

CONSTRUCTION LAW INTERNATIONAL

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ENERGY ENVIRONMENT, NATURAL RESOURCES AND INFRASTRUCTURE LAW SECTION (SEERIL)

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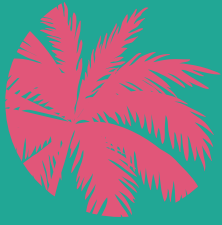
DECEMBER 2021



**A new course
towards
sustainable
construction**

**The energy
transition in
Central Asia**

**The legal framework
for international
construction projects**



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CONTENTS

CONSTRUCTION LAW
INTERNATIONAL

Vol 16 ISSUE 4 December 2021

A Committee publication from the IBA Energy, Environment, Natural Resources and Infrastructure Law Section tinyurl.com/IBA-SEERIL

REGULARS

2 FROM THE EDITORS

3 FROM THE CO-CHAIRS

4 DIVERSITY AND INCLUSION INITIATIVE

Questionnaire: Aarta Alkarimi, Diversity and Inclusion Officer, IBA International Construction Projects Committee

Questionnaire: Marine Assadollahi

7 FIDIC AROUND THE WORLD

Thailand

10 COUNTRY UPDATES

Job or jab? New South Wales' mandatory vaccinations for construction workers

Termination before works are finished: application of liquidated damages?
Triple Point Technology v PTT Public Company

The two-stage tender procedure for large-scale and complex infrastructure projects in the Netherlands

Remedial Construction Services v AECOM: incorporating arbitration provisions by reference under California law

62 BOOK REVIEW

FIDIC Contracts in Asia Pacific – A Practical Guide to Application

by Donald Charrett

FEATURE ARTICLES

21

Charting a new course towards sustainable construction

James Doe and Tim Healey

28

The energy transition in Central Asia: drivers, policy and opportunities

Alistair Wishart and Afzaal Abidi

36

Legitimate expectations and state assurances: a look at the protection of predictability and stability of the legal framework for international construction projects

Indira Gomes

43

Is the Nigerian Arbitration and Conciliation Act suitable to construction disputes? A critical analysis

Simon Ejiofor Ossai

51

Duties to warn, advise and provide information: a comparative study of the obligations of contractors and design professionals in French and English law

Philip Lawrenson

International Bar Association

5 Chancery Lane,
London WC2A 1LG, United Kingdom

Tel: +44 (0)20 7842 0090

Fax: +44 (0)20 7842 0091

www.ibanet.org

Editorial:

editor@int-bar.org

Advertising:

andrew.webster-dunn@int-bar.org

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Cover image: Ain Dubai, the world's tallest ferris wheel, which opened in October 2021.
Credit: Sriya Pixels/Shutterstock.com

FROM THE EDITORS

Dear readers,

It is with great pleasure that we introduce the December 2021 issue of *Construction Law International*.

Before introducing the excellent articles that comprise this issue, I take the opportunity to congratulate China Irwin, who will take over the role of International Construction Projects (ICP) Committee Editor 2022–2023. This publication is in safe hands given the close involvement China has had with this publication over the past two years.

We begin this edition with Shona Frame and Ricardo Barreiro's final column as Co-Chairs. As you will appreciate, the past two years have seen significant challenges on many fronts but Shona and Ricardo have continued the excellent work of the ICP Committee and achieved much during this time.

In this issue, we continue the diversity and inclusion questionnaire with two contributions from Aarta Alkarimi, Diversity and Inclusion Officer, IBA International Construction Projects Committee, and Marine Assadollahi. We are grateful for their insights and for sharing their personal reflections on such important issues.

Recent issues of *CLInt* have focused on construction arbitration updates, and we welcome a response to the longstanding FIDIC Around the World series with insights from Thailand by Nuanporn Wechsuanarux, David Beckstead, Asia Pacific Regional Forum Liaison Officer, IBA Power Law Committee, Phalintip Ueprapeepun and Suphachok Saengarun.

In our country updates, Amanda Staninovski shares the latest position from Australia on the Covid-19 recovery, where there are rapidly moving laws and policy on mandatory vaccinations in New South Wales. In the United Kingdom, Scott Stiegler and Yasmin Bailey discuss a recent UK Supreme Court decision that settles the law on the application of liquidated damages in circumstances where a contract is terminated before the works are completed. From the Netherlands, Jacob Henriquez considers the latest on the two-phase tender process for large-scale infrastructure projects. From California, Nathan O'Malley and Giorgio Sassine offer an update on the recent case *Remedial Construction Services v AECOM*, which considers the incorporation of arbitration provisions by reference under California Law.

This edition also includes five insightful feature articles. James Doe and Tim Healey consider the significant challenges facing the construction sector, such as tackling climate change and sustainable development. Alistair Wishart and Afzaal Abidi offer an in depth analysis of the drivers, policy and opportunities for energy transition in Central Asia. Indira Gomes considers the issue of legitimate expectations in the context of the fair and equitable treatment standard by reference to arbitral cases that reflect the importance of commitments made by states to investors. And Simon Ossai considers whether the Nigerian Arbitration and Conciliation Act is suitable for construction disputes. In our final feature, Philip Lawrenson carefully considers the duties to warn, advise and provide information, offering a comparative study of the obligations of contractors and design professionals in French law to those in English law.

We also include a book review, by Kiri Parr, who takes a look at Donald Charrett's *FIDIC Contracts in Asia Pacific – A Practical Guide to Application*.

We would like to thank our contributors for their insightful articles and hope you will enjoy reading this edition.

We welcome your contributions, thoughts and insights on our diversity and inclusion series, FIDIC around the world, or country updates and feature articles, by contacting us or submitting your articles to CLInt.submissions@int-bar.org.

Thomas Denehy
ICP Committee Editor, IBA International Construction Projects Committee
Corrs Chambers Westgarth, Sydney
thomas.denehy@corrs.com.au

FROM THE CO-CHAIRS

Dear ICP Committee members,

As we approach the end of our term in office on 31 December 2021, it is interesting to reflect on the last two years. Our first Co-Chairs' message for *CLInt* was written in March 2020 in the early days of the Covid-19 pandemic. At that point we were all adapting to different ways of working and balancing work, family commitments and other challenges under various levels of lockdown, as restrictions were imposed around the globe.

We saw governments take different approaches to managing the pandemic but no country has emerged unscathed. We saw some respite in mid-2020, as the initial wave of infections began to recede but that turned out to be a false dawn as second and third waves and new variants emerged.

We welcomed, with great relief, the vaccines that began to appear in late 2020 after a herculean effort by scientists worldwide, followed by a global effort by governments to roll out vaccines to their populations.

Now, almost two years on, we are beginning to move into a phase of adapting to living with Covid-19, although pressures on health services remain and we still seem to be far from leaving it behind.

What was, in early 2020, a new way of working is now business as usual for many of us. We have, to a large extent, replaced face-to-face meetings and business travel with video calls. Conferences and seminars have been replaced with webinars. Some of us are making a gradual return to working in the office, while others are still working from home. Going forward, the model continues to evolve, with a hybrid approach starting to emerge. In-person events are returning although cautiously and gradually.

We are very much looking forward to our Working Weekend in Vevey, Switzerland, in May 2022, which was postponed in May 2020, and to other events which we hope can take place in 2022.

In the meantime, the Committee remains very active. We have now rolled out four masterclass events during 2021: Practical considerations for mediation of construction disputes; Practical aspects of cross examination techniques; Fundamentals of Project Establishment; and Fundamentals of Project Delivery, as well as a webinar focused on the role of experts in construction disputes.

We revisited the Covid-19 webinar held in August 2020, and on 7 December hosted a webinar titled 'Beyond Covid-19: impact on construction contracts and projects'. It focussed on lessons learned, changes, improvements and trends derived from the pandemic.

We have three ongoing projects:

- Project Establishment Subcommittee's 'Ten tips for Project Establishment';
- Project Execution Subcommittee's 'Supply Chain Insolvency Ready Reckoner'; and
- Dispute Resolution Subcommittee's 'ADR in Construction Country Guides'.

Our exclusive publication, *Construction Law International*, has continued to be published regularly, albeit in digital format, and sourced with excellent content thanks to the tremendous efforts of the editorial team.

In addition, along with Mauro Rubino-Sammartano (Former Chair of Dispute Resolution Subcommittee) and the Cour Européenne d'Arbitrage (European Court of Arbitration), we are jointly organising the Online Training Course on Construction Arbitration. This consists of a series of 25 online lectures which are free of charge and many ICP Committee members are participating as lecturers.

We were delighted that the IBA has offered the ICP Committee the opportunity to participate in a LinkedIn trial as a way of communicating more effectively with our members. The LinkedIn group launched in August 2021 and we are excited at the opportunities it provides for members to connect, communicate and exchange ideas. We encourage you to join the group and submit posts and participate in discussions via this link: <https://www.linkedin.com/groups/12550671/>. As we have seen over the past two years, the ability to stay connected and engage with each other has become increasingly important, and the LinkedIn group is an important tool for this.

We held an ICP Committee virtual networking event in April, and our annual members meeting in December, at which the new officers for 2022–2023 were announced. We held a virtual handing over of the ICP hard hats to new Co-Chairs Jean-Pierre van Eijck of SPANT Advocaten in the Netherlands and Joe Moore of Hanson Bridgett in San Francisco, United States. We know they and the team of officers will do a fantastic job in looking after the ICP Committee going forward. We wish them well for their terms in office and at the same time extend a very heart-felt thank you to our team of officers for 2020–2021. We asked a lot of the team and they responded extremely positively and worked hard to deliver events and projects to the benefit of the Committee and our members. We could not have asked for a better team and we are confident we are passing on the reins in good heart.

We wish you and your families, friends and colleagues well and look forward to a healthy, happy and prosperous 2022.

Shona Frame
ICP Co-Chair
shona.frame@cms-cmno.com

Ricardo Barreiro-Deymonnaz
ICP Co-Chair
rbarreiro@bodlegal.com

DIVERSITY AND INCLUSION INITIATIVE



Aarta Alkarimi

Diversity and Inclusion Officer, IBA International Construction Projects Committee

Managing Partner, Chrysalis

1. What is your current job, role or title?

I am the Managing Partner at Chrysalis, a law firm that specialises in construction and infrastructure-related matters with a particular focus on advocacy within the realm of alternative dispute resolution.

In the last few years, the firm has dedicated considerable time assisting various developing nations in setting up or developing an arbitration centre. These efforts have been spearheaded by development programmes and initiatives led by some major government entities who approached us. This work has been particularly rewarding as it has not only provided us an opportunity to contribute in the more general sense but to also dovetail with considerations related to diversity and inclusion from the outset.

Additionally, I am often called on to serve as an arbitrator or mediator in disputes.

I also serve on the IBA Diversity & Inclusion Council and am the Senior Diversity Officer for the IBA's International Construction Projects Committee.

2. When starting out in your career, did you have any role models?

I did not have a specific role model, but I admired certain characteristics and skills in various leading legal figures I interacted with over time and aspired to understand, tailor

and implement these qualities to improve the way I approached things. Of these characteristics, the most important were those which took the long-view and maintained a necessary measure of professionalism and respect for everyone. This may seem obvious, but in the pressures and stresses of contentious situations a lawyer who is acting on behalf of their client's best interest, and also trying to be effective with the opposing party's counsel, must be able to take charge or will end up being consumed by the process. To assume such a role, you must have built up a reputation of having uncompromised ethics and empathy as well as demonstrating a tireless pursuit of self-development. I have consistently seen that the best and most effective in our field are those who earned the respect of their peers and are now considered authorities as a result of such efforts; not those who demanded recognition from others.

3. What advice did you receive which helped you progress in your career?

I've received a lot of good advice over the years, but there are two overarching principles which related to reputation. Nothing is more rewarding or more unforgiving for lawyers than their reputation.

Quality of work: During my mid-level years as I put in a lot of effort and long hours – like all good lawyers – while battling against deadlines, exhaustion, distractions and information overload, a managing partner would often remind us that 'we're often measured mainly by the quality of what we produced for our prior case'. While a cliché, it is an inescapable fact that the stakes are often very high for your clients and outcomes greatly rely on how you deal with the issues. This applies equally to front-end work and matters related to disputes. So, quality matters and a lawyer's reputation relies heavily on this.

Being a managing partner, this consideration is further elevated because I am now responsible for how my firm's brand is perceived.

Ethics: In real-life practice one is routinely put in positions where ethics are tested in various ways, both subtle and overt. In the end, we are all commercial beings in one way or another, but ethical standards are considerably higher for those in law-related professions – be it enforcement, advocacy or adjudication – for very good reasons. As such, the advice was to always maintain an uncompromising level of ethics. One does not take any shortcuts.

4. Do you think that diversity is improving in your particular professional area?

Most definitely. However, this is partially because the profession lagged behind other professions and has had to catch-up. We should have been ahead of the curve given the profession is supposed to champion equity and rights.

We still have a long way to go. Last year in the United States almost 55 per cent of first-year law students were women and nearly 52 per cent of law school graduates were women. Almost 50 per cent of all associates were women but the figure drops to less than 25 per cent of equity partners. The figures in the UK are very similar.

There has been very modest improvement with respect to racial diversity in the US and it has been particularly slow for African Americans who comprised a mere five per cent of associates and only one per cent of partners in 2020.

5. What positive steps have you seen organisations take to progress diversity and inclusion?

I have seen positions created within human resources and compliance departments to actively prioritise initiatives that encourage greater awareness, inclusivity and

empowerment (considering the spectrum of diversity and inclusion to include ethnicity and race, religious beliefs, sexual orientations and people with disabilities).

Many law firms have also instituted diversity training to foster greater recognition of unconscious biases and negative behavioural patterns.

That said, most of these policies should be tailored to their particular organisations, societal structures and geographical regions to ensure that such initiatives are meaningful and long-lasting.

6. What aspects do you think are still ripe for improvement in organisations?

Every organisation and society has its own issues based on its culture, history and needs. Women's equal rights maybe in a non-issue in certain countries, and a significant matter in another. The impulse to implement policies in a generic and universal manner can be short-sighted, especially in organisations with significant international presence or a diverse client-base.

It is also important to deal with access to quality education so that candidates are not seen as merely fulfilling quotas. In this, larger firms in particular can play a role in improving standards within their locale through mentorships, outreach and funding.

With continued globalisation, firms that are forward-thinking with regard to diversity and inclusion see the world as it is today and how it will be in the future. These firms will usually adapt better and prosper where those who continue 'business as usual' will face challenges and lose opportunities.

7. What are the indicators of when a reasonable diversity balance is reached?

There is no magic number or target. I think setting targets as a part of a road map to measure progress is necessary, but an ultimate or final

target fails to recognise that things are ever-changing. The aim is always to represent the communities in which an organisation operates, whether that is local, regional or global.

8. What do diversity and inclusion mean to you and why are they important?

It means a lot. I have been truly fortunate to have experienced the benefits of diversity first-hand through my personal circumstances: I am ethnically Persian. I was born and spent my early years in the UK, studied and lived in the US for over a decade, have travelled internationally throughout Europe, Asia and the Americas on assignment, and am now based in Dubai (a city that is home to some 185 different nationalities).

On a macro scale, encouraging diversity is imperative in today's global economy where nations are facing common challenges that require global problem solving (Covid-19 and climate change, to name but two). Also, diverse firms dealing internationally – whether with governments or multi-national companies – have a very apparent and impressive edge over those who have not sufficiently diversified.

My personal growth and the opportunities the firm has gained are intrinsically tied to our exposure to diversity on many levels.

9. What impact has the Covid-19 pandemic had on diversity in your professional area?

I believe it is too early to truly identify the impacts; especially in terms of which ones are temporary and which are long-lasting.

As the frequency of social and professional gatherings has dropped significantly, one has not been as exposed to others. This is especially the case with a prolonged period of limited international travel.

On the other hand, the near universal utilisation of web-based meetings and conferences has

meant that there has been a more equal footing in terms of the ability to participate (ie, reducing the economic and logistical hurdles many faced attending international conferences).

If the pandemic ends up permanently affecting the traditional office environment, there are bound to be challenges to diversity and inclusivity initiatives. Any significant reduction in being able to meet your diverse group of colleagues in person is likely to affect the strength of bonds that are often made during 'water cooler' chats and conversations at lunch.



Marine Assadollahi
*Director of Risk and Compliance,
Fives Group*

1. What is your current job, role or title?

I am the Director of Risk and Compliance at an international industrial engineering group headquartered in France.

2. When starting out in your career, did you have any role models?

I did not have role models per se. However, I was fortunate to have great mentors throughout my career who guided me and helped me create a path of my own. There are many men and women I admire who have been inspirational to me. They are visionaries whose courage made a difference. They pursued their goals, even when it conflicted with society at the time. These individuals were avant-garde and had a sense of purpose beyond their own interest and thus benefited others greatly. Examples in the field of law, Gisèle Halimi (one of the founders of the Democratic Feminine Movement), or Ruth Bader Ginsburg (Former Associate Justice of the United States Supreme Court), to name but two.

3. What advice did you receive which helped you progress in your career?

I had a boss/mentor who seldom shared positive or negative comments about me when he received them. When I inquired why he did not share them with me,

he advised that any such remarks would be distractions and irrelevant to what I already knew. 'You did your best, didn't you?' he stated. Naturally, he provided constructive feedback but would always omit any opinions or perceptions. This approach resonated with me and drove me to self-evaluate only based on the amount of work and effort I put in. I try not to let other people's opinions, good or bad, compensate for who I am or my career status, allowing me to remain authentic and find intrinsic value. It was the best advice I received and hope to inspire.

4. Do you think that diversity is improving in your particular professional area?

Diversity and inclusion is improving almost all organisations; this is undeniable. However, a long road ahead remains. The gender distribution at executive levels within companies, particularly in industry, remains unbalanced, and there is plenty of room for improvement.

5. What positive steps have you seen organisations take to progress diversity and inclusion?

There are now numerous initiatives promoting women into leadership positions in companies and promoting more flexibility in the workplace to allow a balance of work and family.

6. What aspects do you think are still ripe for improvement in organisations?

See point 7 (below).

7. What are the indicators of when a reasonable diversity balance is reached?

The main indicator to measure such balance will be by surveying diversity in the steering committees or organisations' board of directors.

