpsum design-build contract, work that is expressly or impliedly within the contractor’s promised deliverable does not morph into a payable extra merely because it proves more expensive than anticipated.

Even if they were variations, the notice regime still bites

The Privy Council went on to explain that, even if the disputed items had been instructible variations, UBC faced fatal procedural defects. Under Clause 13 [Variations and Adjustments], an instruction or approval triggers the Engineer’s determination process under SubClause 3.5 [Determinations], which is the path to any adjustment to price. The Conditions make this explicit: ‘Whenever these Conditions provide that the Engineer shall proceed in accordance with this SubClause 3.5 to agree or determine any matter, the Engineer shall consult with each Party... If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract... [and] give notice to both Parties of each agreement or determination, with supporting particulars’ (Sub-Clause 3.5).

UBC did not invoke that procedure. Further, where a determination is not forthcoming or is disputed, SubClause 20.1 [Contractor’s Claims] requires the contractor to give notice of claim ‘as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the events or circumstance’. If notice is not given in time, ‘the Time for Completion shall not be extended, the Contractor shall not be

entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim'. The Privy Council treated this as classic condition-precedent drafting: no notice, no claim.

Termination does not resurrect time-barred claims

The Court of Appeal had reasoned that termination rendered SubClause 20.1 [Contractor's Claims] inapplicable. The Privy Council rejected that analysis. Termination is ordinarily prospective; it does not undo accrued rights, obligations or consequences that have already arisen. Here, the 28-day periods for notice had long expired before termination. Termination could not revive claims already extinguished by the contract's time-bar.

the site culture of 'we'll sort it out later' does not supersede the contract

'Fairness', waiver and estoppel require timely pleading and real evidence

The Privy Council dealt succinctly with the Court of Appeal's resort to 'fairness'. If a contractor wishes to avoid the contractual consequences of non-compliance by asserting waiver or estoppel, it must plead that in its initial written statements of case and support it with contemporaneous evidence of representation, reliance and detriment at or before commencement of the action in court or arbitration. UBC first raised waiver/estoppel only during submissions in the Court of Appeal. That was too late, and in any event, UBC did not provide evidence that WASA waived non-compliance with the contractual provisions.

The FIDIC engineer cannot waive the contract

Even if UBC had tried to frame waiver around the conduct of the FIDIC engineer, the contract foreclosed that route. SubClause 3.1 [Engineer's Duties and Authority] states the Engineer 'shall have no authority to amend the Contract'. The engineer is neither a party to

the contract nor the employer's general agent; the engineer's role is quasi-independent and administrative. The idea that the engineer can unilaterally dispense with the variation/claims machinery (including the condition-precedent notice regime in SubClause 20.1) is inconsistent with the structure of the contract.

Practical implications

Contractors should treat notice requirements as urgent procedural safeguards, not as administrative paperwork to be dealt with later. If a contractor considers that an instruction or circumstance gives rise to time or money, the contractor must follow the contract by seeking a SubClause 3.5 determination, where appropriate and, if necessary, giving a timely SubClause 20.1 notice. A party should not rely on informal assurances, even from the engineer. SubClause 20.1 exists precisely to 'unlock' stalled issues.

For employers/owners and engineers, the Privy Council's decision is a reminder that the site culture of 'we'll sort it out later' does not supersede the contract. Informal departures from contractual procedures may seem efficient in the moment, but they can magnify disputes, and once those disputes crystallise, the written contract will control the matter.

If waiver or estoppel is to be relied on, it is crucial that it is pleaded early with the evidence assembled. Courts, especially on appeal, will not allow relief on fairness alone where the party has not complied with an agreed upon condition precedent.

Notes

- 1 The Judicial Committee of the Privy Council is a court of final appeal for many Commonwealth countries and is made up of the judges of the United Kingdom Supreme Court.
- 2 FIDIC Conditions of Contract for Plant and Design-Build (Yellow Book, 1st edn, 1999), Clauses 4.11, 13, 3.5, 20.1, and 3.1

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Why delay experts differ: method, records and reproducibility

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When delay experts reach different conclusions, tribunals often treat this as a binary choice between analyses. This article argues that it is more useful to ask why the analyses differ, examining what records each uses, what assumptions it draws from them and where its critical choices are made. Comparing as-planned versus as-built analysis in windows with time-slice analysis, it shows that how each method uses contemporaneous programme updates explains divergence more often than the method itself, and that time-slice analysis, properly built, offers greater transparency and reproducibility, helping tribunals to assess competing analyses on their merits.

Competing delay analyses

Tribunals in international construction arbitrations are regularly presented with competing expert forensic delay analyses that use different methods and reach different conclusions. The natural response is to treat that as a simple choice: accept one, reject the other. In some cases, a tribunal will ultimately have to choose between the experts' conclusions to decide the dispute, but even then, understanding why the analyses differ makes that choice better informed. That choice is often unnecessary.

A more productive approach is to examine what each analysis shows: what records it uses, what assumptions it draws from them and which choices drive its conclusions. Each analysis can then be tested against the same project record rather than evaluated on the name of the method. In many disputes, parts of each analysis will be useful even where the overall conclusions differ.

Projects change as they proceed: priorities shift, access opens or closes, design is released incrementally, procurement slips, resources are

redeployed and recovery programmes are introduced. When prepared with reasonable care, programme updates set out the current plan for the works at each stage, and are the primary source for how those changes were reflected in the sequence and the duration of the remaining works; progress reports, correspondence and instructions support why change occurred. To set the programme updates aside, or treat them as background rather than primary material, is to set aside the record of how the project's history unfolded and the events that shaped those changes.

On large international projects, including those under FIDIC contract forms, programmes are not produced once and then set aside. They are updated throughout the works and used by the contractor, engineer and employer as an active management tool.

Two experts who use the same method can still reach substantially different conclusions

Programme updates record the sequence being used, the assumptions then in play and the activities the network logic identified as controlling completion at that point in the works. Controlling completion means the sequence of activities whose combined duration and logic determine the earliest date by which the project can finish (the critical path); a delay to any activity on that path extends the completion date by the same amount.

How analyses use the project records

The principal difference between competing delay analyses is not usually the methodology. It lies in how each analysis uses the project records, specifically, which documents are relied upon, how the programmes and their revisions are treated, and what assumptions are drawn from the record as a whole. Two experts who use the same method can still reach substantially different conclusions if, for example, one validates the baseline programme logic before measuring departures from it, while the other applies the method to an unvalidated baseline.

A tribunal assessing competing analyses may find it useful to look not only at which method each expert uses but also at how each uses the project's programmes and records, and what each expert draws from those records in identifying what was controlling completion in each period.

Why contemporaneous programmes matter

A project programme is a working tool for project execution, and, as it is updated through the course of a project, a contemporaneous record of how the work was planned and revised as the works progressed. It sets out all planned work sequences through to completion; identifies which sequence is critical; and is updated as the works progress to monitor performance, evaluate change and direct resources. Programme updates are valuable for analysis not because each update matters on its own, but because, together, they show when the sequence of the works changed, when planning for a new phase became more detailed and when the activities controlling completion changed. This is particularly true on projects managed through rolling programmes: programmes that are updated in successive phases as later work is planned in more detail. As the works advance, the programme for the next phase gains detail that earlier versions did not carry. That additional detail does not invalidate earlier programmes; it reflects the normal development of project planning as information becomes available and work sequences firm up. Not every update is analytically significant. Some record routine progress. Others capture a substantive shift – a major resequencing of work, a strategy to complete certain systems first, or a shift in which area of work was driving the end date – that changes which activities are controlling completion. Those substantive shifts are the ones a sound analysis will identify and explain.

Programme updates require scrutiny. Some are optimistic. Some contain logic errors. Some reflect claims pressure rather than actual project conditions. Those deficiencies call for expert review and correction, not outright rejection. If an update was being used to plan and execute the works, it records the planned sequence of work at the time, and that record remains useful despite its imperfections. An analyst who discards a contemporaneous update

without accounting for how it was being used loses a primary source of project history.