8. What do diversity and inclusion mean to you and why are they important?

Diversity and inclusion allow enriched views and ideas to emerge and let us all evolve by overcoming our known or unknown biases.

9. What impact has the Covid-19 pandemic had on diversity in your professional area?

I am not sure if the impact was specific to diversity. The pandemic has certainly made it more challenging to integrate new hires within organisations.



FIDIC Around the World – Thailand

Nuanporn Wechsuwanarux

David Beckstead

Asia Pacific Regional Forum Liaison Officer,
IBA Power Law Committee

Phalintip Ueprapeepun

Suphachok Saengarun

Chandler MHM, Bangkok, Thailand

In this questionnaire, references to FIDIC clauses are references to clauses in the 1999 Red Book.

1. What is your jurisdiction?

Thailand.

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

FIDIC contracts are often used in infrastructure projects in Thailand. In our experience, the most commonly used forms are the turnkey agreement (Silver Book) and the design-build agreement (Yellow Book). Since the introduction of the revisions to the FIDIC suite of contracts in 2017, we have seen the new editions used in several projects; however, some project owners and contractors continue to prefer the 1999 editions.

FIDIC contracts are used in all types of infrastructure projects, such as power plants, rail projects, refineries, ports, etc. The Silver Book and Yellow Book are both commonly used in projects funded by asset-based project financing.

3. Do FIDIC produce their forms of contract in the language of your jurisdiction? If no, what language do you use?

There are no official Thai translations of FIDIC form agreements, though we have seen translated versions of FIDIC contracts for government-owned projects. The English-language versions are commonly used for projects in Thailand.

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

Thai law generally embraces the principle of freedom of contract, meaning parties are free to stipulate the contents of their agreements so long as the agreement is not illegal or contrary to public order or the good morality of Thailand. As such, there are no amendments necessary in order to ensure the FIDIC terms are operative.

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

Some of the adjustments to FIDIC Conditions of Contract that we regularly see in Thailand are:

1. Splitting the contract

As in other jurisdictions in Asia, it is common practice in Thailand to ‘split’ the scope of work to be performed under an engineering, procurement and construction contract into an onshore agreement and an offshore agreement. In order to recreate the effect of the turnkey structure, the parties will also typically enter into a wrap agreement to ensure that both onshore and offshore contractors are jointly liable; that there are no

horizontal defences available to the contractors; and there is consistency in the liquidated damages regime, among other relevant matters.

The primary motivation for splitting the construction contract is for tax planning purposes. However, the structure can also be beneficial for foreign contractors, as engineering, architecture and domestic trading are restricted business activities under Thailand’s Foreign Business Operations Act.

2. Removal of Dispute Adjudication Board (DAB)

In our experience, (for better or worse) DABs are seen by parties as an unnecessary and additional expense. As a practical matter, the pool of qualified individuals who would be capable of sitting on a DAB is smaller than in jurisdictions where DABs are more commonly used.

3. Employer-friendly derogations for government-owned projects

Where a project is owned by a governmental agency or state-owned entity, the Conditions of Contract will typically be amended by the particular conditions to be more Employer-friendly. Some examples we have seen are: (1) the removal of the Contractor’s liability cap at Sub-Clause 17.6; (2) limiting the Contractor’s ability to request extensions of Time for Completion at Sub-Clause 8.4; and (3) the removal of provisions entitling the Contractor to certain relief in the event of changes in legislation (Sub-Clause 13.7) or due to interference by governmental authorities (Sub-Clause 8.5).

6. Does your jurisdiction treat Sub-Clause 2.5 of the 1999 suite of FIDIC contracts as a precondition to Employer claims (save for those expressly mentioned in the sub-clause)?

Yes, the employer must comply with the notification requirements

under Sub-Clause 2.5 as a condition for asserting a claim under the Conditions of Contract. In our experience, Sub-Clause 2.5 is commonly included without amendment and is generally acceptable to employers in Thailand, particularly public authorities for the construction of infrastructure projects.

Thai law generally recognises the principle of freedom of contract, meaning the parties may stipulate adherence to certain conditions prior to asserting a claim. Therefore, based on a textual reading of Sub-Clause 2.5, an employer may lose its right to claim as a result of its failure to comply with the notification requirements.

7. Does your jurisdiction treat Sub-Clause 20.1 of the 1999 suite of FIDIC contracts as a condition precedent to Contractor claims for additional time and/or money (not including Variations)?

Yes, the procedures set out at Sub-Clause 20.1 would be seen as a condition precedent to Contractor claims for additional time and/or payment, since the provision expressly provides that the Employer's liability in respect of the respective claim will be discharged in the event the Contractor fails to assert its claim within the specified period.

8. Does your jurisdiction treat Sub-Clause 20.1 of the 1999 suite of FIDIC contracts as a condition precedent to Contractor claims for additional time and/or money arising from Variations?

Similar to the answer at question 7, the Contractor's compliance with Sub-Clause 20.1 would be treated as a condition precedent to its claims for an extension of time and/or additional payment arising from Variations.

For claims for additional time, the Contractor would have to comply with the procedures set out in Sub-Clause 20.1 in order to assert its claim for an extension of time as a

result of Variations stipulated in Sub-Clause 8.4, if the Contractor and the Employer/Engineer cannot agree on the adjustment to the time for completion.

As for claims for additional payment, if the Contractor does not agree with the value of the Variations determined by the Employer/Engineer under Sub-Clauses 3.5, 12.3 and 13.3, then the Contractor could still potentially assert its claim for an additional payment in accordance with Sub-Clause 20.1. Compliance by the Contractor under Sub-Clause 20.1 would be treated as a condition precedent to its assertion of claims for additional payment.

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

Dispute adjudication boards, as contemplated at Sub-Clause 20.2 and elsewhere in the Conditions of Contract, are not commonly used in Thailand.

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

For projects owned by private parties, arbitration is commonly used as the final dispute resolution forum. Typically, the parties will nominate either the Thai Arbitration Institute (TAI) or the Singapore International Arbitration Centre (SIAC) as the body to administer the arbitral proceedings. The seat of arbitration will typically be either Thailand or Singapore. If both the Employer and Contractor are Thai, then a TAI-administered arbitration with Thailand as the seat is likely. However, if either party is foreign (or the Thai subsidiary of a foreign company), the foreign party may

push for arbitration in a neutral venue such as Singapore.

Over the past 15–20 years, the Thai government has adopted an official policy of not favouring arbitration as a dispute resolution mechanism for government contracts. As such, most government-owned projects will require disputes to be resolved through Thai courts.

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

There are no published Thai Supreme Court decisions interpreting FIDIC contracts. However, there are some interesting issues provided in FIDIC form agreements that have been interpreted by Thai courts in other contexts:

1. Liquidated damages

The right to liquidated damages provided for under the FIDIC Conditions of Contract, such as delay damages (Sub-Clause 8.7), might be treated as a penalty under Thai law. Accordingly, the stipulated quantum of the liquidated damages may be reduced in accordance with section 383 of the Civil and Commercial Code at the discretion of the court or arbitral tribunal if it finds the amount excessive in light of the actual injury incurred.

2. Termination due to delayed delivery of the site

Thai courts have ruled that delivery of a construction site to the contractor for commencing the work is a substantial obligation of the project owner (Sub-Clause 2.1). Accordingly, failure to deliver the site will be deemed as an event of default of the Employer which would allow the Contractor to terminate the contract pursuant to Thai law, regardless of whether such termination right is explicitly set out in the contract.

3. Governing law

In any proceedings in Thailand, the choice of a foreign law (other than Thai law) as the governing law (Sub-Clause 1.4) will generally be recognised. However, the foreign law will be applied by the Thai court only to the extent to which the law is proven to the satisfaction of the Thai court (the satisfaction of which is within the discretion of the Thai court); and not considered contrary to the public order and good morals of the people of Thailand.

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

Although use of FIDIC contracts in Thailand is becoming more common, the number of occasions where the provisions of FIDIC Conditions of Contract have been interpreted by Thai courts is fairly limited. As such, the status of many of the provisions of the FIDIC Conditions of Contract has not been definitively established under Thai law. Furthermore, common market practices are still in the process of being developed.

Nuanporn Wechsuwanarux is a partner at Chandler MHM in Bangkok, Thailand and can be contacted at nuanporn.w@mhm-global.com. **David Beckstead** is a counsel at Chandler MHM in Bangkok, Thailand and can be contacted at david.b@mhm-global.com. **Phalintip Ueprapeepun** is an associate at Chandler MHM in Bangkok, Thailand and can be contacted at phalintip.u@mhm-global.com. **Suphachok Saengarun** is an associate at Chandler MHM in Bangkok, Thailand and can be contacted at suphachok.s@mhm-global.com.



AUSTRALIA

Job or jab? New South Wales' mandatory vaccinations for construction workers

Amanda Staninovski

Corrs Chambers Westgarth, Sydney, Australia

Introduction

It wasn't that long ago that Australia was the envy of the world, boasting its control over the pandemic and largely Covid-free status in most states. After months of frequent lockdowns, stringent international and domestic border measures and cautious social-distancing procedures, slowly life returned to pre-pandemic bliss: restrictions were eased, cranes sprung back up and hope for normalcy was restored.

Then, in June 2021, the Delta variant reached Australia's shores. Suddenly, more than half of Australia's population was placed in immediate lockdown with some of the harshest restrictions the world has seen.

Specifically in New South Wales, in an attempt to stop the spread of the virus, the NSW government implemented one of the most controversial restrictions: a complete pause on all construction sites for a period of two weeks from 19–31 July 2021.¹ All work on major Sydney infrastructure was temporarily halted, including the construction of the WestConnex Motorway and elements of the Sydney Metro rail project.

With this drastic construction shutdown costing the governing approximately AU\$1.4 bn,² the NSW government's solution was to mandate the vaccination of construction workers in specific local government areas of concern.

This article explores the implementation of compulsory vaccinations for construction workers in NSW. This is done by first providing an overview of the government's general legislative powers to respond to the Covid-19 outbreak, and second identifying the relevant legislation requiring mandatory vaccinations. This is followed by a consideration of the effectiveness of the mandatory vaccination laws, having regard to current vaccination rates and the easing of restrictions.

This article reflects the current Covid-19 laws in New South Wales as of 14 September 2021.

NSW government's legislative powers

The NSW government has issued a plethora of laws and regulations relating to the pandemic since March 2020. These laws relate to a number of issues including self-isolation, interstate travellers, gathering and movement, aged care, and, most recently, Delta variant outbreak restrictions. All public health orders are available on the NSW government's legislation website.³

The NSW government's powers to legislate on matters that affect public health are derived from the Public Health Act 2010 (NSW) (the 'Act'). Specifically, section 7 of the Act allows the Health Minister to issue 'Public Health Orders' if the Minister considers 'on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health'.

Under section 7, the Minister has broad powers to respond to the public health risk. For example, without limitation, the Minister may issue directions to:⁴

- reduce or remove any risk to public health in an area;
- segregate or isolate inhabitants of an area; and
- prevent, or conditionally permit, access to an area.

Failure to abide by the Public Health Orders exposes an individual to a civil penalty of up to AU\$11,000 or six months' imprisonment, or in the case of a corporation, a fine of up to AU\$55,000.⁵

These orders are published in government gazettes,⁶ and come into effect immediately on the specified commencement date. Each order expires after 90 days unless an earlier date is specified.⁷

Once a Public Health Order has been made, the Health Minister may issue amendments to the order on an ad hoc basis. These amendments are incorporated into the Order, and the most up-to-date consolidated order is published.

The latest influx of restrictions, including the vaccination provisions, are made pursuant to the Public Health (Covid-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021 (NSW) (the 'Delta Public Health Order').⁸ Due to the ongoing restrictions and rise in Covid-19 cases, these public health orders are volatile and change on a daily basis.

Mandatory vaccination laws for construction workers

In NSW, construction workers are affected by two types of public health orders: orders specifically for construction sites; and orders relating to 'authorised workers'. A construction worker is an authorised worker for the purposes of any relevant legislation.⁹

Both orders are limited to workers who reside in, or work in, an 'area of concern'. An 'area of concern' is a local government area that has recorded a high number of Covid-19 cases, or has experienced 'clusters' of reported cases. NSW currently has 12 areas

of concern prescribed under the Delta Public Health Order.¹⁰ This means that over 2.5 million residents are subject to these stricter mandatory vaccination orders.

Together, the two types of orders mandate that all construction workers must receive at least one dose of a Covid-19 vaccine; and construction workers living in an area of concern cannot leave that area of concern (including for the purposes of work) unless the worker has received at least one dose of a Covid-19 vaccine by 19 September 2021.

The relevant provisions are as follows:

Section 5.8 in relation to construction sites provides:

‘5.8 Vaccination required to work on construction sites in Greater Sydney

- (1) A person whose place of residence is in an area of concern must not enter or remain on a construction site in Greater Sydney unless the person –
 - (a) has had 2 doses of a COVID-19 vaccine, or
 - (b) has had 1 dose of a COVID-19 vaccine at least 21 days ago, or
 - (c) has had 1 dose of a COVID-19 vaccine within the previous 21 days and has been tested for COVID-19 within the previous 72 hours, or
 - (d) has a medical contraindication certificate issued to the person and has been tested for COVID-19 within the previous 72 hours.
- (2) The occupier of the construction site must not allow the person to enter or remain on the construction site unless satisfied that the person has complied with this clause.
- (3) The person must, when entering or on the construction site –
 - (a) carry the required evidence, and

- (b) produce the required evidence for inspection if requested by –
 - (i) the person’s employer, or
 - (ii) the occupier of the construction site, or
 - (iii) a police officer, or
 - (iv) an authorised officer.’

In addition to this, the relevant authorised worker orders provide:

‘4.3 Leaving area of concern for work

- (3) An authorised worker who is at least 16 years of age must not leave the area of concern for work unless the worker:
 - (a) has had at least 1 dose of a COVID-19 vaccine, or
 - (b) has been issued with a medical contraindication certificate.

[...]

(3C) From the beginning of 9 September 2021 until the end of 19 September 2021:

- (a) an authorised worker is taken to comply with subclause (3) if the authorised worker has an appointment to receive a COVID-19 vaccine on or before 19 September 2021, and
- (b) evidence of the appointment is taken to be the worker’s vaccination evidence for the purposes of the required evidence in subclause (3A).’

The effectiveness of the mandatory vaccination laws

Since returning from the two-week construction shutdown and implementation of the mandatory vaccination scheme, construction works continue to operate in NSW under stringent rules, including rapid antigen testing¹¹ and registered Covid-19 Safety Plans.¹²

No study or data has yet been released that evaluates the specific effect of compulsory vaccinations on the construction industry.

Therefore, the effectiveness of the mandatory vaccination laws for construction workers must be viewed in light of the collective statistics covering all general population vaccinations and mandatory vaccinations for healthcare,¹³ airport and quarantine workers.¹⁴

In order to consider this, it is important to note the position prior to the mandatory vaccination laws. At a high level, Australia’s overall vaccination levels prior to the Delta outbreak were noticeably low in comparison to worldwide figures. Statistics published by the Australian Department of Health show that prior to the implementation of NSW’s stay-at-home orders on 26 June 2021,¹⁵ NSW’s daily vaccination doses were fewer than 40,000 doses a day for the period 16–25 June 2021.¹⁶

The low vaccination rates were a result of a variety of factors, including:

- The government’s initial vaccination programme. Australia currently offers both AstraZeneca and Pfizer Covid-19 vaccinations.¹⁷ Initially in NSW, a rollout of AstraZeneca commenced with the elderly population, slowly opening up eligibility for certain age groups (eg, people aged 60+, people aged 50+ and so on). The Pfizer vaccine was rolled out soon after, for the 40+ age group. In addition, the Therapeutic Goods Administration (TGA) originally recommended a longer period between the two doses. This has since been reviewed and reduced.
- Vaccine hesitancy. The Australian government limited the AstraZeneca vaccine to the older population based on the risk of thrombosis.¹⁸ It was not until the Delta outbreak that those under the age of 40 were encouraged to seek consultation from their general practitioner and consider the AstraZeneca vaccine.
- Low daily Covid-19 cases.

• No mandatory vaccination laws. Following the two-week construction lockdown, mandatory vaccinations for construction workers came into force on 11 August 2021.¹⁹ Following this, daily doses steadily rose from approximately 50,000 until numbers peaked at approximately 148,000 doses on 30 August 2021.²⁰ As of 14 September 2021, 79.46 per cent of NSW's eligible population has received one dose of a Covid-19 vaccination, with 47.54 per cent of the eligible population being fully vaccinated.²¹

Based on the statistics alone, the implementation of mandatory vaccines in NSW (in conjunction with marketing encouraging the general population to vaccinate) has resulted in an incredible surge in the percentage of the vaccinated population. This rise is particularly seen between the period of 12 and 30 August 2021, being immediately subsequent to the implementation of the mandatory vaccination laws.

The spike in vaccination statistics and push for the easing of restrictions has resulted in the NSW government releasing a 'roadmap to freedom' for the fully vaccinated population.²² The 'roadmap' outlines that NSW's harsh stay-at-home orders will be lifted on the first Monday after NSW reaches the 70 per cent double vaccination target. This is predicted to be in late October 2021.²³

Conclusion

New South Wales is currently the only state to require mandatory vaccinations for construction workers. Its laws are still in the early days of implementation but depending on the long-term public reception and success, these laws may pave the way for other Australian states to implement similar legislation. In fact, Victoria may be the next state to mandate vaccinations for construction workers in the near future after a

number of building sites have been affected by Covid-19 outbreaks.²⁴

While this compulsory vaccination order for construction workers has received mixed reception since its implementation, the mandatory laws nonetheless allow an essential billion-dollar industry to continue to work safely and efficiently during the Delta outbreak.