A sound analysis also distinguishes between planning assumptions that genuinely reflect contemporaneous project management and later adjustments introduced without support in the project record. Planning assumptions recorded at the time remain analytically relevant – even where later events exposed their limits – because they explain the context in which decisions were made and resources were committed. A tribunal can apply this distinction when reading each expert’s report: is the assumption grounded in what the project record shows about how the works were being planned and executed at the time, or is it a later reconstruction?

The two methods: how each identifies criticality

The two methods most commonly applied in large-project arbitrations are: (1) as-planned versus as-built analysis in windows; and (2) time-slice analysis. Both examine delay across successive periods, identify what was controlling completion in each period and require the analyst to account for how the remaining works changed over time. The methods differ in how each identifies criticality.

An as-planned versus as-built analysis in windows uses the baseline programme’s late dates as the reference. The analyst measures actual progress against those late dates, which typically shows variance – the difference between planned and actual progress – on more than one activity in a given window. Identifying which of those variances controlled completion, rather than merely accumulated alongside it, is a judgment: the Society of Construction Law (SCL) Protocol describes this method as relying on ‘common-sense and practical analysis of the available facts’,¹ acknowledging that the conclusion depends on the analyst’s reasoning rather than a network calculation of float across all activities. This approach becomes unreliable where the remaining works are no longer following the baseline sequence because a large variance against the baseline does not establish that the activity was still controlling completion – it may simply have accumulated delay while a different sequence became the longest path to completion.

A time-slice analysis does not simply take contemporaneous contractor programme updates and run them as the analysis. Contractor updates vary widely in quality, logic integrity and analytical purpose – some are submitted to support claims; some are optimistic; and some contain open ends (activities with no logical successor in the network) or superseded logic (links between activities that no longer reflect how the work was executed). The analyst instead builds analysis programmes: schedules derived from the contemporaneous updates, but reviewed and corrected before being used as the basis for the analysis.

Holding the logic unchanged except where the project record supports a change is what distinguishes a time-slice analysis from a simple replay of contractor submissions. The analyst uses the contemporaneous updates as primary source material for understanding the sequence, logic and project team’s planning at each stage – but applies judgment to identify which changes reflect actual shifts in work approach, which reflect errors in the schedule or claims strategy and which reflect work that was executed out of sequence – that is, in a different order from the one planned. The critical path emerges from a network calculation applied simultaneously to all activity paths.

In both methods, the analyst’s choices – which records to use, which logic changes to accept and which sequence to treat as critical – determine the result. It is those choices, and the project record that supports or undermines them, that bear most directly on the reliability of each analysis.

Both methods require analytical judgment

It is common for one analysis to be characterised as factual and another as theoretical or model-based – particularly when an as-planned versus as-built approach is contrasted with a time-slice analysis. That characterisation is analytically unsound. Both methods examine the same project history through the same body of records, and in both, the analyst’s judgments about sequence, logic and what was controlling completion shape the result. Understanding what those judgments are and whether they are justified is more informative than treating

one method as inherently more objective than the other.

An as-planned versus as-built analysis in windows compares planned and actual progress. Once it moves beyond describing that comparison and identifies what was driving delay, it is making an analytical judgment – no more purely factual than any other form of delay analysis. A time-slice analysis constructs analysis programmes from the project record and uses them to calculate criticality at successive points in time. Where those programmes are built from contemporaneous updates that were the tools through which the project was planned and managed, they are grounded in the project record. Neither method is exempt from judgment.

The SCL Delay and Disruption Protocol identifies recognised delay analysis methods and provides short descriptions of each

Transparency and reproducibility

In practice, the distinction between the two methods that bears most directly on how competing analyses can be evaluated is the combination of transparency and reproducibility – whether the basis for each critical path conclusion can be independently examined and tested. In an as-planned versus as-built analysis, that basis is the analyst’s judgment about which variance controlled completion in a given window. Analysts frequently describe this reasoning as common sense, but common sense is not a uniform standard. One analyst’s obvious critical path is another’s unsupported assertion. Whether the late delivery of structural steel controlled completion over a six-month window, rather than a concurrent shortage of formwork crews, is not obvious – it is a judgment, and the basis for it should be stated and capable of being checked.

Because the reasoning must be articulated step by step across each window, as-planned versus as-built analyses tend to produce reports that are very long, though that length does not always translate into transparency. Reports of 400 to 600 pages or more, supported by dozens of spreadsheets and progress curves, are common. The length reflects the effort required to justify each window’s

conclusions in prose because the analysis itself does not produce a record of the analytical decisions that stands on its own. The spreadsheets and curves support the narrative, but the narrative carries the analysis. Despite this, the basis for the critical judgments within it is often only partially explained.

A time-slice analysis produces its results within the analysis programmes themselves. The network logic, the critical path calculation and the adjustments made at each window are embedded in the programme files, and can be opened in the scheduling software and tested by an analyst. A well-constructed time-slice analysis can typically be presented in a report of around 100 pages, with the analytical programmes and a targeted set of supporting schedules and curves carrying the detail. The tribunal can see not just the conclusion but the structure that produced it. The expert’s role shifts from narrating a series of judgment calls to explaining the analytical programmes – what changed between windows, why the project record supports those changes and what significance those changes carry for the critical path. That is precisely the form of explanation that allows a tribunal to engage with the analysis directly rather than simply accept the conclusions.

Where the Protocol fits

The SCL Delay and Disruption Protocol identifies recognised delay analysis methods and provides short descriptions of each. Those descriptions can create a false impression: that an as-planned versus as-built analysis in windows is a more practical, records-based exercise, while a time-slice analysis is software-driven and more removed from the project facts. The opposite is closer to the truth.

A time-slice analysis is built directly from the contemporaneous programme updates, which are reviewed, corrected and used as the primary analytical source; the network calculation is applied to that material, not substituted for it. An as-planned versus as-built analysis, by contrast, relies on the baseline programme mainly for its late dates and depends less on the contemporaneous updates that recorded how the sequence actually changed as the works progressed – it measures variance against a baseline that may no longer reflect the actual sequence of work,

and fills the gap between that baseline and the as-built record with the analyst's judgment rather than a network-derived critical path.

A named methodology is a framework: a structure for organising the analysis of project information. Its reliability depends entirely on how it is applied to the specific records that exist for a given project. A method does not become more reliable by having a recognised name, and it does not become less reliable by being less familiar. A debate about which method the Protocol prefers is less informative than an explanation of how each analysis uses the project record and what the project record actually shows.

Where contemporaneous programmes and progress records are comprehensive and well-maintained, they provide the primary basis for understanding when and why completion was delayed. Where records are sparse, inconsistent or demonstrably unreliable, the choice of method needs to reflect what the available records can actually support. A time-slice analysis depends on programme updates of sufficient quality to build reliable analysis programmes; where those updates are absent or cannot be relied upon, an as-planned versus as-built approach may be the more appropriate basis. The report should clearly state which records were unavailable or disregarded and why that affected the choice of method.

What was controlling completion?

Both methods address the same underlying question: what was controlling completion in the relevant period? But they reach that answer in different ways and understanding that difference is important when a tribunal reads each expert's critical path conclusions.

In a time-slice analysis, the analyst holds the planned logic steady at the start of each window and advances actual progress through it. The logic is updated only at the start or end of a window where the project record documents a change in how the work was being approached: a mitigation measure, a revised sequence, a formal instruction, or a management decision recorded in the project's correspondence or meeting records. The analyst adjusts for work already performed out of sequence because that is a fact but does not change the forward programme logic based on what the

contractor later submitted, unless the reason for that change is independently recorded in the project record.

An as-planned versus as-built analysis identifies the activity or sequence whose departure from the baseline was most responsible for delaying completion in each window. It anchors criticality in variance from the original plan, period by period, rather than in a network calculation of the works as they were then being planned and executed. That distinction allows a tribunal to identify, in each window, whether the expert's critical path finding rests on a network calculation applied to the analysis programme, with float calculated across all activity paths, or on the analyst's judgment about which variances were most significant.