Notes

- 1 Construction work was only permitted in limited exceptions, including to ensure the safety or security of the construction site (see 24AB of the Public Health (COVID-19 Gathering Restrictions) Order (No 2) 2021) (now repealed).
- 2 Caitlin Fitzsimmons, Lucy Cormack and Tom Rabe, 'Construction shutdown to come at \$1.4 billion cost to NSW economy' *Sydney Morning Herald* (Sydney, 18 July 2021) www.smh.com.au/national/nsw/construction-shutdown-to-come-at-1-4-billion-cost-to-nsw-economy-20210717-p58ajx.html accessed 14 September 2021.
- 3 NSW government, Covid-related legislation, <https://legislation.nsw.gov.au/information/covid19-legislation> accessed 14 September 2021.
- 4 Public Health Act 2010 (NSW) s 7(3).
- 5 *Ibid.*, s 10.
- 6 *Ibid.*, s 7(4).
- 7 *Ibid.*, s 7(5).
- 8 NSW government, Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021 [https://legislation.nsw.gov.au/file/Public%20Health%20\(COVID-19%20Additional%20Restrictions%20for%20Delta%20Outbreak\)%20Order%20\(No%202\)%202021_210914.pdf](https://legislation.nsw.gov.au/file/Public%20Health%20(COVID-19%20Additional%20Restrictions%20for%20Delta%20Outbreak)%20Order%20(No%202)%202021_210914.pdf) accessed 14 September 2021.
- 9 Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021 (No 2) (NSW) clause 4.2(4) Note 1 – A list of authorised workers is published on the NSW Government's website at www.nsw.gov.au/covid-19/rules/authorised-workers#construction accessed 14 September 2021.
- 10 Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021 (NSW) Schedule 1 Part 3.
- 11 NSW government, Rapid antigen testing,

www.nsw.gov.au/covid-19/health-and-wellbeing/rapid-antigen-testing accessed 14 September 2021.

- 12 NSW government, Construction and tradespeople, www.nsw.gov.au/covid-19/covid-safe/construction-and-tradespeople accessed 14 September 2021.
- 13 Public Health (COVID-19 Vaccination of Health Care Workers) Order 2021 (as at 14 September 2021).
- 14 Public Health (COVID-19 Air Transportation Quarantine) Order (No 3) 2021 (as at 14 September 2021).
- 15 Australian Government Department of Health, Vaccination numbers and statistics, www.health.gov.au/initiatives-and-programs/covid-19-vaccines/australias-covid-19-vaccine-rollout accessed 14 September 2021. This data is used by the *Sydney Morning Herald* to produce daily interactive trackers: www.smh.com.au/coronavirus-pandemic.
- 16 See www.smh.com.au/coronavirus-pandemic accessed 14 September 2021. This website is updated daily.
- 17 The Moderna vaccine has recently been approved by the TGA and will be implemented in Australia in the near future.
- 18 Australian Government Department of Health, Is it true? Does the Vaxzevria (AstraZeneca) COVID-19 vaccine cause blood clots? www.health.gov.au/initiatives-and-programs/covid-19-vaccines/is-it-true/is-it-true-does-the-vaxzevria-astrazeneca-covid-19-vaccine-cause-blood-clots accessed 14 September 2021.
- 19 Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Amendment (No 23) Order 2021, [https://legislation.nsw.gov.au/file/Public%20Health%20\(COVID-19%20Additional%20Restrictions%20for%20Delta%20Outbreak\)%20Amendment%20\(No%2023\)%20Order%202021.pdf](https://legislation.nsw.gov.au/file/Public%20Health%20(COVID-19%20Additional%20Restrictions%20for%20Delta%20Outbreak)%20Amendment%20(No%2023)%20Order%202021.pdf) accessed 14 September 2021.
- 20 See n 16 above.
- 21 *Ibid.*
- 22 NSW government, 'Roadmap to freedom unveiled for the fully vaccinated' www.nsw.gov.au/media-releases/roadmap-to-freedom-unveiled-for-fully-vaccinated accessed 14 September 2021.
- 23 See n 16 above.
- 24 Sumeyya Ilanbey and Aisha Dow, 'Mandatory jabs being considered for Victorian

construction workers' *The Age* (Melbourne, 14 September 2021) www.theage.com.au/national/victoria/mandatory-jobs-being-considered-for-victorian-construction-workers-20210913-p58r7n.html accessed 14 September 2021.

Amanda Staninovski is an associate at Corrs Chambers Westgarth in Sydney, Australia, and can be contacted at amanda.staninovski@corrs.com.au.



UNITED KINGDOM

Termination before works are finished: application of liquidated damages? *Triple Point Technology v PTT Public Company*

Scott Stiegler

Yasmin Bailey

Vinson & Elkins, London

In a decision welcomed by many practitioners in the United Kingdom and abroad, the UK Supreme Court recently settled the law on the application of liquidated damages (LDs) in circumstances where a contract is terminated before the works are complete. The approach taken by the Court of Appeal in *Triple Point Technology Inc v PTT Public Company Ltd* [2021] UKSC 29, which contemplated that a contractor could avoid the payment of accrued liquidated damages for an

incomplete milestone in the event of termination, left many in the industry unsettled. In overturning the decision of the Court of Appeal, the Supreme Court returned to an orthodox approach whereby the right to liquidated damages accrues until the termination of the contract, and thereafter general damages may be sought.

Factual background

PTT and Triple Point entered into a contract further to which Triple Point was to provide software and related services to PTT. The works under the contract were divided into a number of phases, with each phase being further divided into a number of stages. Payment under the contract was provided for by milestones, although the contract also included specific payment dates.

The works progressed slowly and eventually fell into delay. Triple Point sought payment further to the specific dates set out in the contract, which PTT refused to pay on the basis that Triple Point had failed to achieve the relevant milestones to which the payment related. Triple Point subsequently suspended the contract for non-payment and in turn PTT terminated the contract.

Prior to termination, Triple Point had completed stages 1 and 2 of phase 1 of the works, but the other works remained incomplete.

The liquidated damages clause in question relevantly provided as follows:

‘If CONTRACTOR fails to deliver work within the time specified and the delay has not been introduced by PTT, CONTRACTOR shall be liable to pay the penalty at the rate of 0.1% (zero point one percent) of undelivered work per day of delay from the due date for delivery up to the date PTT accepts such work’.

Previous case law

The case law in this area was developed following the specific liquidated damages provisions in question in each of the cases. This resulted in a variety of possible outcomes. In a scenario where a contractor was subject to previously accrued liquidated damages, but was then terminated with those remaining works being completed by another contractor, three different approaches began to emerge:¹

1. The orthodox view had generally been that accrued liquidated damages were recoverable up to the date of termination, irrespective of whether the milestone had been finally achieved or not.²
2. In *British Glanzstoff Manufacturing Co Ltd v General Accident Ltd*,³ it was decided that a liquidated damages clause applied only where the contractor had actually completed the works, but had been late in doing so – it did not apply where completion of the works had not been achieved.⁴
3. In another case, a position developed that liquidated damages may be recoverable beyond the date of termination and up to the date the works were completed by another contractor.⁵

Each of these positions presented a different outcome for both contractor and employer.

First instance decision⁶

In the proceedings at first instance, Triple Point claimed for payment of its invoices, denied that the termination was lawful and claimed payment for the value of services performed prior to termination.

PTT disputed that any payment was due and counterclaimed liquidated damages for delay and unliquidated loss and damage resulting from the termination.⁷ Various defences were raised by Triple Point in relation to the

liquidated damages clause; however, Jefford J stated that neither of the arguments were well made.⁸

Jefford J found that Triple Point was responsible for the delay that had occurred to the project by May 2014 when it ceased to perform. Consequently, as Triple Point was not entitled to cease performance, it was found to be responsible for the further delay up to the date of termination.⁹

It was subsequently held that liquidated damages applied up to the date of termination (in respect of both phases of the works) and that general damages were recoverable thereafter. This was, for all intents and purposes, the orthodox approach. For stages 1 and 2 of phase 1, liquidated damages were calculated at £154,662. For the remainder of the various stages in the two phases, liquidated damages was calculated at £3,304,616.40.¹⁰

Decision of the Court of Appeal¹¹

While the Court of Appeal (Lewison LJ, Floyd LJ and Sir Rupert Jackson) dismissed many of Triple Point's grounds of appeal, it did allow its appeal with respect to liquidated damages, and this was the main focus of the decision.

In the Appeal, Triple Point argued that the liquidated damages provision was not engaged, in that the provision only applied when work was delayed, but subsequently completed and then accepted – that is, it does not apply in respect of work that the employer never accepted.¹² This was described by Sir Rupert Jackson as a ‘formidable argument which raises questions of general principle concerning the operation of liquidated damages clauses in termination or abandonment cases’.¹³

The Court of Appeal held that applying this approach to interpreting a liquidated damages clause would depend on the

wording of the relevant clause and noted that there is no invariable rule that liquidated damages must be used as a formula for compensating the employer for part of its loss.¹⁴

The Court of Appeal also noted that while the approach that liquidated damages are recoverable up to the date of termination, irrespective of whether the milestone had been finally achieved, was considered the orthodox approach, this was not an approach free from difficulty, noting that it may ‘sometimes be artificial and inconsistent with the parties’ agreement’ and that in circumstances where ‘a construction contract is abandoned or terminated, the employer is in new territory for which the liquidated damages clause may not have made provision’.¹⁵

Applying this reasoning, the Court of Appeal held that where a liquidated damages clause focused specifically on the delay between the contractual completion date and the date when completion was actually achieved, upon the construction of the words in the clause, liquidated damages would not apply if the completion of those works was never, in fact, achieved.¹⁶ In this regard, the Court of Appeal particularly relied on the wording in *British Glanzstoff Manufacturing Co Ltd v General Accident Ltd*.

In light of the specific wording of the liquidated damages clause in question, PTT was only entitled to recover liquidated damages in respect of stages 1 and 2 of phase 1 of the works, being £154,662, which Triple Point had completed prior to termination of the contract.

Decision of the Supreme Court¹⁷

On 16 July 2021, the Supreme Court (Lord Hodge, Lady Arden, Lord Sales, Lord Leggatt and Lord Burrows) unanimously overturned the Court of Appeal’s decision

on whether liquidated damages were payable with respect to the incomplete works. The Supreme Court noted that the Court of Appeal’s reliance on *Glanzstoff* ‘loomed large in the reasoning of the Court of Appeal’,¹⁸ even though it was ‘little-known’,¹⁹ and like the Court of Appeal, much attention was focused on the case.

Lady Arden observed that the Court of Appeal saw much force in the reasoning of the House of Lords in *Glanzstoff* and took the view that the wording of the liquidated damages clause in issue in this case could be so close to the wording in *Glanzstoff* that the House of Lords decision was binding.²⁰ Lady Arden, however, found that this observation was difficult to follow, and noted that the clauses in question in *Glanzstoff* were ‘not said to be some market-accepted wording or clauses from some standard form recognised in the industry where the interpretations of the courts in reported cases may in practice be treated as binding in later cases involving the same wording’.²¹ Lady Arden stated that with those exceptions, ‘in general the decision of one case as to the meaning and effect of a clause cannot be binding as to the meaning and effect of even a similar clause in another case’.²²

The Supreme Court identified that a difficulty with the Court of Appeal’s conclusion on the interpretation of the liquidated damages provision was that it was ‘inconsistent with commercial reality and the accepted function of liquidated damages’.²³ Ultimately, the parties agreed a liquidated damages clause so as to provide ‘a remedy that is predictable and certain for a particular event’ and so ‘the employer does not then have to quantify its loss, which may be difficult and time-consuming for it to do’.²⁴

Lord Leggatt also identified that a liquidated damages regime which would not be effective unless a contractor completed the works brought with it a perverse outcome.

Such a provision would ‘give a contractor who badly overruns the time specified for completion an incentive not to complete the work in order to avoid paying liquidated damages for the delay which its breach of contract has caused. It makes no sense to create such an incentive.’²⁵

With respect to Sir Rupert Jackson’s comment that if a construction contract is abandoned or terminated, the employer is in ‘new territory for which the liquidated damages clause may not have made provision’, Lady Arden stated that it was, in fact, ‘well-trodden’ territory.²⁶ Ultimately, Lady Arden went on to conclude that she did not consider that *Glanzstoff* should have led the Court of Appeal to their ‘radical re-interpretation of the case law on liquidated damages clauses’.²⁷

The Supreme Court restated the general law, which is that the accrual of liquidated damages comes to an end upon termination of the contract (after which a party must seek damages for breach of contract under the general law) but those rights accrued as at the date of termination survive. The Supreme Court also held that a liquidated damages clause does not need to provide for such an outcome expressly.²⁸

What was perhaps most interesting was the fact that the issue of whether or not liquidated damages were payable where Triple Point never completed the works and PTT never accepted them was only raised orally in the Court of Appeal. Lady Arden noted that there were no skeleton arguments for this point in the Court of Appeal and the Supreme Court could not tell precisely how the argument was put. Lady Arden also noted that initially Triple Point did not propose to argue the point by reference to an analysis of the authorities that were ultimately cited by the Court of Appeal in its judgment.²⁹

Conclusion

A liquidated damages regime brings with it a level of certainty for both parties. However, the Court of Appeal’s decision left the position unclear as to whether a contractor may potentially face a different level of exposure than under a liquidated damages regime for delays incurred prior to termination or, conversely, may force an employer to go to greater lengths and expense to demonstrate its claim for delay-related damages over and above what would be required if the liquidated damages regime was effective. There is also, of course, the concerning practical outcome identified by the Supreme Court whereby a contractor may be incentivised not to complete the works in order to avoid liquidated damages for delay being accrued because of its own breach of contract.

The Supreme Court approached the issue with common commercial sense. Lord Leggatt surmised most relevantly that there were ‘cogent commercial reasons why parties who include a liquidated damages clause in their contract would be unlikely to intend the employer’s right to receive such damages for delay by the contractor to be conditional upon the contractor actually completing the work’.³⁰

Of course, the application of the principles from this case will always turn on the precise language of the contract in question. However, parties to a contract containing an appropriately drafted liquidated damages clause can take some comfort that in circumstances where the contract is terminated, in the absence of express wording to the contrary, an orthodox interpretation of that liquidated damages clause ought to prevail.

Notes

- 1 *Triple Point Technology, Inc v PTT Public Company Ltd* [2019] EWCA Civ 230 (5 March 2019) at [106].
- 2 Keating on Construction Contracts (10th Ed), para 10-039. See also *Greenore Port Ltd*

v Technical & General Guarantee Company Ltd [2006] EWHC 3119 (TCC); *Shaw v MFP Foundations and Pilings Ltd* [2010] EWHC 1839 (TCC); *LW Infrastructure PTE Ltd v Lim Chan San Contractors PTE Ltd* [2011] SGHC 163; [2012] BLR 13; *Bluewater Energy Services BV v Mercon Steel Structures BV* [2014] EWHC 2132 (TCC).

- 3 [1913] A C 143.
- 4 *Chanthall Investments Ltd v F G Minter Ltd* SC 73 1976 and *Gibbs v Tomlinson* 35 Con LR 86.
- 5 *Hall v Van Der Heiden* (No 2) [2010] EWHC 586 (TCC); *Crestdream v Potter* (2013) HCCT 32/2013; *GPP BigField LLP & Anor v Solar EPC Solutions SL* [2018] EWHC 2866 (Comm).
- 6 *Triple Point Technology, Inc v PTT Public Company Ltd* [2017] EWHC 2178 (TCC) (23 August 2017).
- 7 *Ibid*, at [13].
- 8 *Ibid*, at [270].
- 9 *Ibid*, at [263].
- 10 *Ibid*, at [264].
- 11 *Triple Point Technology, Inc v PTT Public Company Ltd* [2019] EWCA Civ 230 (5 March 2019).
- 12 *Ibid*, at [75].
- 13 *Ibid*, at [76].
- 14 *Ibid*, at [110].
- 15 *Ibid*, at [110].
- 16 *Ibid*, at [112].
- 17 *Triple Point Technology, Inc* (Respondent) *v PTT Public Company Ltd* (Appellant) [2021] UKSC 29.
- 18 *Ibid*, at [25].
- 19 *Ibid*, at [42].
- 20 *Ibid*, at [30].
- 21 *Ibid*, at [30].
- 22 *Ibid*, at [30].
- 23 *Ibid*, at [35].
- 24 *Ibid*, at [35].
- 25 *Ibid*, at [81].
- 26 *Ibid*, at [35].
- 27 *Ibid*, at [42].
- 28 *Ibid*, at [35].
- 29 *Ibid*, at [24].
- 30 *Ibid*, at [80].

Scott Stiegler is a partner at Vinson & Elkins in London, United Kingdom and can be contacted at [sstiegler@velaw.com](mailto:ssstiegler@velaw.com).
Yasmin Bailey is a senior associate at Vinson & Elkins in London, United Kingdom and can be contacted at ybailey@velaw.com.



NETHERLANDS

The two-stage tender procedure for large-scale and complex infrastructure projects in the Netherlands

Jacob M Henriquez
Ploum, Rotterdam

Introduction

Approximately three years ago, the Dutch Directorate-General for Public Works and Water Management (*Rijkswaterstaat*) initiated research into the ways in which it can improve the tender procedure for infrastructure projects with a contract value of more than €250m. The research led to a report published in May 2019, known as the McKinsey Report.

The research was required for the following reasons:¹

- There are few contractors in the Netherlands able and sufficiently experienced to execute large-scale and complicated infrastructure projects, which means that the Directorate-General for Public Works and Water Management is dependent on a handful of large private sector contractors.
- It is predicted that the Dutch market for these large-scale and complex infrastructure projects will increase annually by 3.4 per cent until 2023, inter alia, due to necessary maintenance and replacement works.
- Dutch contractors are becoming increasingly cautious of tendering

for such large and complicated infrastructure contracts, due to the adverse risk–reward ratio. This could potentially lead to less market competition since contractors would, understandably, be unwilling to accept a risk–reward ratio that could seriously compromise their financial stability.² It is believed that the current market dynamics limit the ability of (potential) contractors to factor in the risks adequately.³

While a two-stage tender procedure or similar methods⁴ are not entirely new, it's interesting to look at recent developments in the Netherlands to see whether they may be useful for other jurisdictions.

The Dutch two-stage tender procedure in a nutshell

Since the Dutch Directorate-General for Public Works and Water Management is the largest employer in the Netherlands for high-value infrastructure projects, it took on the responsibility of researching ways in which improvements could be made. The McKinsey Report indicated a measure that could be taken to lower infrastructure project risks: the introduction of a 'two-stage tender procedure'. This would entail the contract price for the Design and Construct/ECP contracts to be determined only after the contractor has completed the design and engineering phase and is therefore at a stage in which more information is known.⁵ Needless to say, with such two-stage tender procedures in which the price is fixed when more information is known, there are less uncertainties and consequently fewer risks for a contractor.

The McKinsey Report also showed that there are typically a few 'information' risks which are difficult to identify in a pre-tender stage. Two of them are the state of the area and subsoil data. Only after reliable information is made available to a contractor can a well-considered decision be made

about an adequate distribution of risks between employer and contractor. The two-stage tender procedure would, however, mean that the employer would also have the possibility of switching to another contractor if an agreement on the contract price is not achieved after the design and engineering stage. An exit arrangement would therefore have to be in place after the first stage.⁶ It has also explicitly been pointed out that the two-stage tender process does not lead to the application of a more 'traditional' approach in which the employer provides the design to the contractor, with or without concluding a pre-construction services agreement. The contrary is intended: the employer would still only provide the employer's requirement on which a contractor may propose 'design' solutions within its duty to make the design.

When applying the two-stage tender procedure four positive effects are envisaged.⁷ First, it is expected that in the short-term, the total project risks can be lowered, which would benefit the Directorate-General for Public Works and Water Management as well as the contractors involved. Productivity improvements as well as innovation would, in the long-term, benefit the financial position of the market. Second, contractors would most likely shift their 'focus on risks' in a project to a 'focus on risks and improvements'. Third, the two-stage tender procedure would lead to less bidding costs and expenses for contractors, since the 'open tender' would only be for the first stage, therefore limiting the overall and total bidding expenses. Finally, the assumption is made that this development would also lead to savings for the Directorate-General for Public Works and Water Management (in its role as an employer for such projects) in future.

Lessons learned so far

The Directorate-General for Public Works and Water Management has had some experience of the two-stage tender procedure in five smaller infrastructure projects.⁸ In May 2020 an evaluation report on these projects was presented,⁹ in which the main similarities and differences were analysed.

Based on questions such as: (1) Which risks and/or uncertainties need to be dealt with in the two-stage tender procedure? (2) What impact do these risks and/or uncertainties have on the detailed design and contract price? (3) What are the required efforts of the market during and after the tender procedure? (4) What is the exit-strategy if an agreement cannot be reached on the design and/or the contract price?, one may then continue to set up the project against the following nine variables that were identified. These can be summarised as:

- scope;
- contract price – eg, a capped price combined with unit prices, a cost-plus contract, a final price for parts of the works with provisional sums for other parts;
- the price/quality ratio as part of the tendering process;
- the stage by which agreement has to be reached on the contract price (whether before or after the acceptance of a tender);
- risk allocation;
- exit strategy;
- design freedom;
- integration of teams and systems; and
- syndication.

The report concludes that the limited number of projects in which the Directorate-General for Public Works and Water Management was able to accrue experience with the two-stage tender procedure is too limited to draw final conclusions. The first signs are, nevertheless, considered to be positive.

As would be expected, not all projects are deemed suitable for a

two-stage tender procedure. For straightforward projects this would not add value.¹⁰ Value can be added in projects where many and/or larger uncertainties hinder the possibility for a Design and Construct contractor to make a reasonable bid in a regular tender procedure, or where the many and/or large uncertainties make it nearly impossible for a contractor to submit a reasonable bid.

Future developments

On 22 September 2021 the Dutch Institute for Construction Law held a conference around this subject predominantly from the angle of the possible need for new futureproof conditions for construction contracts. During this conference, some general and specific information risks were acknowledged and one of the conclusions was that these risks would be the underlying cause of various adverse consequences during a Design and Construct construction project.

Since the two well-known and widely used standard conditions in Dutch construction law (the UAV 2012 and the UAV-GC 2005 for D&C projects) are currently in the process of being revised, this would further underline the need to keep a close eye on the ways in which the lessons learned from the two-stage tender procedure may be incorporated.

The two-stage tender procedure is still very relevant in the Dutch construction sector. Not least because the 2020 Evaluation Report was also the starting point for four new projects in the Netherlands in which the two-stage tender procedure would be applied.¹¹ These projects are still under way, with some of them yet to begin. To be continued.

Notes

- 1 'Toekomstige Opgave Rijkswaterstaat: Perspectief op de uitdagingen en verbetermogelijkheden in de GWW-sector' ('the McKinsey Report'), May 2019, p 7.
- 2 The Dutch Directorate-General for Public Works and Water Management has (on average) seen a decrease in the number of contractors willing to tender for projects with a contract value greater than €250m.
- 3 McKinsey Report, p 21.
- 4 See, eg, the Two Stage Open Book and Supply Chain Collaboration models in the UK; see also D Mosey, 'Project Procurement and Delivery Guidance: Using Two Stage Open Book and Supply Chain Collaboration', (Kings College London 2014), pp1–62.
- 5 This procedure is often compared to the 'Early Contractor Involvement' methods, which are being used in the UK.
- 6 McKinsey Report, p 36.
- 7 *Ibid*, p 37.
- 8 The projects reviewed were the Nijkerker bridge, Krib- en oeververlaging Pannerdensch Kanaal (RWS KOP), Stadsdijken Zwolle, Zuidasdok (Amsterdam South Axis) and Zuid-Willemsvaart (canal).
- 9 RWS, *Evaluatie 2-fasen proces. Leerervaringen uit projecten*, ('Evaluation report 2020') 28 May 2020.
- 10 *Ibid*, p 39.
- 11 The projects include: the road project A27 Houten-Hoopolder, the Utrecht beltway, the A73 Roertunnel/Swalmen Tunnel (one project), as well as the road project A12 IJsselbruggen.

Jacob M Henriquez is a Construction and Real Estate partner at Ploum, and can be contacted at j.henriquez@ploum.nl.



UNITED STATES

Remedial Construction Services v AECOM: Incorporating arbitration provisions by reference under California law

Nathan D O'Malley

Giorgio Sassine

Musick Peeler & Garrett, Los Angeles, United States

On 15 June 2021, the California Court of Appeal denied a construction subcontractor's motion to compel arbitration in a published decision, holding that an arbitration clause in the prime contract, which was incorporated by reference into the subcontract, did not provide for a 'clear agreement' to submit the dispute to arbitration.¹ This decision by a state appellate court initially raised concerns over the enforceability of arbitration provisions in California that are incorporated into a commercial relationship by reference. Nevertheless, the authors here submit that this decision should be narrowly construed, and that it may not apply at all to cases involving international construction projects.

Incorporation by reference and conflicting terms

The dispute in this matter arose out of a subcontract executed in connection with a project for the decommissioning of an oil terminal on the central coast of

California. AECOM Inc,² the party moving to compel arbitration and the general contractor for the decommissioning project, signed a prime contract with the owners of the facility (the Prime Agreement), Shell Oil Products US, LLC and Shell Pipeline Company LP (Shell). AECOM in turn subcontracted (the Subcontract) with Remedial Construction Services, LP (RECON) to perform portions of the work.

The agreement between RECON and AECOM made reference to the Prime Agreement, specifically incorporating its provisions, and excerpts from it were appended to the Subcontract. Importantly, the Prime Agreement included an agreement to arbitrate, which stated that '[a]ny dispute or claim, arising out of or in connection with' the Prime Agreement 'will be finally and exclusively resolved in arbitration' under the International Centre for Dispute Resolution's (ICDR) International Dispute Resolution Procedures. Despite the clear reference to arbitration, however, within the Subcontract itself, a standard clause referring to litigation was also included, reading:

'[a]ny litigation initiated by and between the Parties arising out of or relating to this Subcontract shall be conducted in the federal or state court of jurisdiction in the State whose law govern this Subcontract and Contractor and Subcontractor each consents to the jurisdiction of such court'.

The trial court denies the motion to compel arbitration

Once a dispute under the Subcontract arose, RECON initiated a state court action, in response to which AECOM moved to compel arbitration based on the arbitral provision of the Prime Agreement. The Superior Court of California (ie, the court of first instance) denied the motion to compel, which was then appealed to the California

Court of Appeal. Upon review, the Court of Appeal concluded that AECOM failed to establish the existence of an arbitration agreement to arbitrate RECON's claims. The Court expressed the view that the incorporation of the Prime Agreement's arbitration clause into the Subcontract was not 'sufficiently clear' per California law for there to be an effective agreement to arbitrate. While the Court acknowledged that the terms of the Prime Agreement, including arbitration under the Prime Agreement in certain circumstances, had been clearly referred to in the Subcontract, the Court reserved particular scepticism for the arbitration provision's general application and effect on the lower tier contract:

'[i]t is not reasonable to conclude that an arbitration clause in a 151-page document would override the litigation forum selection provision in the text of the Subcontract itself'.³

The Court also engaged in an extensive analysis of the Subcontract and Prime Agreement's provisions, finding that the arbitration agreement was not effective against RECON. In particular, the Court noted that a waiver of a right of access to a judicial forum should not be found lightly, a sentiment that appeared to prompt the Court to view the applicability of the arbitration clause with heightened scrutiny.⁴ In further support of its decision, the Court of Appeal also considered that the provision referring to court litigation within the Subcontract would have been rendered 'superfluous' if arbitration were compelled, an outcome that would violate rules governing the interpretation of contracts under California law.⁵

Remedial v AECOM and arbitration in California

It may be tempting to see *Remedial* as potentially adding hurdles to the

practice of incorporating arbitration provisions into a commercial relationship by reference under California law. If that is true, this development could prove problematic for the construction industry where contracts are often voluminous and contain flow down provisions incorporating other terms into an agreement. While, from an arbitration perspective, the Court's reasoning may be at some points questionable in *Remedial*, there are reasons to think this decision will not enjoy broad application.

First, for most internationally operating contractors and subcontractors involved in California projects, the applicable law governing their right to arbitrate will often be the US Federal Arbitration Act (FAA), not state law. Under the FAA, it has long been settled that arbitration clauses should not be subject to heightened scrutiny, even if the net effect of their application is to deprive one of access to a judicial forum. The US Supreme Court has reiterated that the FAA requires courts to place arbitration agreements 'on equal footing with all other contracts'.⁶ The FAA also makes plain in section 2 that if an agreement to arbitrate is found to exist, even if buried in a large commercial contract, it is irrevocable. Thus, the Court's apparent reticence to enforce an arbitration provision because it was incorporated by reference to a voluminous contract, and general concern over waiving access to a judicial forum, may not be shared by other courts who review such issues under the FAA.

Second, the *Remedial* Court engaged in extensive contractual analysis to determine that the arbitration provision did not apply to the dispute between AECOM and RECON, but this may not be appropriate. The analysis concerned the issue of scope, insofar as the Court reviewed the agreement to arbitrate to see if it fitted the dispute. Although it

appears that the issue was not raised here, when contractual parties have incorporated rules such as those of the ICDR into their agreement, it is generally the arbitrators and not the courts who decide jurisdictional issues like scope, because the rules explicitly delegate such matters to the arbitral tribunal.⁷ In the 2017 case *Portland Gen Elec Comp v Liberty Mutual Ins Comp, et al, (PGE)* the US Court of Appeals for the Ninth Circuit found that an arbitral tribunal, not the court, should decide whether an arbitration agreement found in contractual exhibit, or a reference to the local courts in the main EPC contract, should govern where the dispute was heard. Like in *Remedial*, the parties in *PGE* had incorporated rules (the ICC Rules) delegating the authority to decide questions of scope to the arbitrators. The Ninth Circuit upheld such a delegation under long-settled FAA precedent.

Third, while the *Remedial* Court found a reference to court litigation and arbitration to be irreconcilable, many other federal and state courts have not. Other courts have interpreted forum selection clauses that exist alongside an agreement to arbitrate, to require that the parties must litigate only those disputes that are not subject to arbitration – for example, a suit to challenge the validity or application of the arbitration clause or an action to enforce an arbitration award.⁸ Again, many of these decisions reflect the pro-arbitration bias of the FAA and, to the extent another court or arbitrator is confronted with the presence of these two clauses, it may consider that provisions may be read congruently, and not follow the *Remedial* Court's position.

Conclusion

While the *Remedial v AECOM* decision was not necessarily a positive one for arbitration in California,

as noted above, its ramifications may be limited. Nevertheless, one cannot help but be reminded in this instance of the importance of paying careful attention to the alignment of various contractual dispute resolution provisions when preparing multiple agreements for a project.

Notes

- 1 *Remedial Construction Services, LP v AECOM, Inc, et al* (2d Civ No B303797), at 2.
- 2 AECOM, Inc and AECOM Technical Services, Inc were the formal parties to the contract (collectively, 'AECOM').
- 3 See n 1 above, at 6.
- 4 *Ibid*.
- 5 *Ibid*, at 7.
- 6 *Kindred Nursing Ctrs Ltd P'ship v Clark*, 137 S Ct 1421, 1424 (2017). California state courts have also decided similarly. *Armendariz v Foundation Health Psychcare Servs, Inc*, 24 Cal 4th 83, 127 (Cal 2000).
- 7 Pursuant to Art 19(1) of the ICDR Rules, 'The arbitral tribunal shall have the power to rule on its own jurisdiction'. That is, the ICDR Rules incorporate the well-established international commercial arbitration principle of competence-competence.
- 8 See, eg, *Pers Sec & Safety Sys Inc v Motorola Inc*, 297 F.3d 388, 395–96 (5th Cir 2002); *Bank Julius Baer & Co v Waxfield Ltd*, 424 F.3d 278, 285 (2d Cir 2005); and *UBS Fin Servs v Carilion Clinic*, 706 F.3d 319 (4th Cir 2013).

Nathan D O'Malley is a partner in the Los Angeles office of Musick Peeler & Garrett and can be contacted at n.omalley@musickpeeler.com.
Giorgio Sassine is an associate attorney in the Los Angeles office of Musick Peeler & Garrett and can be contacted at g.sassine@musickpeeler.com.



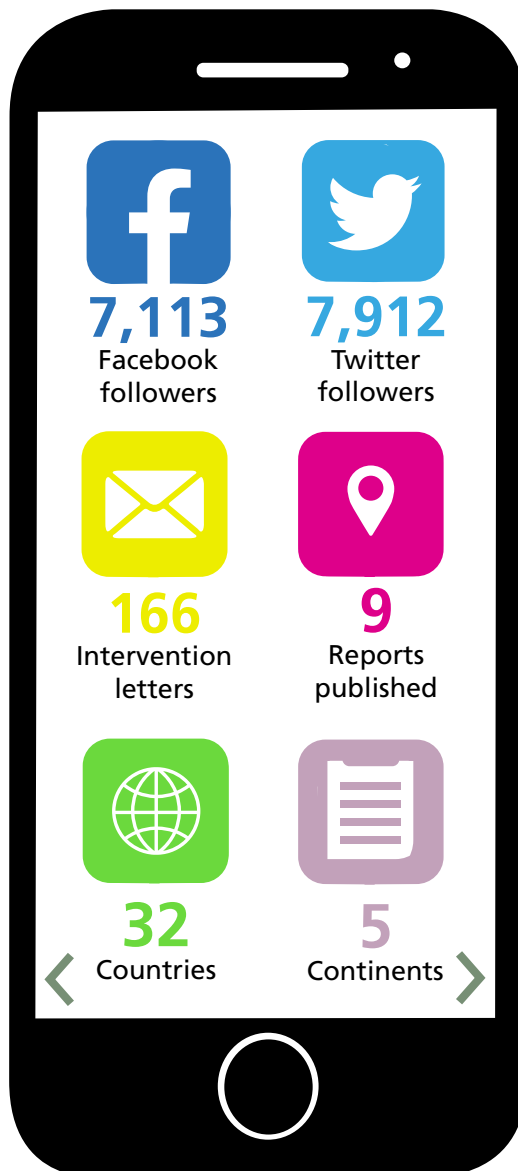
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IBAHRI 2020 HIGHLIGHTS IN NUMBERS

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3
Trial hearings observed



150
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2
Mission rapporteur



166
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James Doe
*Herbert Smith
Freehills, London*

Tim Healey
*Herbert Smith
Freehills, London**

Charting a new course towards sustainable construction

Sustainability: a global challenge

As with every major commercial sector, the construction sector faces significant challenges tackling the climate crisis, supporting the energy transition and delivering sustainable solutions. The issue is increasingly becoming a central feature of C-suite decision-making for both developers and contractors, as well as investors, funders and other stakeholders, not least because the process of construction itself is carbon-intensive. These challenges will undoubtedly become more pronounced as the global community strives towards carbon net zero in their strategic plans and further commitments are made at an international level.¹

The construction paradox

The global construction sector is one of the largest contributors to climate change and is therefore a key partner for governments intent on delivering the energy transition and achieving broader sustainability goals.

On the one hand, construction and operation of buildings alone are estimated to generate nearly 40 per cent of annual global CO₂ emissions, and building stock is expected to double in area by 2060 (the equivalent of a New York City every month for 40 years).² In this context, it is perhaps unsurprising that reports suggest that more than half of all materials extracted from the earth are transformed into construction materials and products, and excavation, demolition and construction activities

account for anywhere between one to two thirds of waste generated annually.³

On the other hand, the construction sector is under pressure to change. Perhaps the most obvious and pressing is the need to decarbonise and improve the energy efficiency of the built environment, both in terms of embodied carbon in the construction phase and operational carbon emissions over the lifespan of buildings and facilities (existing and new).

It is in this context that this article considers how the construction industry might facilitate the energy transition and a move towards more sustainable development by examining:

- the importance of the procurement model to innovative and sustainable development;
- the need to encourage and incentivise innovation beyond the design phase; and
- examples of how innovation works in practice by reference to ‘state-of-the-art’ technology and modern methods of construction.

The importance of the procurement model to innovative and sustainable development

A range of procurement models and techniques is available for securing the innovation necessary for the energy transition and delivering sustainable construction solutions. The optimal solution will depend on a range of inputs including the type of project, the client, the supply chain itself, the required levels of innovation and any funding constraints. This article explores a number of different considerations.

Defining and embedding requirements

It is key that environmental and broader sustainability requirements are made central to project planning at the outset.

Sustainability requirements may take into account a wide range of indicators including in relation to the selection of construction materials (eg, responsible sourcing and reductions in embodied carbon), waste management strategies (eg, as re-use, recycling or safe disposal of waste materials), efficiency and other aspects of operational performance (including emissions) and broader environmental and social sustainability indicators (eg, local resourcing, suitable labour and working conditions).