An as-planned versus as-built analysis will typically identify one primary as-built departure from the baseline as the delay driver for each window, even where the underlying critical path shifted during the period. A time-slice analysis identifies those shifts more directly by recalculating the network from the analysis programme at the start of each window. Which approach better reflects the project's actual history depends on the quality and completeness of the records available and on how the project was planned and managed.

What matters in practice?

When experts present different methods and different conclusions, the questions that tend to be most productive are not about methodology. They are: what does each analysis show about what delayed completion, when it occurred and by how much; how well does that account fit the way the project was actually planned, managed and executed; and what assumptions does it rest on? Those questions can be applied to each analysis individually and used to identify where the analyses are aligned, where they diverge and what causes the differences between them.

In cases where the experts have been unable to agree on what their methodological differences mean for the identification and quantification of the project delay, the tribunal is not required to choose one methodology wholesale and discard the other. A tribunal can, in that situation, look at which analysis is better supported by the project record for a given window or issue,

draw on the parts of each analysis where that support is strongest and weigh each expert's critical path conclusions against the documents that were governing the project at the time. The more useful questions are whether the critical path conclusion follows from the programme data and records relied upon, and whether the reasoning that connects the data to the conclusion is explained clearly enough to be examined.

Methodology matters, but a recognised method does not become more reliable by having a familiar name. Its reliability depends on how carefully it is applied to the specific project record. Gaps in that record do not automatically invalidate an analysis – they require the analyst to state clearly what can and cannot be established from the available records. Expert analyses constructed on that basis – using the

contemporaneous record as the primary source, explaining what controlled completion in each period and stating the basis for each analytical decision – put a tribunal in the best position to determine entitlement to an extension of time, whether or not the experts agree.

Note

- 1 Society of Construction Law, *Delay and Disruption Protocol* (2nd edn, SCL 2017) Guidance Part B, para 11.6(d).

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Building trust before building power plants

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An engineering, procurement and construction (EPC) contractor can win a tender, yet weaken the project before mobilisation by treating every clarification as a concession and every concession as interchangeable. Using the FIDIC Silver Book as one contractual setting, this article argues that disciplined perspective-taking, bounded transparency and risk-adjusted give-and-take improve both contractual certainty and dispute avoidance. Although the principles are transferable, the discussion is anchored in power projects, including the multi-contract structures increasingly used for solar, wind and hydropower. It proposes two practical tools: the Trust-Enabled Negotiation (TEN) framework and the Risk-Adjusted Comparable Exchange (RACE) principle.

Negotiation starts delivery

Engineering, procurement and construction (EPC) negotiations are usually described as exercises in risk allocation. That is correct, but incomplete. They also establish the working assumptions, behavioural expectations and documentary record that will govern the project long after the negotiating team leaves

the room. Before engineering is mobilised, each party is already learning how the other responds to uncertainty, inconvenient facts and competing interests.

This matters because an EPC contract can be legally robust and operationally fragile. A contractor may secure favourable wording, yet create distrust by withholding

a material inconsistency, overstating confidence or trading unrelated concessions as though they were equivalent. Conversely, a contractor may accept no additional risk and still improve the project by explaining its assumptions clearly, identifying contradictions and proposing a workable allocation before signature.

The better view is that negotiation is the first phase of delivery. Its objective is not to remove disagreement; sophisticated parties will disagree. It is to make disagreement intelligible, priceable and administrable. That requires legal discipline, commercial judgement, and an understanding of how people assess trust and risk.

What the Silver Book demands

The FIDIC Silver Book provides one demanding setting for this argument. Its EPC/turnkey model is intended to give the employer a high degree of price, time and performance certainty through broad contractor responsibility for design, procurement, integration and execution. FIDIC also identifies an important boundary: the form is not suitable where tenderers lack sufficient time or information to scrutinise the employer's requirements, develop the design, assess risk and estimate the works.¹

Negotiation is the first phase of delivery. Its objective is not to remove disagreement; sophisticated parties will disagree

That warning should shape the negotiation process. The contractor cannot rationally price a risk that remains unintelligible, and the employer cannot obtain genuine certainty by transferring an undefined problem. The FIDIC Golden Principles similarly emphasise clear particular conditions and preservation of the form's risk/reward balance.² The question is therefore not only who bears a risk, but whether the trigger, consequence, control measures, price effect and contractual route are understood by both parties.

This is particularly important where the employer's requirements interact with the priority-of-documents provision, Clause 5 design obligations, Clause 8 delay regime, Clause 13 variation mechanism, and Clauses 20 and 21 on claims and disputes. A qualification hidden in a price schedule may

not cure a broader performance obligation elsewhere. Negotiators should test the contract as an integrated system, not as a collection of isolated clauses.

Power-project contract matrices

The Silver Book provides the principal contractual lens for this article, but contemporary power projects are not always delivered under a single EPC/turnkey contract. A large thermal project may follow that model, whereas solar, wind and hydropower developments are often divided among equipment supply, balance-of-plant or civil works, grid connection, storage, commissioning, operation and long-term service packages. Depending on design responsibility, the project may combine the FIDIC Silver, Yellow or Red Book with bespoke supply, installation and service agreements.³ Renewable projects may also, in the author's experience, involve more mid-sized contractors and specialist suppliers than a large thermal EPC. That does not justify lower standards, but it may require proportionate security, liability caps, notice procedures and reporting systems that the counterparty can realistically administer. In a multi-contract project, clear interface ownership, coordinated testing and aligned delay remedies become especially important.⁴ The more fragmented the contract matrix, the more advisable it becomes to adapt the approaches discussed in this article in order to achieve greater clarity, stronger trust and a more coherent overall project outcome because certainty within individual packages does not, by itself, create certainty across the project.

Trust is commercial infrastructure

Trust is sometimes treated as a soft value to be considered after the hard drafting is complete. Organisational research suggests a more useful model. Mayer, Davis and Schoorman identify ability, benevolence and integrity as central dimensions of perceived trustworthiness.⁵ In an EPC negotiation, ability is demonstrated by technical and commercial command of the risk; integrity by consistency between statements, qualifications and drafting; and benevolence by a credible concern for a workable project outcome,

rather than by altruism or surrender. The Trust-Enabled Negotiation (TEN) framework brings these ideas together by showing that trust is not a separate courtesy but a practical negotiating tool that helps the parties to reach clearer, more workable and more resilient contractual outcomes.

Trust does not replace securities, notice provisions, liability limits or a dispute board. Formal contract and relational governance can reinforce one another.⁶ Clear rights make cooperation safer; trustworthy conduct makes those rights less expensive to administer. The practical effects include earlier disclosure of bad news, more credible forecasts, faster decisions and greater willingness to examine a solution before positions harden.

Transparency must nevertheless be bounded. A contractor is not required to disclose its reservation price, privileged advice, negotiation mandate or confidential supply-chain strategy. The relevant duty is narrower: disclose material contradictions, assumptions and consequences that the other party must understand for the proposed bargain to work. Organisational transparency research conceptualises transparency through disclosure, clarity and accuracy, and links those qualities to assessments of trustworthiness.⁷

Empathy without surrender

The most useful form of empathy in contract negotiation is disciplined perspective-taking. It asks what the employer is trying to protect, what internal approvals it requires and how it will experience the proposed risk. Experimental work distinguishes perspective-taking from emotional identification and shows that entering the other party's cognitive frame can improve the discovery of hidden interests and mutually beneficial trades.⁸

Consider an employer insisting on a high delay liquidated damages rate. The stated position is a percentage. The underlying interests may be debt-service obligations, a power-purchase agreement, regulatory milestones, lost production or board accountability. Simply arguing that the rate is 'too high' addresses none of them. A better response may combine a realistic baseline programme, relief for employer-caused delay, objective access assumptions, milestone logic, an exclusive-remedy structure, a cap and,

where appropriate, an incentive for early or reliable completion.

Perspective-taking is not agreement. It improves the contractor's ability to choose where to resist, where to explain and where to create options. It also helps to avoid a common credibility error: presenting every requested amendment as equally essential. Employers usually recognise when a negotiating team has not separated genuine project-threatening exposure from ordinary commercial preference.