Specific requirements are likely to be determined by factors such as the nature and

location of the project (including compulsory legal requirements), the identity and experience of the client and its funding strategy (eg, there are some prevalent requirements of multilateral development banks such as the IFC’s Performance Standards on Environmental and Social Sustainability and the 4th Equator Principles).

Where innovative solutions are required, clients may decide to engage with suppliers before tender to explore what is likely to be

more than half of all materials extracted from the earth are transformed into construction materials

achievable and deliverable, by whom and when. Outcomes of early engagement can then be taken into account in project planning. For example, restrictions on budget may steer towards intermediate guaranteed outcomes, with competition, innovation and incentives used to encourage achievement of ‘stretch’ targets.

A key factor in achieving successful outcomes will be that requirements, once established, are embedded within the overall procurement process, from tender evaluation to delivery.

Integrating design, construction and potentially operation

A key challenge in many projects is ensuring that the constructed asset meets and sustains the relevant environmental and other performance standards set by the client’s initial brief. A division of responsibilities or a failure to cooperate between designers and contractors can exacerbate this.

In the authors’ experience, conventional models of contracting may not best facilitate a ‘whole life’ approach to optimising performance and other characteristics during operation as well as during construction. For example, traditional procurement with a separation of design and construction provides the employer with close control over design but potentially reduces opportunities for early buildability input from the construction team. Design and construction (including turnkey) contracts that place responsibility on a single contractor should enhance coordination between the design and construction teams, but the ability of the employer to influence the design process is likely to be reduced.

By contrast, a design, build and operate/maintain model may provide greater incentives to optimise sustainability as all project participants should directly benefit from greater operational efficiency. Features of contract models that wrap construction and building/facility operation could include longer-term incentives to help ensure that best available techniques and technologies are taken into account both in the initial design and at appropriate stages during the life of the asset.

Design competitions

Design competitions may be used to secure innovation in procurement. On major projects in some sectors, it is not uncommon for the employer to appoint two or more contractors at the front-end engineering and design (FEED) stage in order to secure alternative design solutions, maintain competition until the commercial proposal is settled with the successful contractor and mitigate against re-procurement risks.

However, design competitions can create challenges for employers and suppliers. For example, designers and suppliers will want their intellectual property rights protected. As a result, intellectual property rights protection and appropriate non-disclosure arrangements need to be in place from the outset. There can also be tensions in sharing ideas during competitive processes unless the unsuccessful bidder receives a genuine commercial share in the value of its innovative ideas. Where ideas developed by the unsuccessful bidder will be used by the employer, consideration needs to be given on both sides to any ongoing responsibilities or liabilities and the terms of ownership or licensing of newly created intellectual property rights.

Design competitions can create challenges for employers and suppliers

Another important challenge is the balance between upfront investment in innovation and longer-term financial savings. There may be a reluctance from suppliers to produce fully developed and innovative ideas unless development costs are going to be fully reimbursed. By contrast, less developed ideas might save upfront costs but increase risk during construction and may also result in missed opportunities for whole life cost benefits. These

are issues employers need to consider carefully at the outset of the project.

Early contractor involvement

Early contractor involvement (ECI) contracting is frequently adopted in a number of sectors in order to bring in appropriate expertise and to encourage collaboration and innovation within the supply chain as early as possible.

ECI should enable the supply chain to understand the employer's requirements more clearly, identify optimum design solutions and, where applicable, innovative or more sustainable alternatives, while avoiding unnecessary abortive work or contractor-retained contingencies. Because suppliers can engage with the employer's engineering team at an early stage, design development can be integrated with buildability and operability. Suppliers can gain a proper understanding of any approvals requirements and processes, and prepare a robust construction programme.

Important considerations for an employer will be to secure innovation where necessary, but also to avoid over-engineering to ensure that requirements are satisfied and targets are achieved while keeping within the agreed budget and programme. This may be managed in a number of ways, including structured fee or incentive arrangements and gateways for advancement or exit. It is usually critical for the employer to be sufficiently resourced and capable of monitoring work during ECI so that it can identify any unnecessary scope and risks, as well as any potential missed opportunities for improvement.

In the authors' experience, some employers have been reluctant to adopt ECI due to concerns over losing negotiating leverage with contractors and losing the benefit of outside competition and innovation too early in the project. As a result, variants and alternative approaches to ECI have developed. For example, in an optimised contractor involvement (OCI), contractors may be brought in at a stage in design that is late enough for a competitively tendered target price to be obtained, but early enough for them to be able to influence buildability and value engineering.

Value engineering after contract award

A relatively simple and common arrangement to incentivise innovation in sustainable design

and technologies might be to allow the selected contractor to share in reductions of development costs or savings in whole life costs stemming from any value engineering proposals accepted by the client and instructed as a change order (see, eg, the JCT and NEC contract suites).

Building information modelling

Building Information Modelling (BIM) is a collaborative process for producing, managing and sharing whole life asset information through common data standards and protocols underpinned by cloud-based technologies and systems. In simple terms, a person can upload information to a common data environment where it can be consolidated with information supplied by others.

From a construction and operation perspective, BIM should facilitate suppliers working together from an early stage to improve efficiencies in the design and construction process, achieve cost and programme savings and facilitate optimum whole of life asset management and performance. From a legal perspective, as an interactive multi-party process, BIM presents some potentially complicated challenges relating to: design liability and duties to warn in relation to consolidated models; professional indemnity insurance cover relating to consolidated models; protection of sensitive know-how stored in the cloud and integrity of data stored in the cloud; as well as software and accessibility risks relating to the cloud itself.

While the use of BIM is mandated for UK centrally secured projects and adopted by various clients in the private sector, in the authors' experience, there is some distance to go before widespread interactive coordinated models are achieved. There are greater levels of electronic exchange and cloud-based information management, but BIM is still used primarily for data collection and detection of design clashes. It has not replaced conventional contractual processes relating to design coordination requirements and design review and acceptance procedures.

Supplier participation in the equity

One way to align interests and find efficiencies and savings in whole life costing of potentially capital-intensive innovation projects could be to invite key suppliers to have an equity stake in the project.

In theory, the interests of a supplier taking an equity stake should be more structurally aligned with the interests of the other investors and sponsors. The supplier should be encouraged to take actions beneficial to the project, including finding efficiencies and savings in whole life costing. The supplier might be willing to bear a higher proportion of its costs of tendering and development, and to provide stronger certainty and visibility at an early stage on capital expenditure. This would also apply to operating expenses if the contractor is also the operator.

However, there is also potential for conflicts of interest. First, suppliers may prefer a lower but earlier and potentially more certain cash return over a short period than a bigger but hypothetical return over a longer period.

From a legal perspective, BIM presents some potentially complicated challenges

Second, as the sponsors are likely to be required to accept exclusivity on the letting of the relevant supply contract, it is unlikely there will be a competitive tender process. Third, some suppliers may not be willing to accept project risk in the long run and could add contingencies into their prices to cover the risk of equity loss. This is sometimes regarded as a reason for limiting suppliers taking equity to a relatively minor interest.

Encouraging innovation beyond design

The identification and application of innovative solutions does not need to end once any applicable technology is selected or design is finalised. Construction contracts can be, and often are, prepared in a way that incentivises suppliers to go beyond initial design or minimum targets.

Key performance indicators and incentives

Provided they are achievable, key performance indicators (KPIs) with incentives can be a powerful motivator for achieving successful outcomes, including innovation necessary to achieve a step change in performance.

Incentive arrangements are often used to encourage cost efficiency, programme milestones, safety levels, quality (by reference

to rates of occurrence of defects) and, where applicable, improved levels of performance and efficiency in operation. Incentives will be more attractive to employers, and more likely to be acceptable to funders, if they are self-funding, effectively financed out of the employer's unspent contingency budget.

Collaborative contracting models

Projects requiring a higher degree of innovation may need alternatives to fixed price lump sum contracts. A fixed price may not be economically efficient where innovation is required or work is less defined. Fixed price risk transfer is also often associated with adversarial behaviours underpinning a culture of claims for increased costs and extensions of time. A target cost or cost reimbursement model (with risk/reward) may produce better value for money and behaviours.

A target cost contract is a cost reimbursement arrangement (plus contractor's overheads and profit) which aims to incentivise a contractor to complete work within time and budget. If the contractor fails to do so, it will bear a proportion or the 'pain' of any excess outturn cost but, if it succeeds in completing the project under budget, it will share the 'gain' of any savings with the developer. This should offer advantages to an employer as there will be less risk to price in the contract while incentivising the contractor to find ways of making construction processes efficient, keeping costs down. The absence of price certainty, however, may be less satisfactory to projects looking for limited recourse project finance.

More incentivised contracts go further than target cost contracts in seeking to align the interests of the employer and supply chain. Under a target cost contract, a contractor may still look to make claims (to secure relief from liability for delay and increases to the target cost to avoid pain share), and view additional returns on cost savings only as a secondary consideration. If there is a cap on the contractor's pain share, a target cost contract becomes cost reimbursable above the cap.

While there is no 'one-size-fits-all' model, contractors engaged under incentive contracts are typically reimbursed actual costs under a transparent payment model. However, rewards (profit and corporate overhead) are earned mainly or wholly through achieving successful outcomes

against various indicators rather than simply as a function of increasing cost. Rewards are maximised by a higher rate of return on incentives rather than by compensation events giving rise to additional permitted construction costs plus margin. Incentives could be set up to reward achievement of stretch targets in operation, as well as to find productivity and other efficiencies to drive down outturn cost and reduce programme costs.

Some employers on major projects will look at ways of encouraging innovation and collaboration across contract or programme lines in order to achieve overall project requirements. One option is to use a strategic alliance framework between the employer and its individual key contractors, under which participating contractors are entitled to additional incentive payments if overall KPIs are achieved. Incentives might be funded from the employer's unspent project-level contingency, plus the employer's share of savings against any unspent contract-level contingencies.

Another model is a pure alliancing structure. Pure alliances are quite different to other contract models, with a collective approach to risk ownership, management and delivery, and exposure to collective performance. They represent a holistic approach to procurement where the team comes together under a single contract to deliver a project jointly, with common goals and shared risks and rewards on a mostly 'no claim, no blame' basis. Crucially in an alliance, achievement of successful outcomes may take into account the effect on all participants, including the client.

An example of innovation in practice: 'state-of-the-art' technology

Technology continues to evolve and has been identified as key to supporting the energy transition and driving innovation and improvements in sustainable construction. New technology can come in all shapes and sizes. For example, in the offshore wind sector it may range from new gearbox components to larger turbines or floating foundations.

Using 'state-of-the-art' technology

For employers, there are a number of issues associated with using new technology.

For example, new technology often needs to be certified by an independent third party (eg, DNV-GL) as conforming to international standards. This will usually be a requirement of insurers and any lenders. Third-party certification may take time and has the potential to delay the commencement of construction. There may need to be closer definition and control over interim milestone payments so that the employer and other stakeholders can be satisfied that progress towards a successful outcome is being made.

As well as using new technology, employers may be looking to secure the benefits of product improvements and may want a right to be informed of advances in technology. Furthermore, proprietary or ‘black box’ know-how, including source codes and spares, may need to be protected by escrow arrangements so that it can be accessed in the case of insolvency of the supplier or withdrawal from the market.

While suppliers will usually be expected to provide a commitment to use good industry practice, they may be reluctant to accept strict fitness for purpose obligations and may require additional exclusions from liability (including regarding performance guarantees) or, possibly, lower-than-usual caps on liability. A provider of new technology may be able to rely on ‘state-of-the-art’ defences in defence of liability for negligent design or product liability. In the UK, the standard of care in relation to design depends on what was expected of a competent designer at the date of the design. However even pioneering designers have to be prudent. In *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd*,⁴ the court held that even though the design and construction of a cylindrical communications mast was ‘both at and beyond the frontiers of professional knowledge at that time it was still incumbent on [the designer] to exercise a very high degree of care’.

Providing a ‘wrap’ of technology and design

Various issues can arise where an employer requests a ‘wrap’ providing single point responsibility for design, construction and performance. A main contractor asked to ‘wrap’ third-party design or technology will need to consider factors such as whether technology is ‘black box’ or open access,

if there is any relationship or track record between the designer or technology provider (either positive or negative), and whether the employer will provide the main contractor with direct recourse to the designer or technology provider, for example, by way of novation or warranty.

In some cases, a main contractor may only be willing to accept a partial risk transfer, particularly where design or technology is not proven or if there are extensive exclusions or limitations of liability in the relevant FEED agreement or technology licence. A partial wrap may involve the main contractor being liable for performance guarantees, liquidated damages and defects attributable to

Proprietary or ‘black box’ know-how may need to be protected by escrow arrangements

proprietary technology failures only to the extent that it can recover from the technology licensor, that is, on a ‘back-to-back’ basis. However, employers may look to give the main contractor the burden of proof that failures stem from the technology. They may also look for a full risk transfer in respect of any open-access information and in relation to the structural integrity of physical works.

An example of innovation in practice: offsite and modular construction

‘The Farmer Review of the UK Construction Labour Model: Modernise or Die’,⁵ published in October 2016, concluded that the UK construction industry would face ‘inexorable decline’ unless it embraced modern methods of construction (MMC). MMC is a significant component of the UK government’s recently published ‘Analysis of the National Infrastructure and Construction Pipeline 2021.’

One area that has been embraced is offsite and modular construction, for example, assembly of turbines for offshore wind farms and production of units of modular construction for buildings. Offsite processes differ from traditional construction, which focuses on design followed by works onsite. Perceived benefits include improved efficiency and productivity (with significant potential for replication), reduced margin for error, reduced environmental impact (including carbon emissions and waste) and, as a result, savings in programme and cost.

There are various contractual and risk matters to take into account with this method of construction. For example, the proximity of the offsite facility to the development site will have a bearing on project cost and environmental impact, and not all projects will be compatible with the use of ‘off-the-shelf’ rather than bespoke products. As demand increases, capacity may also be an issue.

Because more work takes place off-site, suppliers are likely to need greater levels of payment before delivery of plant and materials to site. This can raise issues as regards security of payment as well as ownership of plant and materials. If the construction site has the ability to house a logistics centre or temporary factory, some of the risks of early payment can be substantially mitigated.

Depending on the approach taken, some elements of work may be procured separately from the modular components (eg, foundations in a wind farm project). In these circumstances, it will be necessary to ensure that design and programme are coordinated effectively and interface risk is properly managed. Generally, design decisions need to be settled at the outset of the project, and quality management and testing procedures (including during manufacture) are crucial to ironing out interface issues, improving structural integrity, durability, future maintenance planning and the safety of the finished build. Interface issues can drill right down to the smallest of component parts in order to mitigate the risk that, at worst, defects only come to light when the relevant unit arrives on site.

Robust quality management and assurance procedures are likely to be key to satisfying insurers and any lenders or purchasers. While there is significant scope of improvements in quality and construction processes, insurers in particular may perceive greater risks with offsite and modular construction, such as greater risks of serial defects and/or the need to remove modular units giving rise to more expensive costs of reinstatement relative to traditional builds.

Concluding remarks

It is apparent that a shift in the practices adopted by the construction industry is required to support the energy transition and a

move towards more sustainable development.

There is increasing focus on embedding appropriate sustainability indicators in procurement processes in order to drive and unlock potential environmental and economic advantages.

Opportunities for improvements will be maximised by challenging or disrupting traditional or established practices and rewarding innovation.

Economic stimulus packages can encourage investment, but there are inevitably constrained budgets for capital investments as well as operating and maintenance expenditure. There is, therefore, a challenge to find the right balance between potentially substantial upfront investments in delivering innovative and sustainable development and the financial savings and wider benefits that could be achieved from those investments.

Based on our experience, employers and contractors alike are increasingly engaging in the climate change debate and developing new ways of thinking. Ultimately only time will tell whether the construction industry is willing to adopt the strategies necessary to achieve the overall goals.

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* With special thanks to Lucinda Hill, Associate, Herbert Smith Freehills, for assisting with the preparation of this article.

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James Doe is a partner at Herbert Smith Freehills in London and can be contacted at james.doe@hsf.com.
Tim Healey is a partner at Herbert Smith Freehills in London and can be contacted at tim.healey@hsf.com.



Solar furnace of Uzbekistan, the largest concentrated solar power facility in Asia. Credit: Shchipkova Elena/Shutterstock

The energy transition in Central Asia: drivers, policy and opportunities

Alistair Wishart

*Vinson & Elkins,
London*

Afzaal Abidi

*Vinson & Elkins,
London*

Central Asia is the region to the east of the Caspian Sea with Russia to the north, China to the east, and Afghanistan and Iran to the south. In this area of four million square kilometres sit the five former Soviet republics of Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan. Although often considered as a homogenous bloc facing many common challenges and constraints, the Central Asian republics have taken differing approaches to the development of renewable energy resources. The region provides an interesting snapshot of the opportunities the energy transition can present to developing economies.

Hydrocarbon dependence

Central Asia has sizeable deposits of gas and other natural resources. Turkmenistan has the sixth-largest proven gas deposits in the world,¹ and Kazakhstan has significant deposits of oil and coal. Hydrocarbons dominate domestic electricity generation and the region's wider economies.

Kazakhstan is a typical example of hydrocarbon dependence. Kazakhstan is the 62nd most populous country in the world yet is in the top 25 largest emitters of greenhouse gases (GHG). Kazakhstan's abundance of natural resources has underpinned an economic reliance on oil exports for almost three decades, and its domestic electricity sector is dominated

by ageing coal-fired power generation, fuelled by cheap, large volumes of coal found in the country's north-east. As a result, Kazakhstan's energy sector accounts for the bulk of the country's GHG emissions.²

The Central Asian republics also inherited a legacy of ageing infrastructure from the Soviet era, and face many geographical challenges to development: all are landlocked with no direct access to seaports, or double-landlocked in the case of Uzbekistan. The region's climate fluctuates from cold winters to punishingly hot summers, which can put a strain on the reliability of existing electricity supplies as well as constraints on the design and construction of renewable energy facilities. However, as growing populations and developing economies demand greater access to reliable energy supplies, opportunities abound for investment in renewable energy and infrastructure projects in the region.

Opportunities abound for investment in renewable energy and infrastructure projects in the region

As with many developing economies, building renewable electricity generation facilities is only part of the picture. To encourage an attractive investment climate and to establish the framework needed for investments into renewable energy projects, Central Asia is seeing significant structural and regulatory reforms in the electricity sector and wider economies of the region.

Paris Agreement commitments

Against this backdrop, the Central Asian republics have engaged to a greater or lesser extent on setting a course to transition away from dependence on oil and gas, and all five countries are now signatories to the Paris Agreement.

Kazakhstan ratified the Paris Agreement and submitted its intended nationally determined contribution (INDC) in 2016,³ committing to reduce GHG emissions by 15 per cent below 1990 levels by 2030, and setting a further, conditional target to reduce GHG emissions by 25 per cent below 1990 levels, subject to additional international investments, access to low-carbon technologies and the establishment of a green climate fund.⁴ That same year, Turkmenistan ratified the Paris Agreement, 18 years after ratifying the Kyoto Protocol. Notably,

Turkmenistan pegged its INDC to its GDP; the nation's unconditional target is to keep the growth rate of GHG emissions lower than the growth rate of GDP between 2015 and 2030, with a further, conditional target of preventing any increase in GHG emissions between 2015 and 2030, subject to the republic garnering international support.⁵

The following year, 2017, Tajikistan ratified the Paris Agreement and submitted its INDC, committing to reduce GHG emissions by ten to 20 per cent below 1990 levels by 2030, and to 25–35 per cent below 1990 levels by 2030, subject to new substantial international funding and technology transfer.⁶ A year later in 2018, Uzbekistan ratified the Paris Agreement with the intention of strengthening measures and actions to counter climate change and to decrease specific emissions of GHG per unit of GDP by ten per cent by 2030 from 2010 levels. As with Turkmenistan and Tajikistan, in formulating its INDC, Uzbekistan envisaged support from international organisations and financial institutions, as well as the influx of advanced low-carbon technologies.⁷

Last of the group, Kyrgyzstan ratified the Paris Agreement in October 2019.⁸ Having relatively low GHG emissions to start with,⁹ the Kyrgyz Republic committed to reducing GHG emissions by 11.49–13.75 per cent below 'business as usual' in 2030; and, contingent on receiving adequate support from the international community, to reducing GHG emissions by 29–30.89 per cent below 'business as usual' in 2030. Looking further ahead, the republic plans to reduce GHG emissions by at least 12.67–15.69 per cent below 'business as usual' in 2050, and with the support of the international community, by 35.06–36.75 per cent below 'business as usual' in 2050.

Kazakhstan: a decade of development

The first Central Asian republic to sign the Paris Agreement is also one with a longer track record of developments in the renewable energy sector. Kazakhstan is a vast country, the ninth-largest in the world. Its vast steppes offer great potential for developing wind and solar energy. However, its geography also presents challenges. Investments in its electricity sector must grapple with the country's size, location, very low population density, ageing infrastructure and climate extremes.

For the first two decades following independence, Kazakhstan's renewable electricity generation assets were limited to a few Soviet-era hydropower plants that contributed around 13 per cent of the country's electricity. Over the last decade or so this picture has slowly evolved. At the time of writing, Kazakhstan had 117 active renewable energy facilities with a total capacity of more than 1.7GW.¹⁰ By the end of 2021, the Ministry of Energy expects a further 23 facilities to come online with a total capacity of more than 380MW.¹¹

Kazakhstan's legal and regulatory framework for the implementation of renewable energy projects has developed over time. In 2009, Kazakhstan adopted a law *On Supporting the Use of Renewable Energy Sources*, which aimed to incentivise investment by giving renewable energy suppliers a right to connect to the electricity grid and requiring transmission companies to buy the electricity they generated. The law also set aside land plots for renewable energy projects and provided a mechanism for concluding power purchase agreements for renewable energy at prices and with payback periods developed in feasibility studies.

Also in 2009, Kazakhstan adopted its *Concept on Transition towards Green Economy until 2050*. This long-term strategy aims to increase the share of solar and wind energy sources in electricity production from nought to three per cent by 2020, and then raise the share of alternative sources in electricity production to 30 per cent by 2030, and 50 per cent by 2050.

These early reforms and policy drivers failed to spark significant growth in the renewable electricity sector, partly due to the need for further regulation and the project-based nature of renewable electricity tariffs under the renewable energy law, which required tariffs for each project to be negotiated on a case-by-case basis.

In 2013, Kazakhstan passed a new law that introduced a feed-in tariff scheme. This improved the investment climate and started drawing more interest from both domestic and international investors. Then in 2017/2018, Kazakhstan moved from feed-in tariffs to an auction-based framework that is designed to allow competitive market pricing. Successful investors are awarded the right to enter into a long-term power purchase agreement with Kazakhstan's common offtaker, the Financial Settlement

Center of Renewable Energy, a 100 per cent subsidiary of the national grid operator Kazakhstan Electricity Grid Operating Company (KEGOC), which has been operating since 1 January 2019 as the country's sole buyer of renewable electricity.

Under the auction scheme, the Ministry of Energy publishes an annual schedule of auctions, indicating the auctioned capacity, and in the case of projects under 30MW, relevant connection points and reserved land plots. Because the auction system favours projects under 30MW in this way, much of Kazakhstan's new generation capacity is being added in the form of smaller projects. 19MW of renewable energy capacity was awarded in the initial pilot auction in early June 2018, and the second round in October 2018 resulted in the award of 664MW of renewable energy capacity. The country's renewable energy auctions have generally been oversubscribed and have seen significant reductions in levelized energy costs.

Another notable component of Kazakhstan's regulatory environment is its emissions trading scheme (ETS). Launched in 2013, the National Allocation Plan of Kazakhstan was the first emissions trading scheme in Central Asia and is still the only active scheme in the region.

Kazakhstan's story is one of slow and incremental development, with a long history of reforms and a greater number of smaller renewable energy projects over the past decade than its Central Asian neighbours.

Uzbekistan: rapid reforms

Uzbekistan's approach to the energy transition has followed a different path to Kazakhstan's. It is the most populous Central Asian country with over 34 million citizens. For a long period following its independence, Uzbekistan had a tightly controlled economy with a heavy reliance on natural gas. In recent years, however, Uzbekistan has engaged in a rapid and wide-ranging series of economic reforms under President Mirziyoyev. The reform agenda has encompassed the energy sector, with a programme of privatisation, restructuring and deregulation. In this context, Uzbekistan is also engaging in a programme of rapid expansion into renewable electricity generation on a significant scale from a near-standing start.

Uzbekistan enacted its first comprehensive renewable energy law in 2019 (Law No ZRU-539 On Use of Renewable Sources of Energy dated 21 May 2019). The law supports investment in renewable energy generation by providing tax, customs and other benefits and preferences to producers of renewable energy and equipment used in the renewable energy sector. Other legal and regulatory reforms in the sector include a regulation for the connection of private sector electricity manufacturers to the national electricity grid.

Two other pieces of recent legislation are the Law on Public-Private Partnership (Law No ZRU-537 adopted on 10 May 2019) and the Law on Investment and Investment Activities (Law No ZRU-598 dated 25 December 2019). These laws have a broader scope across the Uzbek economy, but they provide regulatory frameworks and government support for the implementation of renewable energy projects.

Uzbekistan's first solar PV projects attracted interest from dozens of international developers and investors

In October 2019, Uzbekistan published its strategy for the transition to a green economy in the period to 2030. The strategy aims to fulfil the country's obligations under the Paris Agreement. The plans include the construction of almost 10GW of new renewable energy facilities by 2030, including 5GW of solar, 3GW of wind and 1.9 GW of hydroelectric power plants. Recent announcements suggest that those wind and solar targets are being increased further to 7GW and 5GW respectively.¹²

Uzbekistan's first solar PV projects attracted interest from dozens of international developers and investors. In March 2019, 23 companies from Europe, Asia and the Middle East participated in the tender process for a 100MW PV project in the Navoiy province. In October 2019, Uzbekistan announced that Masdar Clean Energy of the United Arab Emirates had been awarded the country's first competitively tendered PV solar power station to be implemented on PPP principles, with the pricing coming in at around 2.7 US cents per kilowatt-hour, the lowest price among emerging markets at the time. Subsequent tenders have seen participation from a large number of interested foreign investors and progressively lower pricing.¹³

In the renewable electricity space, although solar PV generation has dominated the headlines in Uzbekistan, other technologies also feature. Uzbekistan has some existing hydro-generation assets and the European Bank for Reconstruction and Development (EBRD) is financing the rehabilitation of an existing hydro plant in the Tashkent region. Other new hydro projects have also been announced recently, with funding coming from China Exim Bank, the Uzbekistan Fund for Reconstruction and Development (UFRD) and the Russian Export-Import Bank (Rosexim).

Uzbekistan is also developing wind power generation facilities, both through tenders and on a bilateral basis. Alongside the push for renewable generation, Uzbekistan is pursuing an ambitious nuclear power strategy and has recently announced several investments in gas-fired CCGT power generation assets in the south of the country, with funding from the Asian Development Bank (ADB), EBRD and the UFRD. Uzbekistan's need for significant increases in power generation capacity offers significant opportunities for foreign investment in Uzbekistan.

Kyrgyzstan and Tajikistan: hydro powerhouses

Kyrgyzstan and Tajikistan are much less populous countries that take advantage of their mountainous geography to generate the majority of their electricity from hydroelectric power stations. Both nations produced over 90 per cent of their annual electricity from hydropower in 2017, possess abundant water reserves and have more than 8GW of existing hydroelectric capacity.¹⁴

Kyrgyzstan has one of the highest shares of renewable electricity in the world.¹⁵ The Naryn river flows through Kyrgyzstan, feeding the giant Toktogul reservoir to the West, and numerous large and medium-sized rivers offer an estimated 140–170TWh of hydro potential, of which only ten per cent has been exploited.¹⁶ Nevertheless, the republic faces some challenges. Between 2010 and 2018 Kyrgyzstan made no major additions to its hydropower capacity, and residential electricity demand rose by almost 60 per cent between 2007 and 2016.¹⁷ Reliability is also a concern: five out of Kyrgyzstan's seven main hydropower plants

are more than 30 years old, and with almost 40 per cent of Kyrgyzstan's electricity coming from the Toktogul reservoir, many people in the republic may soon feel the effects of country-wide droughts which have seen the Toktogul reservoir water level fall in recent years.¹⁸

Like Kazakhstan, Kyrgyzstan initiated reforms aimed at renewable energy investments more than a decade ago, adopting a Law on Renewable Energy at the end of 2008 to provide a framework for the continued development of renewable energy resources and various incentives and privileges for renewable energy producers. The republic also established an Independent Regulator, a National Energy Holding Company, and a State Committee on Industry, Energy and Subsoil Use. Since 2016, the State Committee has been responsible for developing and implementing a uniform state policy in the energy sector, including developing incentives for energy efficiency and the use of renewable energy sources and creating conditions for introducing and using renewable energy sources.¹⁹

Tajikistan, too, is a mountainous country with significant potential for generating electricity from hydroelectric sources. With substantial water reserves and 93 per cent of its topography covered in mountains, approximately 98 per cent of the republic's electricity is generated by hydropower plants.²⁰ However, because many of Tajikistan's hydropower plants are dependent on river basins fed by glacial meltwater and snowmelt, the effects of climate change may soon begin to affect the dynamics of the republic's hydroelectric power supply, particularly given that 70 per cent of the landlocked nation's electricity comes from a single facility, the 3,000MW Nurek hydropower plant.²¹

Tajikistan's renewable energy sector is underpinned by a law on the use of renewable energy sources, adopted in 2010 and updated in 2015. In 2013, Tajikistan produced its *Sustainable Energy for All* framework, in which it analysed the current status of its energy sector and set out certain long-term goals and objectives to achieve by 2030. Among other objectives, the framework sets out to ensure access to electricity for people living in rural areas, improve energy efficiency, and notably, to increase energy production from renewable energy sources by 20 per cent against the baseline year (2010), corresponding to a ten per cent share of

renewable energy in the total electricity balance, and to increase indigenous energy sources in the energy sector from 59.3 per cent in 2010 to 80 per cent in 2030.²²

Like Kyrgyzstan, Tajikistan's power supply is vulnerable to supply shocks and seasonal shortages that provide strong drivers for the development of alternative, renewable sources of energy.

Turkmenistan: green shoots

Some commentators see gas as a transition fuel that can offer a transitory alternative to more polluting coal and oil. With its overwhelming dependence on natural gas for electricity generation, Turkmenistan currently sits in this 'transition' slot. Although the country has been slower than its Central Asian neighbours to introduce policy and regulatory reform supporting the development of renewable energy, Turkmenistan has now become the last of the five Central Asian republics to introduce a renewable energy strategy and

Some commentators see gas as a transition fuel that can offer a transitory alternative to more polluting coal and oil

a dedicated law on renewable energy. A Presidential Decree dated 4 December 2020 approved Turkmenistan's national strategy on the development of renewable energy for the period up to 2030, and in March 2021, Turkmenistan passed a law on renewable energy sources.²³ The law envisages support for renewable power generation including tax and customs benefits and guaranteed connection of generating facilities into the power network of Turkmenistan.

Support from international financial institutions

Support from international financial institutions has been crucial to driving the energy transition in Central Asia. For example, in 2019 Uzbekistan became the first country outside Africa to join the World Bank Group's Scaling Solar programme.²⁴ In addition, the World Bank is working with the Uzbek government on a grid code, tariff reform, renewable project development and investment strategy.

Uzbekistan has also utilised the support of international financial institutions as transaction advisors to help with the structuring and financing of large-scale solar PV projects. In fact, the country is pursuing two parallel programmes with different institutions as transaction advisors. In August 2019 Uzbekistan signed a mandate with ADB on a programme to build several PV power stations with a total capacity of up to 1GW. Then, in October 2019, Uzbekistan signed a mandate with the International Finance Corporation (IFC) to develop up to 900MW of solar power.

Kazakhstan's renewable energy sector also benefits from significant support from the EBRD through the EBRD Kazakhstan Renewables Framework, which has seen the EBRD invest in a large number of Kazakhstan's green energy projects across two phases, including both the development of renewable power-generation capacity across Kazakhstan and strengthening and improving Kazakhstan's electricity grid. The Kazakhstan Renewables Framework is also being supported by the Green Climate Fund, the largest climate fund in the world, which will provide concessional finance and a comprehensive technical cooperation programme.

Other international financial institution support in the region includes the World Bank Group's Tajikistan–World Bank Group Country Partnership Framework 2019–2023²⁵ and ADB's support for modernisation of hydropower facilities in Kyrgyzstan.²⁶

This support from international financial institutions is likely to continue in the medium-term as the renewable energy sector grows, which can help facilitate an increasing level of private sector investment in projects in the region.

Transition 2.0: hydrogen

Although Central Asia could be said to be playing catch-up on renewable electricity generation, there are also signs that Central Asian countries are recognising the benefits and opportunities of being at the forefront of the energy transition. Many developed economies are seeing increased hype and enthusiasm about the potential that hydrogen could play in the energy transition across the sector, including for domestic heating, electricity generation, as a fuel for heavy transport, shipping and aviation, and as a zero-

carbon solution for hard-to-abate industrial sectors such as steel production.

Both Uzbekistan and Kazakhstan have indicated an ambition to explore possibilities for hydrogen production and use. Uzbekistan is developing a hydrogen strategy by way of a presidential decree aimed at boosting the development of renewable and hydrogen energy. The decree is expected to set out measures to support technological innovation in both hydrogen and renewable energy and to build hydrogen infrastructure to promote energy efficiency and security.

Separately, the Ministry of Energy of Uzbekistan, Saudi Arabia's ACWA Power and the US industrial gases giant Air Products have announced their cooperation on the development of hydrogen and green energy in Uzbekistan. The Ministry of Energy has also signed a memorandum of understanding with Germany's Siemens Energy on the development of various energy projects, including hydrogen.²⁷

Kazakhstan has also made a splash in the hydrogen space with the announcement by German developer Svevind that it has signed a memorandum of understanding with Kazakh Invest for a massive hydrogen project in Kazakhstan.²⁸ The announcement refers to an ambitious 45GW of solar and wind farms powering 30GW of electrolyzers to produce three million tonnes of green hydrogen per annum. This is a massive scale for hydrogen production, let alone green hydrogen, and is by far the largest green hydrogen project announced to date. Even the renewable energy component is an order of magnitude bigger than anything in Central Asia. If the project is successful, it will mark a significant departure from Kazakhstan's previously small-scale and incremental approach to developing clean energy assets.

As hydrogen continues to play an increasing role in efforts to transition away from fossil fuels, one potential supply chain model would see green hydrogen produced at low cost at locations with abundant renewable energy potential and fewer space constraints, then exported to countries that have the demand, but not the production capacity, needed to satisfy that demand with local production. This trend can be seen in Australia's plans for exporting hydrogen to East Asia, Germany's plans for cooperation on hydrogen development with Namibia, and strategies floated by countries such as

India, Russia, Saudi Arabia and the United Arab Emirates. Central Asia is well placed to capitalise on its abundant renewable energy potential and central location (it's in the name!) to be a hub for hydrogen production and export.

If a developing hydrogen market accommodates blue hydrogen, made by capturing the carbon dioxide emissions from the steam methane reformation process, then the plentiful supply of natural gas in Central Asia may make blue hydrogen a viable opportunity in the region. Turkmenistan has recently talked about the potential for supplying blue hydrogen to Europe.²⁹

Although the development of a hydrogen sector in Central Asia is still at a very early stage, these recent announcements suggest a realisation that the energy transition offers significant opportunities for the Central Asian countries as they grow their economies and move away from reliance on fossil fuels.