Clarify the grey

Contractors sometimes discover an ambiguity that could later support a claim: conflicting output figures, inconsistent test conditions, a spare-parts obligation that does not match the price schedule or an interface described differently in two documents. Silence can appear tactically attractive. Under an EPC/turnkey structure, however, ambiguity is rarely a free option. It can affect the design margin, procurement, programme, performance testing and financing at the same time. Empirical construction research identifies ambiguous contractual language and inconsistent documents as recurring sources of conflict.⁹

A contractor should therefore consider proposing clarification, even when the immediate correction favours the employer. This is not necessarily a concession. It may prevent a mispriced obligation, remove an execution trap and demonstrate integrity. The commercial return is credibility: later, when the contractor identifies a genuine employer risk or seeks a balanced qualification, its position is less likely to be dismissed as opportunistic.

The effect can extend beyond the corrected clause. Negotiators evaluate process, fairness and the future relationship, as well as the immediate economic outcome, and research on reciprocity explains why a voluntary, credible concession can encourage cooperation.¹⁰ The point should not be overstated: a clarification offered theatrically or made conditional on an unrelated demand will look manipulative rather than trustworthy.

The decision in *MT Højgaard v E.ON* provides a power-sector warning. The dispute concerned the design and installation of the foundation structures for two offshore wind farms at Robin Rigg in the

Solway Firth, United Kingdom. Although the contractor followed the J101 industry standard, a flaw in that standard meant that the foundations did not achieve the contract's broader 20-year design-life requirement. Compliance with the standard therefore did not displace the more demanding performance obligation.¹¹ The lesson is not that every inconsistency is resolved against the contractor; it is that technical compliance cannot safely be assumed to neutralise a broader contractual promise. A contradiction visible at tender stage should be reconciled across the employer's requirements, schedules, guarantees, testing provisions and pricing documents.

Give-and-take is unavoidable, but the items exchanged should be commercially comparable

An analogous issue arises under the FIDIC document-review machinery. The 2017 Red, Yellow and Silver Books all use a review mechanism in which the employer or the engineer is to respond within the review period with a notice of no objection or a reasoned notice of non-compliance, and revised documents may then need to be resubmitted before the relevant work can proceed. Unless the particular conditions require a single consolidated response, that process does not guarantee all employer's or engineer's comments to be provided in one single batch. In practice, fragmented commenting can extend approval times, push procurement, and fabrication further into the critical path and affect the contractual completion date. When necessary, the commercially sound response is to negotiate the review timetable transparently, explain the programme impact in clear terms and, where relevant, state earlier experience of delayed or piecemeal commenting so that the employer understands why a disciplined approval process and a proportionate concession strategy are necessary.

There are limits. Clarification should be accurate, proportionate and documented. It should not become a performance of virtue or a device for extracting reciprocal concessions from every correction. Trust is damaged when an apparently helpful point is later revealed as a tactical ambush.

Compare risk with risk

Give-and-take is unavoidable, but the items exchanged should be commercially comparable. This article calls that discipline the Risk-Adjusted Comparable Exchange (RACE) principle. It does not prohibit cross-category trades. It requires the parties first to compare expected value, tail exposure, timing, controllability, insurability, financing effect and internal approval constraints.

The distinction between a spare-parts package and delay liquidated damages illustrates the point. Spare parts are normally a visible procurement cost that can be quantified through quantities and supplier quotations. Delay damages are contingent exposure connected to critical-path performance, revenue loss and termination scenarios.

Delay damages also interact with completion, termination, general damages and liability caps. *Triple Point* confirms that familiar drafting can produce significant questions about how liquidated damages operate before and after termination and whether they fall within a contractual cap.¹² They should not be negotiated as a simple price line.

A similar mismatch arises where an earlier payment milestone is offered in exchange for the relaxation of an output or availability guarantee: the former is principally a financing and cashflow issue, whereas the latter transfers contingent technical and revenue risk. Behavioural economics shows that decision-makers are often loss averse and classify certain costs and contingent risks within different mental accounts.¹³ Treating the two as naturally equivalent may therefore appear less like creative trading and more like an attempt to exchange a known cost for relief from a materially different risk.

The practical rule is to build concession packages within coherent baskets before moving across baskets. The direct scope cost can be traded against payment timing, scope deletion, quantities or another priced obligation. Delay risk can be traded against extension-of-time entitlement, employer dependencies, caps, milestone structure, document-review cycles, acceleration rules or incentives. Performance risk can be traded against test conditions, retest rights, cure periods and a remedy ladder (see Table 1).

Negotiating item	Character and valuation	More coherent counterpart items
Mandatory spare parts	Direct scope cost: quantities, supplier quotations and obsolescence	Other priced scope, payment terms or warranty spares
Delay liquidated damages	Contingent schedule risk: probability, critical path, cap and tail exposure	Time relief, employer dependencies, milestone logic, document-review cycles or incentive
Output, efficiency or availability guarantee	Technical and remedy risk: design margin, test conditions and remedy sequence	Retest rights, cure periods and performance-damages cap
Payment timing	Cashflow and credit risk: financing cost, security and collection risk	Advance payment, retention, security or milestone structure

Table 1: risk-adjusted concession baskets

Culture and team selection

International power-project contractors must also recognise that a strategy effective in one country may fail in another. Research on cross-cultural negotiation shows differences in communication, hierarchy, information sharing and the interpretation of direct disagreement.¹⁴ A highly explicit challenge may signal competence in one setting and disrespect in another; relationship building may be essential before substance in one market and regarded as delay in another.

Cultural preparation should go beyond etiquette. The team should understand who can commit the employer; whether silence indicates reflection or disagreement; how bad news is expected to be delivered; and whether decisions are made in the room or after internal consultation. The contract remains the contract, but the route to a reliable agreement varies.

Companies should select negotiators as carefully as they select external counsel. Technical knowledge is indispensable, but so are listening, emotional regulation, calibrated language and the confidence to raise inconvenient points. Research links emotional intelligence with value creation and claiming in negotiation, while psychological safety supports speaking up and learning within teams.¹⁵ In a competitive tender, a single defensive sentence can reinforce an employer's concern that the contractor may be difficult to work with during execution.

A practical framework

The *Trust-Enabled Negotiation (TEN)* framework translates these ideas into six practices.

- First, translate positions into interests. Identify the financial, operational, regulatory and governance purpose behind each material demand.
- Second, expose material ambiguity. Reconcile the employer's requirements, schedules, guarantees, testing regime, price documents and particular conditions before signature.
- Third, explain risk rather than merely rejecting it. Show the trigger, probability, consequence, control measures and price or programme effect.
- Fourth, exchange comparable value. Use the RACE criteria and record the reason each concession package is balanced.
- Fifth, adapt communication to culture and authority. Confirm who decides, how escalation works and what language will be understood as constructive rather than evasive.
- Finally, carry the bargain into delivery. Prepare a negotiation-to-execution memorandum recording assumptions, rejected positions, agreed risk owners, notice requirements, employer dependencies and unresolved watch items.

These practices are not an empirical scoring system and should not be used to label one party as trustworthy. They are a governance checklist. Their purpose is to make the commercial logic of the deal visible to the people who must administer it.

From signature to delivery

The value of a well-negotiated contract can still be lost at handover. Project teams often receive the executed agreement without the history that explains why a sentence matters. The result is avoidable inconsistency: a project manager gives away a protection, a notice is missed, or an employer's dependency is treated as informal cooperation rather than a contractual condition.

A disciplined handover should identify the project's risk architecture, not merely circulate the contract. It should also establish an early-warning and escalation rhythm. Standing dispute boards and structured contract-management guidance reflect the same principle: issues should be surfaced and addressed while facts, records and relationships remain manageable.¹⁶

A disciplined handover should identify the project's risk architecture, not merely circulate the contract

The central proposition is therefore modest but consequential. The strongest contractor in a power project is not the one that appears to win every point. It is the one that distinguishes cost from risk, protects its legitimate interests, removes dangerous ambiguity and convinces the employer that difficult issues will be handled accurately and professionally. Although framed around power projects, the same discipline can be adapted to other complex contractual negotiations. Trust is not the reward for a successful project. It is part of the infrastructure that makes success more likely.