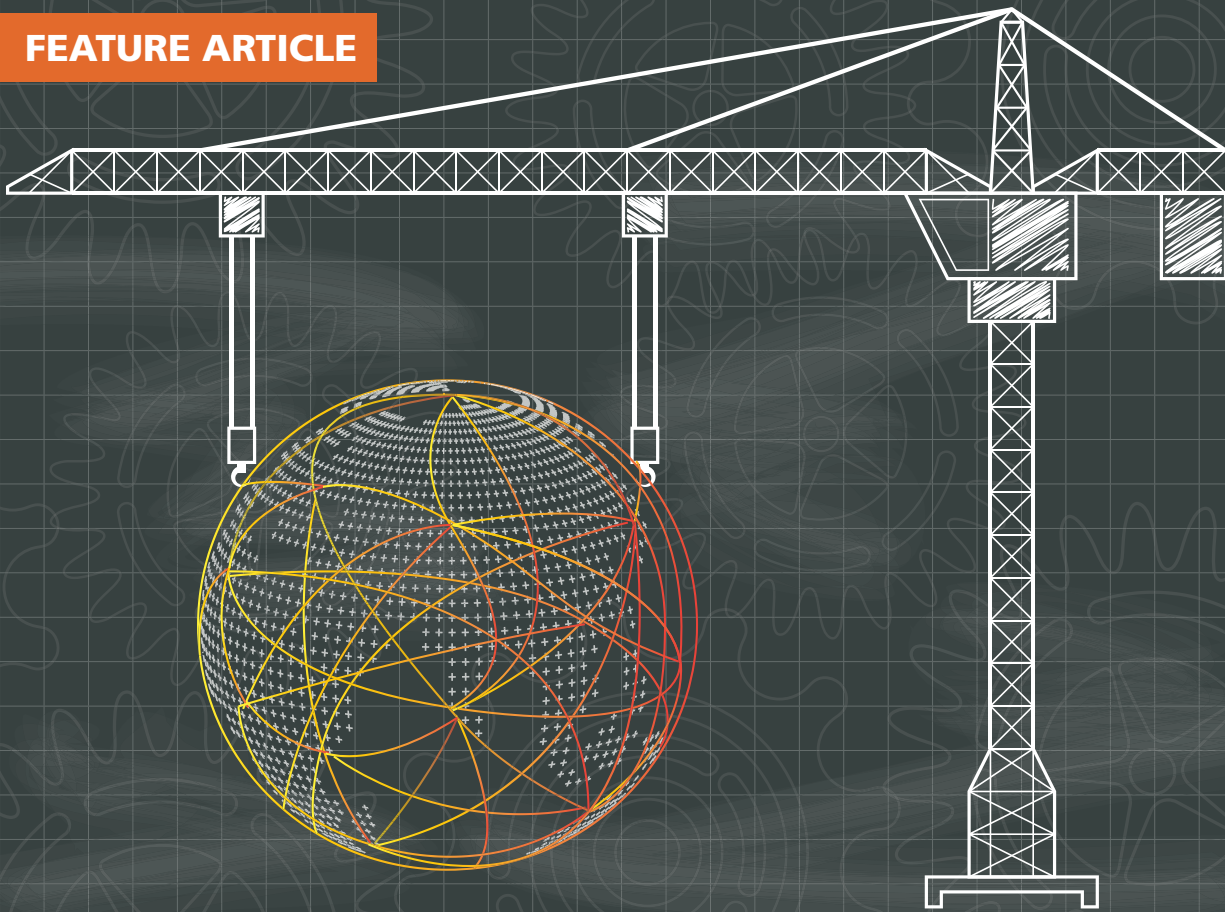
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Alistair Wishart is a counsel at Vinson & Elkins in London, United Kingdom. He can be contacted at awishart@velaw.com. **Afzaal Abidi** is an associate at Vinson & Elkins in London, United Kingdom. He can be contacted at aabidi@velaw.com.



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Legitimate expectations and state assurances: a look at the protection of predictability and stability of the legal framework for international construction projects

Indira Gomes
TIMOR GAP, Dili

This article analyses the problem of legitimate expectations in the context of the fair and equitable treatment standard. The arbitral cases reflect the importance of commitments made by states to investors, which affect their reliance on the stability of the projects' legal framework. There is a balancing exercise that needs to be conducted by arbitral tribunals that requires a review of all the relevant aspects of the case. Arbitral awards have not been consistent in their assessment of the protection of legitimate expectations. Investors should therefore be cautious in their approach to possible claims, anticipating the uncertainties of such disputes.

Introduction

As with most business projects in foreign territories, major international construction projects have their daily activities exposed to the host state's local laws, policies and public opinions.¹ However, should abrupt changes to the host state's laws and regulations which alter the feasibility and the profitability of projects be considered part of the investors' business risk? Should investors bear the risk of non-transparent or inconsistent regulatory requirements?

Considering the risk of instability and unpredictability of the legal and regulatory framework affecting international construction projects, this article analyses the extent to which contractors, as investors, can rely on the fair and equitable treatment (FET) protection deriving from investment treaties. In cases where the host state has made specific commitments, how should investors' legitimate expectations be protected?

Changes to the regulatory and legal framework may result in delays, loss of profit and partial or total impossibility of the project

Contracts between participants in international construction projects and states typically cover complex infrastructures such as roads, bridges, airports and energy facilities. These projects are often maintained by long-term agreements, where the stability of the framework is essential for the feasibility of the project. Changes to the regulatory and legal framework may result in delays, loss of profit and partial or total impossibility of the project. Some changes in the regulatory framework could require additional works (eg, to meet new environmental and safety standards), increase the cost of resources or require the payment of additional taxes. In these circumstances the investor might not have a contractual claim against a contracting state party but might be protected under the relevant investment treaty.²

Although the risks of unpredictability and changes in the laws are perceived primarily as a concern in emerging countries, recent awards in the renewable energy field in Europe demonstrate that the problem can also arise in developed countries, which are often deemed to have a more stable and predictable regulatory framework.³ For instance, the 2016 referendum in the United Kingdom, in which

the country voted to leave the European Union, has urged a debate regarding the possibility of claims of violation of foreign investors' legitimate expectations by the UK.⁴

This article aims to examine how investors in the construction industry could benefit from the protection of legitimate expectations. This is achieved mainly by assessing how arbitral awards have decided previous cases, so as to define patterns that could assist industry stakeholders in structuring claims in investment treaty law.

These claims are not only relevant to contractors. Other industry stakeholders, such as suppliers, developers and funders, may also benefit from understanding the limits and boundaries of treaty claims under the protection of legitimate expectations.

Legitimate expectations as an element of Fair and Equitable Treatment

In most cases, the protection of legitimate expectations is not explicitly mentioned in treaties. Investors rely on the open nature of FET as a standard capable of substantive protection that covers multiple situations. For example, an alleged breach of FET could relate to: a lack of procedural fairness and transparency in the access to justice;⁵ legitimate expectations that the host state would comply with provisions of the concession contract;⁶ changes in the tax and duties law which affected the project's economic environment;⁷ rejection of payment of invoices due to the investors' non-compliance with an atypical local procedure;⁸ and lack of transparency for the denial of construction permits.⁹

In the absence of uniformity in the domestic law systems of a doctrine of legitimate expectations, tribunals refrain from transposing the doctrine as a principle of international law.¹⁰ The favoured approach of tribunals in assessing the protection of legitimate expectations is by considering the relevant circumstances of an alleged breach of FET.¹¹ The liability threshold for failure to accord FET is therefore assessed by considering the applicable rules of interpretation of the treaty and the circumstances of the case. The following situations can be used to introduce this concept.

A developer made several visits to a foreign country to construct a city in an area designated for agricultural use.¹² The developer acquired the land and signed an

investment contract with the nation's foreign investment committee. However, after the investor initiated its investment, the project was refused due to its failure to comply with the country's urban development policy.

In another situation, a developer signed an urbanistic agreement with the state related to the requalification of land, in which the former would invest to build a residential complex.¹³ After signing the agreement, the developer bought the land with the expectation of specifying it for residential use. However, the project was subsequently cancelled because the government did not conduct the required revision of the urban planning.

In the two cases described above, the investors initiated a dispute against the state for an alleged breach of FET through the frustration of legitimate expectations. The first investor was partially successful in its claim. The tribunal held that the state breached its obligation to accord FET by approving an investment for a project contrary to the government's urban policy.¹⁴ The second case was dismissed because the sole arbitrator considered that the commitment made by the state was a mere possibility and not sufficiently clear to generate legitimate expectations.¹⁵ As will be seen, not all commitments create the protection of legitimate expectations, and the particular circumstances of each case also have a significant role in the decisions.

The protection of legitimate expectations where the host state made specific commitments

The state's sovereign right to amend its laws and regulations is not unrestricted. Arbitral tribunals generally accept that when the state has made specific commitments to the investor, the latter may have legitimate expectations that the legal framework will not change.¹⁶ For example, some tribunals consider that specific commitments can be found in general laws and regulations.¹⁷ The problem is that tribunals are not always consistent in their assessment of what constitutes a specific commitment for the purposes of determining a reasonable reliance.¹⁸

One of the aspects discussed by arbitral tribunals to assess if the protection of legitimate expectations exists is the level of formality of the state's representations. The Tribunal in *White Industries v India* held that

statements by government officials regarding India's legal system 'do not come close to meeting the standard required'.¹⁹ A similar assessment was made in *Charanne v Spain*, where the majority of the tribunal rejected that general documents, press releases, presentations and reports distributed to attract potential investors could generate legitimate expectations.²⁰ Conversely, the *Continental v Argentina* tribunal concluded that political statements 'have the least legal value'.²¹

In *Crystallex v Venezuela*, the tribunal analysed the value of different types of representations made in various forms and contexts.²² In this case, the investor faced difficulties obtaining an environmental permit and relied on assurances made by high-level government officials. The permit was ultimately denied, and the investor claimed a breach of legitimate expectations. The tribunal assessed two types of representations: general statements made by politicians and a letter sent by the relevant ministry. The tribunal concluded that the politicians' general promises that the project would be successful could not generate legitimate expectations.²³ On the other hand, a letter sent by the relevant ministry, clearly making reference to an evaluation process having been carried out, and stating that 'once the Bond has been posted [...] the permit will be handed over' was the determinant to the finding of infringement of legitimate expectations.²⁴

Not all commitments create the protection of legitimate expectations

These cases seem to infer that it is unreasonable for investors to rely on representations made in a political context, as it's not uncommon for politicians to break promises. On the other hand, a formal document signed by a government representative could be sufficient to generate some protection, depending on how explicit and unambiguous its terms are.

Investors should not rely on implicit terms. For example, in *Toto v Lebanon*,²⁵ the contractor signed a contract with the state in a road construction project. The contractor claimed, among other things, that the state changed the project regulatory framework, in particular, that the Lebanese custom

duties on cement, building materials, diesel and steel unreasonably increased. Toto based its argument on the fact that the government agency, through the tender documents, required the contractor to examine all Lebanese laws and argued that it was implied that the project would be subject to the Lebanese tax legislation at the time the contract was signed.²⁶ The tribunal denied the existence of a specific commitment in the case, and the contractor failed to establish that the state acted in a drastic and discriminatory manner.²⁷

Tribunals have been adopting a cautious approach when the state's right to regulate is in question. To generate a protection of legitimate expectations a statement must purposely and specifically induce the investment.²⁸ It is common in international projects for government agencies to require the bidding companies to examine local laws before submitting a proposal. Although the investor might expect and desire that the laws remain unchanged, a protection of legitimate expectations will rarely materialise without a specific commitment or some sort of stabilisation clause in the contract.²⁹ The critical aspect is not so much that the assurance exists in a legally binding document but that it contains a clear commitment directly made to induce the investor.³⁰ This is particularly relevant for the construction industry, where participants often rely on verbal representations. In *El Paso v Argentina*, the tribunal confirmed that the investor could rely on different forms of commitments, such as a letter of intent or a promise made in a face-to-face business meeting.³¹

In very specific circumstances, tribunals have found that general laws could generate legitimate expectations. The recent case *Masdar v Spain*³² concerned the change of legislation specifically enacted to encourage investments in Spain's renewable energy sector. Through these laws, Spain guaranteed the stability of benefits if the investors registered the investment with the relevant authority and complied with the required conditions over a particular time period. The *Masdar* tribunal decided that Spain breached its FET obligations since the claimant had registered the investment and complied with all the conditions regarding the plant's construction.³³ In this case, it was determinant that the investor sought and received specific confirmation from the state that the project would benefit from the laws which were later modified.³⁴

However, similar facts were assessed by the *Charanne v Spain* tribunal, which considered the registration to be a mere administrative requirement and rejected the claim.³⁵ This demonstrates how unpredictable the outcome of claims can become without a doctrine of precedent in arbitral jurisprudence. The two cases were related to the same country, and their source was the Energy Charter Treaty. Investors should take into account the possibility of such contradictions before pursuing a claim.

It is not always easy to determine which commitment weighted more in the tribunal's decision. This is due to the lack of step-by-step reasoning from most tribunals in assessing the value of representations.³⁶ Nonetheless, a review of the cases provides some indication of what type of characteristics a representation should have to be reasonably relied on by investors. The most important point to retain is that not every contractual commitment, representation or assurance can generate legitimate expectations. Arbitral tribunals tend to dismiss representations made in a political context, especially when they are made to induce an indeterminate number of possible investors. The level of inducement is connected to the specificity of the commitment made by the host state. Tribunals generally consider that such commitments should be unambiguous and addressed to the specific investor.

Assumption of risk under host state circumstances

In some cases, arbitral tribunals have regarded the host state's economic, social and political circumstances as an essential part of their assessment of legitimate expectations.³⁷ In this sense, tribunals will consider the circumstances when the investment was made, what information the investor had or should have reasonably had and if the investors acted diligently.³⁸ In undertaking such an exercise, tribunals generally consider the information and conditions available to the investors when they decided to invest and refrain from assessing the protection of legitimate expectations with the use of hindsight.³⁹

For example, the *Genin v Estonia* tribunal stated that it would consider the fact that the investor knowingly decided to invest in a 'renewed independent state, coming rapidly to grips with the reality of modern financial,

commercial and banking practices'.⁴⁰ The assessment of whether an investor could have objectively relied on an existing legal framework should entail considerations of what the investor knew or ought to have known about the country's situation.

In *Bayindir v Pakistan* a contractor signed a concession contract with a public authority to construct a road in Pakistan.⁴¹ Disputes arose pertaining to claims for payment and extension of time. Some claims were settled between the parties, and an addendum to the contract was concluded. After the addendum, disputes continued, and the public authority decided to terminate the contract and expel the contractor. Concerning the violation of the FET standard, the investor alleged that the termination of the concession contract frustrated its legitimate expectations because the leader in power made several assurances that the government would continue to support the project.⁴² The tribunal decided that the investor should not have ignored the 'volatility of the political conditions' existing in Pakistan when it agreed on the addendum to the contract and that the future of the project was connected to the changes affecting the state's politics.⁴³

In another case, a contractor signed a contract with a municipality to construct and operate a public car park system.⁴⁴ After the agreement had been signed, the state enacted several laws that changed the possibility of the investor to charge fees to the public, which would financially affect the project. The investor claimed that the changes in the laws frustrated its legitimate expectations. The investor's allegations were dismissed as the tribunal specifically noted that the political and social circumstances in the country, which was transitioning to the EU, could not justify legitimate expectations concerning the stability of the investment.⁴⁵

A review of the cases demonstrates that the context of the host state in which the investor decided to invest is deemed by arbitral tribunals as a fundamental aspect of the protection of legitimate expectations. The open nature of the FET standard supports this view in the sense that what would be unfair and inequitable in normal circumstances might not be the situation in economic or social crisis.

Another important aspect relating to the circumstances of the host state is the assessment of regulatory risk for the

construction and operation of projects with high environmental impact. For example, in *Methanex v USA*, the tribunal held that the investor could not have expected that the state of California's regulations would remain unchanged as the investor knew that there were environmental concerns.⁴⁶ In this case, the claimant, a Canadian producer of methanol, challenged Californian legislation that banned the production of petrol containing methanol-based additives on environmental grounds. The investor claimed a violation, inter alia, of NAFTA's FET obligation, arguing that the ban was unjustified, destroyed its market and discriminated in favour of the United States' domestic ethanol industry.⁴⁷ Similarly, in *Glamis Gold v USA*, the claim of infringement of legitimate expectations partly failed because the location where the claimant was operating was sensitive to the environmental consequences of mining operations.⁴⁸

Arbitral tribunals presume that the 'investor is an experienced and savvy businessman' who normally carries out due diligence concerning the investment framework.⁴⁹ Risk is one of the elements that flow from the business and assist tribunals in identifying investments protected under the treaty.

In *Maffezini v Spain*, the investor claimed that a state entity responsible for offering information to investors provided an inaccurate feasibility study.⁵⁰ The investor also claimed that it was pressured by state officials to start investing in the project without having completed an Environmental Impact Assessment. The tribunal dismissed both claims, stating that treaties are not insurance policies against bad business decisions and that the deficiencies of the state's actions could not be deemed to relieve the investor from risks inherent to the investment. The tribunal also held that ignorance of local laws should not be counted as a defence.⁵¹

The *Masdar v Spain* case, regarding the installation and operation of renewable energy plants, provided some guidance on what might be considered a good example of acceptable due diligence for the purposes of generating the protection of legitimate expectations.⁵² In this case, the investor had: (1) commissioned external reports; (2) engaged in multiple discussions with the local partner, which had detailed knowledge of the regulatory framework; and (3) had extensive discussions with the

local banks and law firms. The tribunal was satisfied that the investor had exercised the required due diligence and that its legitimate expectations were reasonable in light of the circumstances.⁵³

Conclusion

The ambiguity and flexibility of the FET standard allows arbitral tribunals to assess the protection of legitimate expectations concerning a variety of state conduct. It may therefore seem attractive to investors to claim breach of legitimate expectations due to its comprehensive scope. However, the vagueness of the protection conferred by the standard creates uncertainties.

There are inconsistencies in arbitral awards regarding how the investor's reliance should be assessed. For instance, there is still much debate regarding the formality, certainty and specificity of assurances required to induce the investor. The assessment of what the investor knew or should have known regarding the circumstances of the host state has also led to different results in the finding of liability. This lack of clarity contributes to the unpredictability of the outcome of claims based on alleged violations of the investor's legitimate expectations.

The vagueness of the protection conferred by the standard creates uncertainties

Notwithstanding the above, some aspects have been consistently considered by arbitral tribunals, which may guide investors as to what to expect (or what not to expect) from the protection of legitimate expectations.

First, investors should not expect to be protected under the concept of legitimate expectations against damages arising from changes to the general legislation of the host state. Unless the state made specific assurances, investors should not rely on the existing legal framework. Likewise, general statements made by politicians or government officials may not be relied upon.