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Credit: Tom/Adobe Stock

Convertible notes for infrastructure projects: practical legal considerations

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The increased size and complexity of infrastructure projects create demands for funding that cannot always be met with traditional arrangements such as loans or equity contributions. Developers are increasingly using convertible notes to cover this gap, particularly at the early stages of projects. However, convertible notes remain relatively unknown to market participants and advisers. This article intends to explain the most salient features of convertible notes to enable a better understanding of when and how they can be used effectively.

Convertible notes are hybrid financial instruments that allow an initial investment in the form of a loan, giving the lender the option to convert the outstanding balance of the loan into the borrower's equity upon certain triggering events. This early capital can be used in tandem with contributions from sponsors or equity holders.

Convertible notes can be a valuable tool for infrastructure projects, as they can be used to raise capital in the early stages of the project, when revenue is limited or non-existent. In standard loan financing, lenders analyse a borrower's history, emphasising revenue and collateral to secure the loan. However, new infrastructure projects require an initial investment that will translate into revenue only after the commercial operation date is achieved. This early-stage financing is usually provided as equity by sponsors or shareholders. Equity gives equity holders a percentage of profits, but it also implies subordination vis-à-vis lenders in the capital structure.

A convertible note gives lenders flexibility to remain at the top of the capital structure or obtain security over certain assets while preserving the option to become an equity holder if the prospect of future earnings is

sufficiently attractive. Thus, convertible note financing gives flexibility to a lender, depending on the circumstances of the project.

This early investment can serve as catalytic financing, anchoring financing for the project to ramp-up financing discussions with other lenders and attract more competitive equity capital from long-term infrastructure investors.

Structuring

Convertible note financing can be structured in many ways, and it is up to the parties and their counsel to agree on its terms. A critical consideration for the lender is the amount of risk assumed and the remedies available in the event of a borrower's default. Investing early in a construction project is challenging because sources of revenue and collateral are often limited or non-existent.

If no collateral is available, convertible note lenders typically require treatment on at least equal footing (*pari passu*) with any other creditors of the borrower. The lender should be comfortable with how the loan proceeds will be used and the timing for repayment. Thus, it is important for a lender to clearly define the use of proceeds in the documentation and include robust reporting requirements to monitor construction progress, use of funds and the borrower's overall financial health. Negative covenants can also be critical, and may include restrictions on the incurrence of senior or *pari passu* debt, changes to business plans, material asset sales, prohibited affiliate transactions and material changes to project contracts, such as supply contracts.

convertible note financing gives flexibility to a lender, depending on the circumstances of the project

If collateral, such as equipment, land or intangible property, is available, convertible note lenders should consider perfecting a security interest over such collateral. Such a security interest can be subject to resolutive conditions, such as the borrower achieving financial close for traditional financing or the note converting into equity.

All such covenants should be tied to events of default and related remedies affording the lender the ability to accelerate repayment

of the loan.

Notes can be structured so that the borrower can use the proceeds for critical early-stage investment for the project, such as equipment acquisition, development costs, or land acquisition or leasing. For significant investment, such as the purchase of equipment or land, escrow agreements can be used so that the proceeds are directed to the seller. In such scenarios, it is also important for lenders to secure assignability rights with the seller.

Amortisation

Because a convertible note is typically issued before the borrower can generate consistent revenue, amortisation for these notes tends not to involve the usual periodic payment of principal and interest during the term of the loan. Instead, the amortisation of a convertible note can be structured so that the lender receives periodic payment-in-kind interest instead of cash interest. Payment-in-kind interest means that unpaid interest is added to the principal balance of the note, which may later be converted into equity, rather than being paid in cash. If the borrower has some sources of revenue, it is possible to structure the note to provide for cash payments of interest only, while deferring the principal payment as a lump-sum payment, known as a bullet or balloon payment, at the end of the term.

Triggering events

A note can convert into equity at different stages, such as when the project secures long-term financing, achieves the operational phase or starts producing revenue, or when the borrower issues shares. These can be optional or mandatory conversion events for the lender.

Convertible note documentation should include clear mechanisms to calculate the number of shares that the lender will receive based on the outstanding balance of the note. Remedies for failure to convert may include acceleration of the note, specific performance, or injunctive relief to prevent acts or transactions that would impair or diminish the noteholder's rights.

Finally, it is important to consider the securities law regulations that may apply to

convertible note financing. These regulations vary depending on the jurisdiction. For non-public borrowers, such regulations may include limitations on public solicitation or advertising, or restrictions on the offering of notes to certain accredited investors, such as investors with a certain minimum net worth or income, or other special qualifications. For public borrowers, securities laws may require extensive disclosure, filing and notice requirements, market pricing requirements and shareholder approval.

This article was prepared by an employee of the US International Development Finance Corporation (DFC). The views and opinions expressed are those

of the author and do not necessarily reflect the official position, policies, or views of DFC, the US government, or any other agency thereof. References to specific companies, projects, products, or services are for informational purposes only and do not constitute an endorsement or recommendation by DFC or the US government.

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The In-House Counsel Interview

Interview with Nick Cowie, WSP General Counsel, Middle East & Asia

Interviewed by Aarta Alkarimi

Could you tell us about your journey to becoming General Counsel for WSP in the Middle East, and what initially attracted you to the legal profession?

What initially attracted me to the legal profession is exactly what has kept me engaged throughout my career: the opportunity to solve complex, interesting problems that have a tangible impact on the world around us.

Construction law sits at the intersection of legal principles, engineering, commerce and public policy. The projects we work on, whether they involve transportation networks, water infrastructure, cities or major industrial developments, are transformative. There is a real sense that the work matters because the decisions made today can shape communities and economies for decades.

My own journey to becoming General Counsel for WSP in the Middle East and Asia was not one that I had planned from the outset. I moved to the Middle East around 12 years ago, initially intending to spend two years in Kuwait working as a claims consultant. Like many people who come to the region, I was drawn in by the scale, ambition and complexity of the projects being delivered here; however, those two years quickly turned into something much longer.

Once I joined WSP, I quickly realised that I had found a business whose values and ambitions aligned closely with my own. Since then, I have been fortunate to take on a series of new and challenging roles, most recently expanding my responsibilities beyond the Middle East to include Asia. The scope and geography may have expanded over time, but the aspect of the role I enjoy most remains unchanged, helping solve complex problems on projects that leave a lasting legacy.

What does a typical day look like for you and which aspects of your role do you find most rewarding?

Honestly, there probably isn't such a thing as a 'typical day' in this role. One of the things I

enjoy most about the role is the sheer variety. On any given day, I might be overseeing a major arbitration, negotiating contract terms for an infrastructure project, advising on corporate governance matters, managing regulatory compliance issues or supporting strategic business decisions across multiple jurisdictions.

The scope of an in-house legal function at a business like WSP extends well beyond construction law. We are involved in everything from project pursuit and contract negotiation through to dispute resolution, ethics, employment matters, acquisitions and corporate governance. The breadth of the role means that no two days are ever quite the same.

That unpredictability occasionally leads to some genuinely unusual legal questions. Earlier this year, for example, we found ourselves dealing with the distribution of life insurance proceeds following the death of an employee, requiring us to navigate a complex intersection of insurance law, inheritance law, succession rights and Sharia principles across multiple jurisdictions. It was a sensitive matter that had nothing to do with engineering or construction projects, but demonstrates the range of issues that can find their way onto my desk.

The most rewarding aspect of the role is helping the business make confident decisions. Our role is to help colleagues understand risk, navigate complexity and find a path forward. Whether that involves resolving a dispute, structuring a transaction or enabling a project to proceed, the satisfaction comes from helping translate legal complexity into practical commercial outcomes.

WSP operates across major infrastructure, engineering and construction projects. What are the most significant legal and commercial challenges facing the sector in the Middle East today?

From my perspective, the most significant challenges facing the sector today stem from increasing complexity. The Middle East continues to deliver some of the world's most ambitious infrastructure and development programmes. The scale of opportunity is extraordinary, but with that comes a more complex contractual, regulatory and commercial environment than many participants have experienced historically.

A trend that many of your readers will recognise is the continued hardening of commercial risk allocation. Across both public and private sector projects, we are seeing increasingly onerous contractual positions being proposed to consultants and contractors. Examples include longer payment cycles, reduced mobilisation support, broader indemnity regimes, greater liability exposure and termination or suspension rights that allow clients to stop projects with little notice and limited recovery of costs. None of these issues are new in isolation, but the cumulative effect can place significant pressure on project economics and the ability of consultants to manage risk appropriately. There is also a risk that overly aggressive risk transfers simply reappear later in the form of claims, disputes and increased delivery costs.

At the same time, the regulatory environment is becoming more sophisticated. Whether the issue is licensing, professional regulation, sanctions compliance, data protection, corporate governance or insurance requirements, organisations operating across multiple jurisdictions are having to navigate an increasingly complex compliance landscape.

A particularly interesting trend we are seeing is the emergence of large multidisciplinary procurements, particularly within the public sector. Clients are increasingly seeking a single lead consultant to deliver a broad range of services that extend well beyond traditional engineering and project management disciplines, including legal, financial, strategic and transaction advisory services. While this approach can provide clients with a more integrated delivery model, it also creates important questions around regulatory compliance, professional licensing, liability allocation and insurance coverage. Organisations need to think very carefully about which risks they are truly equipped to manage, and which sit more appropriately with specialist advisers.

Ultimately, the industry's challenge is not simply delivering larger or more complex projects. It is ensuring that contractual frameworks, risk allocation and regulatory compliance structures evolve at the same pace as the scale and ambition of these projects.

How do you balance your role as legal adviser and risk manager with the need to support innovation, growth and commercial decision-making?

One of the most important lessons I have learned in-house is that legal teams create the most value when they are viewed as business partners rather than gatekeepers. It is critical that an in-house legal function doesn't merely act as the 'department of no'. The real question is not whether something can be done, but how it can be done in a way that appropriately manages risk while still allowing the business to move forward.

My role is to help colleagues understand the legal, commercial and regulatory implications of a decision so that they can make informed choices. Sometimes that means recommending a particular course of action. Sometimes it means identifying safeguards or alternative structures that achieve the same commercial outcome with a more acceptable risk profile. And occasionally it means advising that a particular risk is simply too great to justify the potential reward. But even in those circumstances, I believe the legal team's role is to help find solutions rather than simply identify problems.

That mindset is particularly important in a business like WSP, where we operate in a rapidly evolving environment. Our clients are pursuing increasingly ambitious projects, entering new sectors and adopting new technologies. If the legal function is seen only as a control mechanism, it can quickly become a bottleneck. If it is seen as a trusted adviser that understands the commercial objectives of the business, it can help enable innovation and growth while still protecting the organisation.

Ultimately, I don't see legal advice and commercial decision-making as competing objectives. The most effective legal teams understand the business well enough to support growth, while ensuring that risks are identified, understood and managed appropriately. The goal is not to eliminate risk altogether, but to help the business take intelligent and commercially informed risks.

At what stage of a project should the legal team become involved and how can early legal involvement help prevent disputes?

Legal teams should ideally be involved throughout the entire project lifecycle, not simply at contract award or when a dispute arises. Traditionally, legal involvement has often been concentrated around contract negotiation. While that remains important, some of the most valuable contributions that legal teams can make occur after the contract has been signed. In my experience, the legal function creates the greatest value when it operates as an ongoing business partner.

Early involvement allows legal teams to help to identify and allocate risk appropriately from the outset; ensure that contractual obligations are understood by delivery teams; and establish governance frameworks that reduce the likelihood of issues developing into disputes. Many disputes have their roots in decisions made long before the first formal claim is submitted.

Equally important is continued involvement during project delivery. At WSP, the legal team regularly supports projects in a project counsel capacity, participates in project risk review sessions, advises on change management and entitlement issues, and becomes involved at the earliest signs of emerging disputes. By addressing issues while positions remain flexible and commercial relationships remain intact, there is often a far greater opportunity to achieve a pragmatic resolution.

Ultimately, legal teams should not be judged by the number of disputes they win. A better metric (albeit harder to track) is the number of disputes that never arise in the first place thanks to early legal intervention.

When selecting external counsel, what qualities distinguish a trusted adviser from someone who is simply providing legal advice?

While technical ability is, of course, an important quality in external counsel, the factors that make a firm a genuinely trusted adviser extend far beyond its technical expertise.

First and foremost, they need to understand our business and our industry. An adviser who understands how an engineering consultancy operates, how major construction projects are delivered and the commercial realities faced by project teams will invariably provide more valuable advice than someone who approaches every issue as a purely legal exercise.

The second quality is pragmatism. Business leaders are not looking for a lengthy memorandum analysing every conceivable legal risk. They want clear, actionable advice that helps them make informed decisions. The best advisers can explain the legal position succinctly, identify the material risks and recommend a practical path forward.

I also place a high value on commercial judgement. A trusted adviser understands that the objective is not to eliminate risk altogether. Instead, the objective is to understand risk, manage it appropriately and make informed decisions. The lawyers I value most are those who can distinguish between theoretical risks and genuinely material risks.

Finally, trusted advisers develop a genuine understanding of their client's objectives and are willing to challenge constructively when necessary. The strongest relationships are built on trust, credibility and a shared focus on achieving the right outcome rather than simply delivering legal analysis.

What leadership principles guide you when managing and developing an in-house legal team across different jurisdictions and cultures?

Leading a legal team across multiple jurisdictions requires a balance between consistency and local empowerment.

The first principle that guides me is trust. I am fortunate to work with talented lawyers across the Middle East and Asia, and I strongly believe that people perform best when they are given ownership and accountability rather than being managed too closely. My role is not to make every decision myself but to create an environment where good decisions can be made in a timely manner at the appropriate level.

The second principle is consistency. While the legal and cultural environments may differ significantly between jurisdictions, our clients should experience the same quality of legal support wherever they engage with us. That requires clear governance, shared standards, common ways of working and a strong focus on knowledge sharing across the team. As our legal function continues to grow, we have invested heavily in creating more consistent training, processes and support structures across regions.

The third principle is development. One of the most important responsibilities of any leader is creating opportunities for

others to grow. Like any other bright, driven people, our talented lawyers are motivated by interesting work, increasing responsibility and clear career pathways. I spend a significant amount of time thinking about how we can expose people to new challenges, broaden their experience and help them develop into future leaders.

Ultimately, I want to build a team that is technically excellent, commercially minded and trusted by the business. The lawyers who create the greatest value are those who understand the wider commercial context and are able to translate legal complexity into practical advice.

Which experience, mentor or professional challenge has had the greatest influence on the way you work today?

I have been fortunate throughout my career to work with and learn from a number of exceptional lawyers and business leaders. If there is one person who has had the greatest influence on the way I work today, it would be my manager, Karen Sewell, WSP's Chief Counsel International. One of the most valuable lessons I have learned from Karen is that the role of an in-house lawyer extends far beyond providing legal advice. Karen has consistently demonstrated that the most impactful in-house lawyers are those who combine strong legal judgement with genuine commercial understanding and an ability to build trusted relationships across the business.

More broadly, I have been fortunate to have mentors who have encouraged me to take on challenges that initially felt beyond my comfort zone. Looking back on my career, the periods of greatest professional growth have almost always come from being presented with an unfamiliar problem and being trusted to work through it. Whether that was moving to the Middle East, transitioning from private practice and claims consulting into an in-house role, or more recently expanding my responsibilities across both the Middle East and Asia, the common theme has been learning through experience.

If there is one principle that has stayed with me, it is that good lawyers should aim to be problemsolvers rather than legal commentators. Clients and colleagues rarely come to us because

they want a lecture on the law. They come to us because they have a challenge that needs solving. The lawyers I admire most, and the mentors who have influenced me most, have all shared that mindset.

Outside your professional life, what interests, routines or activities help you maintain perspective and recharge?

Outside work, I spend a lot of time pursuing interests that are about continuous improvement and lifelong learning. One of those is combat sports, particularly Brazilian Jiu-Jitsu and boxing. Both provide a welcome contrast to the day-to-day challenges of a legal career. They demand complete focus in the moment, which makes them an excellent way to switch off from work, recharge and relieve stress, albeit at the occasional cost of a few bruises. They also reinforce lessons that translate surprisingly well into professional life: discipline, resilience, humility and the importance of staying calm under pressure.

I am also studying Mandarin Chinese, which has been a long-standing interest of mine. I had the opportunity to live in Beijing as a child, and that experience sparked a fascination with Chinese language and culture that has stayed with me ever since. While I am still very much a student of the language, I enjoy the challenge. Learning Mandarin reminds me what it feels like to be outside your comfort zone and to make incremental progress through consistent effort.

What might colleagues who know you only as WSP's General Counsel be surprised to learn about you?

Building on my previous answer, it may surprise some colleagues to learn that their relatively mild-mannered General Counsel spends a significant amount of his spare time being choked, arm-locked and punched in a controlled environment.

Training in Brazilian Jiu-Jitsu and boxing is perhaps not what people expect from someone whose day job involves contracts, governance and risk management. But to me, the contrast is part of the appeal. Both require focus, discipline and the ability to remain calm under pressure, skills that are just as valuable at the negotiation table as they are in a gym.

Arbitration of Commercial Disputes (2nd edn)

Authors: Andrew Tweeddale and Masood Ahmed

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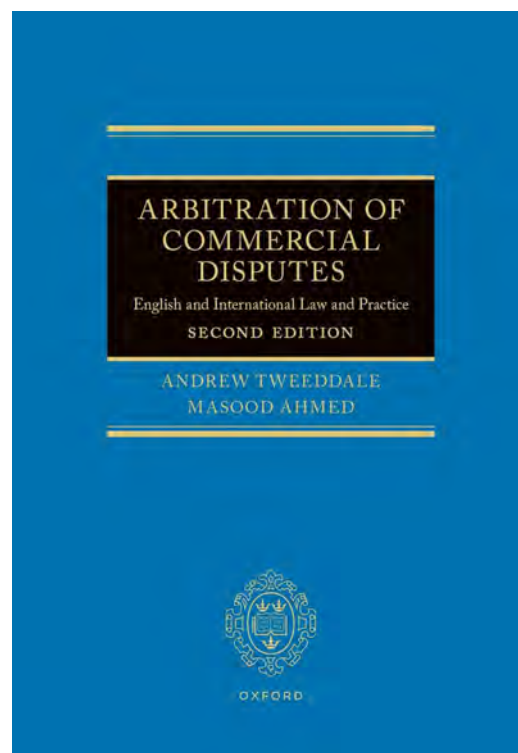
Publication date: 26 December 2026

Reviewed by Joanne Clarke

The second edition of *Arbitration of Commercial Disputes* arrives at a point when arbitration law is moving quickly, with recent legislative reform, a steady stream of important decisions, and the continued development of ‘soft law’ and guidance. It makes a genuinely useful contribution to that discussion. It sets out English arbitration law in a clear and methodical way, while also engaging with international perspectives throughout. One of its real strengths is that it manages to be detailed without becoming heavy going.

A notable feature of the book is its practicality. This is the sort of text that is likely to be reached for regularly rather than consulted only occasionally. It will be particularly helpful for practitioners, but it is also easy enough to navigate for those newer to the subject. The structure is logical and follows the steps of an arbitration from start to finish, which makes it especially easy to use in day-to-day work. The writing is direct and the treatment of authorities is concise without feeling superficial.

The book also does a good job of engaging with recent developments and is very up to date. The text reflects legislative and ‘soft law’ changes, including the Arbitration Act 2025 and the International Bar Association’s 2024 Guidelines on Conflicts of Interest, as well as more recent guidance on the use of artificial intelligence (AI) in arbitration and the growing role of technology more generally. These developments are dealt with in a straightforward way. Case law is brought in thoughtfully, with short explanations that make it easier to see why each decision matters.



That approach is particularly evident in the treatment of current legal issues. The discussion of anti-suit injunctions, for instance, considers *Times Trading Corporation v National Bank of Fujairah (Dubai Branch)* [2020] and notes its more recent application in *Tyson International Company Ltd v GIC Re, India, Corporate Member Ltd* [2025] (with the position now further shaped by the Court of Appeal’s 2026 judgment). Similarly, questions of arbitrability are addressed by reference to the Privy Council’s decisions in *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation (Cayman Islands)* [2023] and *Sian Participation Corp v Halimeda International Ltd (Virgin Islands)* [2024], which are used effectively to illustrate the underlying principles rather than simply cited. On litigation funding, the analysis covers the Supreme Court’s decision in *PACCAR v Competition Appeal Tribunal* [2023] and the Court of Appeal’s decision in *Sony Interactive Entertainment Europe Ltd v Alex Neill Class Representative Ltd* [2025], an area that remains in flux given the United Kingdom government’s stated intention to legislate.

The foreword by Mr Justice Henshaw notes that the book ‘explores areas of perennial difficulty’ and highlights, among other things, the book’s treatment of the exceptions to confidentiality, interim orders against third parties, the courts’ approach to

stays under section 9 of the Arbitration Act 1996, and new provisions on peremptory orders and emergency arbitrators.

Taken as a whole, this is a book that does exactly what you would want it to do. It is dependable, up to date and easy to use, whether you are checking a specific point or reading more broadly. Just as importantly, it is written in a way that makes it feel like a working text rather than something purely academic. That is likely to be what keeps it within arm's reach for those who work in this area.

Building Defects Law

Author: Darryl Royce

Published by: London Publishing Partnership

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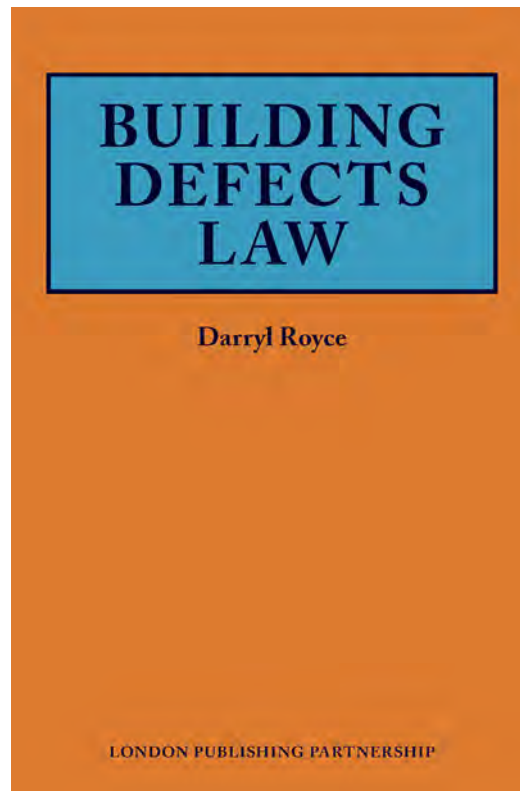
431 pages, £125

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*Reviewed by Thayananthan Baskaran
and Leezzie John*

B*uilding Defects Law* provides a detailed consideration of building defects claims, which are often complex, technical and multifaceted. The book masterfully guides readers through every step of the process, with Chapter 1 setting out an introduction to the historical treatment of building failures under common law and the subsequent development of legislative regimes up until the current position.

Chapter 2 sets out a framework of essential concepts in building contracts relating to building defect claims. Chapters 3–7 subsequently address common causes of action for building defect disputes, including breach of contract of sale or agreement for lease, breach of warranty, breach of statutory duty under the Defective Premises Act 1972, professional negligence and claims under the Building Safety Act 2022. The legal remedies for such breaches are then explored in Chapter 8. The book also deals with



insurance claims in relation to building defects in Chapter 9 and the role of expert evidence in Chapter 10. The book then concludes with Chapter 11, which provides general conclusions and the author's insight on the success and shortcomings of the law governing building defects.

Chapter 7, 'Claims Under the Building Safety Act', offers a meticulous dissection of the Building Safety Act 2022 from the perspective of building defects litigation

in the aftermath of the Grenfell Tower fire tragedy in summer 2017.

Chapter 7 begins with a brief historical backdrop, followed by an introduction of key statutory concepts under the Building Safety Act 2022. Further, as the author notes, in the wake of the Grenfell Tower disaster, many high-rise buildings across England were found to have significant defects, particularly as a result of the widespread use of combustible cladding. In this context, Chapter 7 highlights how the Building Safety Act 2022 provides for unsafe cladding as a special category of defect and the scope of cladding remediation. Chapter 7 also discusses the operation of the Building Safety Fund and the Cladding Safety Scheme as the Government of the United Kingdom's initiative in facilitating the remediation of fire safety risks associated with cladding in high-rise residential buildings.

The central focus of Chapter 7 is the author's analysis of the features, application, procedures, effects and significance of the statutory remedies provided under the Building Safety Act 2022. This includes, among others, Remediation Orders, which require a relevant landlord to carry out remedial works to remedy specified defects; Remediation Contribution Orders, which require a specified body corporate or partnership to contribute towards the costs

of remedying relevant defects; and Building Liability Orders, which pierce the corporate veil and enable liability arising for certain building defects to be extended beyond the immediate defendant to its parent or associate companies.

Chapter 7 then concludes with a summary of the Building Safety Act Working Group's proposed amendments to the Technology and Construction Court Guide to facilitate claims arising from the Building Safety Act 2022 in the Technology and Construction Court, including the management of such claims and a streamlined resolution process where multiple statutory remedies under the Building Safety Act 2022 are pursued simultaneously.

A key strength of Chapter 7 is the author's ability to deconstruct the complexities of the provisions of the Building Safety Act 2022 with exceptional clarity, while also providing for the procedural and practical realities of its application.

Overall, the author's insightful analysis provides a level of clarity and much needed guidance to legislation that is crucial to disputes involving construction and building defects. This authoritative, timely and indispensable addition to construction literature is a valuable resource for construction practitioners, academics and arbitrators alike.

Handbook on Construction Law and Arbitration

Edited by Krishan Singhania and Srishti Singhania

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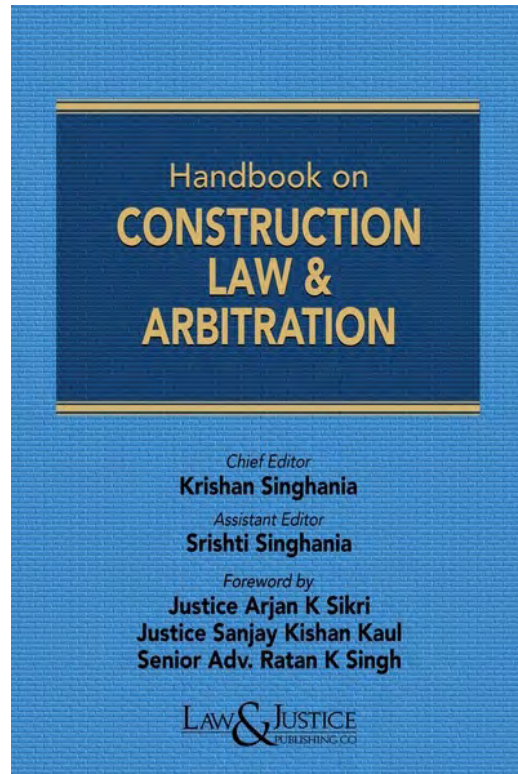
Reviewed by Aleksander Godhe

It has become almost trite to observe that India is now one of the world's most significant jurisdictions for construction law and international arbitration. The *Handbook on Construction Law and Arbitration* is therefore an essential work for practitioners seeking insight into one of the world's leading construction markets without sacrificing a rigorous analysis of the international principles that underpin the discipline.

I've had the opportunity to examine a selection of the chapters in greater depth. Chapter 1 by Amit Kathpalia provides the reader with an excellent overview of the principal standard forms of construction contract used in practice. It considers not only the FIDIC forms, so frequently encountered in international projects but also the National Institute of Transforming India (NITI) Aayog model agreements. The chapter is enriched by practical case studies, including the use of early contractor involvement in the delivery of the United Kingdom's High Speed 2 (HS2) project.

Chapter 3A is particularly noteworthy for its sophisticated treatment of the fundamental principles governing delay. Rajat Singla addresses both the foundational concepts and more contentious issues, including ownership of float and the prevention principle as considered in *North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744. Chapter 3B, by Ananya Kumar and Shriya Luke Murphy, complements this discussion by examining the uniquely Indian issues surrounding 'No Damages for Delay' clauses.

Chapter 8, authored by Mohit K Dubey and Dr Murali Jagannathan, will be



indispensable to parties embarking on construction projects in India. It identifies the principal features of the applicable legal framework, including payment security and the interpretation of liquidated damages clauses, while consistently evaluating Indian law against international best practice. This comparative perspective is one of the book's recurring strengths.

Chapter 13, by Tariq Khan and Aditya Singh Chauhan, examines the termination of construction contracts, observing that termination rights may arise under both common law and the parties' contractual bargain. Although Indian law in this area shares its origins with the law in England and Wales, it has developed independently for some time. The chapter offers a careful and nuanced analysis of the substantive and procedural requirements governing termination. After all, a party that purports to terminate a contract without lawful justification may itself commit a repudiatory breach, thereby exposing itself to substantial liability.

From Chapter 15 onwards, the focus shifts to construction dispute resolution and the procedural framework governing arbitration. Chapter 16A, by Saniya Sharma, opens with an overview of the substantial backlog confronting the Indian courts.

Against this background, the continued expansion of alternative dispute resolution appears almost inevitable if construction parties are to preserve cashflow, minimise project disruption and avoid the costs and delays associated with litigation. The Arbitration and Conciliation Act 1996 represented an important milestone in this regard, while recent mediation legislation may prove equally attractive to participants in the construction industry.

At the same time, the book does not shy away from recognising the challenges facing arbitration in India. Government-imposed restrictions on arbitration in certain public procurement contracts may suggest a degree of institutional scepticism towards the arbitral process. Likewise, the continuing controversy surrounding stamp duty in relation to arbitration agreements and awards remains an area ripe for reform. Chapter 18, by Srishti Singhania and Anjana Devi Karunahariram, provides a timely and insightful discussion of these issues. As the authors observe in relation to arbitration agreements, '[t]hese delays are against the objective behind the introduction of arbitration as an efficient alternative dispute resolution method'. In relation to arbitral awards, they conclude that 'legislative reforms are necessary'.

Chapter 21A, authored by Krishan Singhania and Avni Singhania, examines the increasingly important role of preliminary meetings, which often determine the efficiency and trajectory of an arbitration, particularly in relation to jurisdictional and admissibility objections. The significance of these early procedural conferences is only

likely to increase, as reflected in the 2026 amendments to the International Chamber of Commerce (ICC) Arbitration Rules. The authors also identify practical opportunities to use preliminary meetings to facilitate settlement or direct parties towards alternative forms of dispute resolution, thereby avoiding unnecessary arbitral proceedings.

The book then turns towards a detailed and practical examination of evidence in international arbitration in Chapters 22 and 23, before turning to arbitral awards in Chapters 25 to 27. These concluding chapters analyse the different forms of award together with tribunals' powers to award interest and costs, areas that have not always received consistent treatment in the Indian courts. They also identify a number of practical pitfalls, including issues relating to currency and taxation, ensuring that the discussion remains firmly grounded in practice.

Overall, the *Handbook on Construction Law and Arbitration* provides a comprehensive and highly practical treatment of construction law and dispute resolution. Its greatest strength lies in combining detailed analysis of Indian law with an awareness of international practice, making it valuable not only for practitioners working in India but also for those engaged in cross-border construction projects. In addition to its treatment of current law, the book offers thoughtful reflections on the future direction of construction dispute resolution, including the growing role of online dispute resolution. It deserves a wide readership among construction lawyers, arbitrators and academics alike.

Construction Law International

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