Second, the level of inducement is connected with the specificity of the commitment made by the host state. Participants may rely on verbal representations so long as the commitments are clear, unambiguous and addressed to the specific investor.

Third, arbitral awards generally presume that investors will assume a certain degree of risk associated with their investment. They are required to perform due diligence to assess the requirements of local laws and the country's economic, political and social circumstances.

Overall, there is a balancing exercise that needs to be conducted by arbitral tribunals, which requires an assessment of all the relevant aspects of the case. Such an exercise will weigh the right of the state to adopt measures in the public interest against the expectations of the investor arising from representations made by the state. Ultimately, investors' expectations will only be deemed reasonable if the liability threshold to accord FET has been reached. The overall expectations of investors regarding their protection from states' assurances under FET should therefore be as strict as possible in order to anticipate the uncertainties of treaty claims. The high profile of investor-state disputes makes them costly and slow, and consequently, investors should adopt a conservative approach in their assessment of possible claims.

Notes

- 1 Noah Rubins and N Stephan Kinsella, *International Investment Political Risk and Dispute Resolution. A Practitioner's Guide* (Oceana Publications 2005), p 3.
- 2 See, eg, *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, ICSID case No ARB/01/7 Award (25 May 2004) and *Walter Bau AG v Kingdom of Thailand*, UNCITRAL, Award (1 July 2009).
- 3 See, eg, *Antin Infrastructure Services Luxembourg Sàrl and Antin Energia Termosolar BV v Kingdom of Spain*, ICSID case No ARB/13/31 (15 June 2018), *Eiser Infrastructure Limited and Energia Solar Luxembourg Sàrl v Kingdom of Spain*, ICSID case No ARB/13/36 (4 May 2017).
- 4 Aymar de Fleurieu, 'Brexit and Legitimate Expectations: A Case for Foreign Investors?' in Jennifer Hillman and Gary Horlick (eds), *Legal Aspects of Brexit. Implications of the United Kingdom's Decision to Withdraw from the European Union*, (Institute of International Economic Law 2017) p 287.
- 5 *ATA Construction, Industrial and Trading Company v The Hashemite Kingdom of Jordan*, ICSID case No ARB/08/2 (7 March 2011).
- 6 See *Walter Bau v Thailand*, *Mondev v United States*, ICSID case No ARB(AF)/99/2; *Duke Energy Electroquil Partners & Electroquil SA v Ecuador*, ICSID case No ARB/04/19, Award (18 August 2008); *Waste Management v Mexico*, ICSID case No ARB(AF)/00/3.

- 7 See *MTD v Chile* and *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* (ICSID case No ARB/05/22, Award of 24 July 2008).
- 8 *Garanti Koza LLP v Turkmenistan*, ICSID case No ARB/11/20 (19 December 2016).
- 9 *Tecnicas Medioambientales Tecmed SA v The United Mexican States*, case No ARB (AF)/00/2, Award (29 May 2003).
- 10 ICJ Judgment of 1 October 2018, paras 160–62.
- 11 *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID case No ARB(AF)/11/2 (4 April 2016), para 546.
- 12 See n 7 above.
- 13 See *Inversión y Gestión de Bienes, IGB, SL and IGB18 Las Rozas, SL v Kingdom of Spain*, ICSID case No ARB/12/17 (14 August 2015).
- 14 See n 7 above, at para 166.
- 15 See n 13 above, at para 137.
- 16 *Masdar Solar & Wind Cooperatief UA v Kingdom of Spain*, ICSID case No ARB/14/1, paras 489–91.
- 17 See, eg, *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v The Argentine Republic*, ICSID case No ARB/03/17 (30 July 2010), paras 222–23.
- 18 See n 16 above, at paras 489–91.
- 19 *White Industries Australia Ltd v The Republic of India*, Final Award (30 November 2011), para 5.2.6.
- 20 *Charanne and Construction Investments v Spain*, SCC case No V 062/2012 (21 January 2016), paras 491–508.
- 21 *Continental Casualty Co v Argentina*, ICSID case No ARB/03/9, Award (5 September 2008), para 261.
- 22 *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID case No ARB(AF)/11/2 (4 April 2016), paras 487, 546–575.
- 23 *Ibid*, para 553.
- 24 See n 22 above, paras 562–64.
- 25 *Toto Costruzioni Generali SPA v Republic of Lebanon*, ICSID case No ARB/07/12, Award (7 June 2012).
- 26 *Ibid*, paras 239–46.
- 27 *Ibid*.
- 28 *Glamis Gold, Ltd v The United States of America*, UNCITRAL (8 June 2009), para 766.
- 29 In this respect, see, eg, Katja Gehne and Romulo Brillo, ‘Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment’, Working Paper No 2013/46, Swiss National Centre of Competence in Research, 2014, pp 28–29.
- 30 *El Paso Energy International Company v The Argentine Republic*, ICSID case No ARB/03/15, Award (31 October 2011) para 376.
- 31 *Ibid*.
- 32 See n 16 above.
- 33 See n 16 above, paras 511–22.
- 34 *Ibid*.
- 35 See n 20 above, paras 491–508.
- 36 Yulia Levashova, *The Right of States to Regulate in International Investment Law: The Search for Balance Between Public Interest and Fair and Equitable Treatment* (Wolters Kluwer 2019), p 247.
- 37 See, eg, *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID case No ARB/03/29, Decision on Jurisdiction (14 November 2005) and *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID case No ARB/05/8, Award (11 September 2007).
- 38 See n 3 above, *Antin v Spain*, at para 537.
- 39 *Ibid*.
- 40 *Genin, Eastern Credit Ltd, Inc and AS Baltoil v The Republic of Estonia*, ICSID case No ARB/99/2 (25 June 2001), para 348.
- 41 See n 37 above, *Bayindir v Pakistan*, at paras 190–199.
- 42 *Ibid*.
- 43 *Ibid*.
- 44 See n 37 above, *Parkerings v Lithuania* paras 87–9.3 and *IGB v Spain*, para 140.
- 45 See n 37 above, *Parkerings v Lithuania*, para 335.
- 46 *Methanex Corporation v USA*, UNCITRAL (3 August 2005), Chapter D, para 9.
- 47 *Ibid*.
- 48 *Glamis Gold, Ltd v USA*, UNCITRAL (8 June 2009), para 767.
- 49 *Saluka Investments BV v The Czech Republic*, UNCITRAL, IIC 209 (17 March 2006), pp 79–80.
- 50 *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID case No ARB/97/7 (13 November 2000), para 58.
- 51 *Ibid*, paras 65–70.
- 52 See n 16 above, *Masdar v Spain*, paras 497–99.
- 53 *Ibid*.

Indira Gomes is a legal consultant for TIMOR GAP, EP. She can be contacted at gomes.indira@gmail.com



Eko Atlantic City under construction in Lagos, Nigeria. Credit: MOdAMO/Shutterstock

**Simon Ejiofor
Ossai**
Epinots, London

Is the Nigerian Arbitration and Conciliation Act suitable to construction disputes? A critical analysis

This article discusses the suitability of the Nigerian Arbitration and Conciliation Act (ACA) to construction disputes. It discusses court-ordered injunctions in aid of the arbitration process, the recognition and enforceability of orders, directions of emergency arbitrators and limitation laws to the enforcement of arbitral awards. It also suggests amendments to the ACA.

The Arbitration and Conciliation Act

The legal regime for arbitration in Nigeria predates its independence with the establishment of the Arbitration Ordinance of 1914.¹ The Arbitration and Conciliation Decree No 11 of 1988 (the Decree) was promulgated by the military regime to provide an integrated legal framework for the

fair and efficient settlement of commercial disputes by arbitration and conciliation.² The Decree applied to domestic commercial arbitration throughout the Federation of Nigeria³ and international commercial arbitration.⁴

Prior to 1988, the legal regime was not totally harmonised, as there were local laws on commercial arbitration throughout the country.

These laws included: the Arbitration Law of Lagos State 1958,⁵ the Arbitration Law of Former Eastern Region 1963,⁶ the Arbitration Law of Kano State,⁷ and the Arbitration Law of Cross Rivers State.⁸ It is worth mentioning that the provisions of these laws were derived from the Arbitration Ordinance of 1914.

The emergence of a democratic government prompted the name change of the Arbitration and Conciliation Decree to the 1988 Arbitration and Conciliation Act (ACA),⁹ which practically had the same provisions as the Decree and has remained in force ever since.¹⁰ The ACA was fashioned from the 1985 UNCITRAL Model Law on International Commercial Arbitration (the ‘Model Law’) with some modifications.¹¹ Accordingly, 22 sections of the ACA have almost identical provisions to the Model Law,¹² while 16 sections are formed from the Model Law with certain alterations.¹³ Ten sections are unrelated to the Model Law.¹⁴

There is an ongoing debate on the legislative competence of the federal government to legislate over arbitration and conciliation matters. This is because Nigeria operates a federal system of government with both federal and state governments having the legislative competence to legislate over matters allocated by the Constitution of the Federal Republic of Nigeria 1999. While the federal government has the exclusive power to legislate over matters listed in the exclusive legislative list,¹⁵ both federal and state governments have powers to legislate over matters listed in the concurrent legislative list.¹⁶ If a matter is not listed in the exclusive or concurrent legislative lists, such a matter is said to be on the residual list and the state government has the exclusive legislative competence to legislate over such matters.¹⁷

The exclusive legislative list does not contain arbitration and conciliation. As a result, some have argued that matters of arbitration and conciliation are within the exclusive legislative competence of the state. Another school of thought, however,¹⁸ has argued that since international trade and commerce is contained in the exclusive legislative list,¹⁹ arbitration and conciliation fall within the exclusive legislative competence of the federal government.

In 2005, the National Committee on the Reform and Harmonisation of Arbitration and ADR Laws in Nigeria came to the view that: ‘The Federal Government has the constitutional power and competence to

legislate on arbitration and conciliation but only in respect of trade and commerce which are international or inter-state.’²⁰

The Committee recommended an amendment to the ACA and a Uniform State Arbitration and Conciliation Law.²¹ However, while the federal bill is still awaiting enactment, Lagos State proceeded to adopt the Lagos State Arbitration Law 2009.²²

Although this article focusses on the ACA, where applicable, reference will be made to the Lagos State Arbitration Law 2009.

Section 15(1) of the ACA compels arbitration under the ACA to be conducted in accordance with the ACA Rules. It provides that, ‘the arbitral proceedings shall be in accordance with the procedure contained in the Arbitration Rules set out in the first schedule to this Act’. By this provision, it is arguable that Section 15(1) of the ACA runs contrary to the principle of party autonomy to the extent that it legislates the applicable rules for domestic arbitration. It renders parties to domestic arbitration governed under the ACA incapable of deciding the arbitration rules of choice for their dispute.

The ACA, like the UNCITRAL Model Law on which it was modelled, does not explicitly regulate any form of multi-party arbitration. However, Section 15(2) of the ACA provides: ‘where the rules referred to in subsection (1) of this section contain no provision in respect of any matter related to or connected to any arbitral proceedings, the arbitral tribunal may, subject to this Act, conduct the arbitral proceedings in such a manner as it considers appropriate so as to ensure fair hearing’.

The exclusive legislative list does not contain arbitration and conciliation

It can be argued that Section 15(2) of the ACA may be used as a basis for an arbitral tribunal to order consolidation or joinder in cases where the applicable arbitral rules are silent on multi-party arbitration. This position is debatable. It is unlikely that an arbitral tribunal would allow the conduct of multi-party arbitration solely based on the provision of Section 15(2) of the ACA. The discretion of the tribunal under Section 15(2) merely concerns ancillary procedural questions, such as rules on the taking of evidence, witness statements and the organisation of hearings, and cannot

be applied to core questions that may have a significant impact on the conduct of the proceedings, such as multi-party arbitration. Therefore, if the relevant arbitration agreements are silent on multi-party arbitration and parties cannot reach an agreement on the matter, the arbitral tribunal may not use Section 15(2) as a jurisdictional basis to order consolidation or joinder over a party's objection.

It should be noted that the UNCITRAL Rules, on which the ACA Rules are modelled, contain no explicit provision on consolidation or the intervention of third parties in pending arbitration.

However, the most recent revision of the UNCITRAL Rules, the 2010 UNCITRAL Rules, includes a provision on joinder. Article 17.5 states:

'the arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party *provided such person is a party to the arbitration agreement*, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration'. (emphasis added)

Court-ordered injunction in support of arbitration

Despite the ability of arbitral tribunals to grant interim measures of protection, courts usually step in to act when an arbitral tribunal is yet to be constituted, or there are no provisions for the appointment of an emergency arbitrator, or the interim relief sought is urgent.²³ In the construction sector, a court-ordered injunction might be appropriate where a party is seeking relief that will bind a third party, including for instance, where a contractor wishes to obtain information from a consultant engaged by the employer to support its case. Where the employer is not in possession of the consultant's information and where there is no direct contractual link between the contractor and consultant, the contractor may be better served by making an application to the court to order production of that information.²⁴

However, the ACA contains no provision specifically empowering Nigerian courts to

grant injunctions in aid of arbitration proceedings. It only empowers an arbitral tribunal to grant interim and/or injunctive relief in favour of a party to a pending arbitration.²⁵

In the absence of a specific provision in the ACA, it is debatable whether the courts can grant injunctions in support of arbitration proceedings. Two schools of thought have emerged. The first is that Nigerian courts can only grant injunctions in support of arbitration proceedings if the issues in dispute are brought before the courts.²⁶ This viewpoint relies on the Nigerian Supreme Court decision in *NV Scheep v MV S Araz*,²⁷ where the court refused to grant an interim order for security in support of an arbitration procedure the seat of which was in London. The Supreme Court held that security for damages is not a cause of action that can ground a claim, as the court cannot hear and determine a case where the only purpose of the action brought before it is for security in respect of foreign arbitration proceedings. In other words, the substantive dispute must be before the court before interim orders of injunction can be granted. The admitted exception to this rule is statutory intervention permitting the court to grant interim relief in the absence of a substantive claim. Nevertheless, as the ACA contains no specific provisions on court-ordered injunctions in support of arbitration proceedings, this exception does not apply.

The alternative school of thought is that a Nigerian court has the power to grant interim relief in support of arbitration.²⁸ In the cases where this approach was adopted, it was held that the choice of arbitration does not bar resort to the Nigerian court to obtain security for any eventual award.²⁹ The Nigerian courts have relied on Article 26(3) of the ACA Rules as validation for the exercise of the court's jurisdiction to grant injunctive relief pending arbitration.³⁰ Article 26(3) of the ACA Rules provides that 'a request for interim measures addressed by any party to court shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement'.

While Article 26 has been relied on by Nigerian courts (ie, the Federal High Court³¹ and the State High Court³²) in the granting of an injunction in support of arbitration, it is unlikely that such a decision would stand on appeal considering the decision of the Supreme Court of Nigeria on the subject. Also, Article 26, construed properly, does not

confer to the courts the power to grant injunction in support of arbitration. It merely provides that a request to the court for interim measures by either party to the arbitration would not operate to waive the right of parties to arbitrate their dispute before any tribunal of choice.

It is understandable that Nigeria's courts would adopt a proactive approach in support of arbitration by granting injunction in aid of arbitration. However, unless reforms are made to the ACA empowering the court to grant injunction in aid of arbitration, there will continue to be doubts as to the jurisdiction of the courts to grant injunction in support of arbitration.

Unlike the ACA, Section 44(2) of the English Arbitration Act specifically empowers English courts to grant interim injunctions in support of arbitration.³³ However, such powers can only be exercised by the courts where the arbitrators do not possess the necessary powers to act or are unable to act.³⁴ Where such powers have been explicitly conferred on the arbitrators by the parties or the arbitrators have default powers under Sections 38(3)–(6) of the English Arbitration Act, then the courts cannot act. Finally, it should be noted that Section 44 of the English Arbitration Act is a non-mandatory provision, and therefore parties to an arbitration agreement can opt to exclude its application.

The UNCITRAL Model Law provides in Section 5, Article 17J for interim measures ordered by courts in support of arbitration, and specifically provides that 'a court shall have the same power of issuing an interim measure in relation to arbitration proceedings irrespective of whether their place is in the territory of the enacting state, as it has in relation to proceedings in courts'. The existence of an arbitration agreement does not limit the powers of a competent court to grant interim measures under the Model Law.

Recognition and enforceability of orders and directions of emergency arbitrators

Under some institutional rules,³⁵ including the International Chamber of Commerce Rules, parties may appoint an emergency arbitrator to deal with urgent applications before the full tribunal is constituted.³⁶ The requirement

for emergency arbitrators is perhaps most prominent in construction disputes, where there is often a need for emergency arbitrators to grant urgent relief such as the prevention of a call on the performance bond, preservation of assets, securing the claim or to suspend the application of liquidated damages.

The perceived advantages of seeking relief from an arbitrator rather than a court are that: (1) it is more consistent with the parties' agreement to avoid approaching the national courts, especially if one party has concerns about the neutrality of a particular national court; (2) the key arbitral institutions are able to draw on a large pool of arbitrators and have the facilities to deal with applications on an urgent basis; (3) confining the dispute to arbitration maintains the confidentiality of the proceedings, which may not be the case once a reference has been made to court; and (4) the appointment of an emergency arbitrator will not require the applicant party to instruct additional local counsel to deal with an ancillary court application, as many jurisdictions prohibit foreign counsel from appearing before the courts. While the key benefit of appointing

Article 26, construed properly, does not confer to the courts the power to grant injunction in support of arbitration

an emergency arbitrator over seeking relief from the main tribunal (once constituted) would of course be urgency, there is also the potential advantage that the emergency arbitrator is appointed on a one-off basis and will not form part of the main tribunal. Therefore, the perceived risk of any prejudgment of the merits often associated with seeking interim relief from the main tribunal is eliminated.

There are, nonetheless, limitations on the relief that an emergency arbitrator may grant. In particular, and in contrast to the relief available through the courts, it is typically not possible for an arbitrator to grant relief without notifying the other party. A party seeking a without notice freezing injunction to prevent the dissipation of assets would therefore likely still need to apply to the courts.³⁷ Given the consensual nature of arbitration, it would also not be possible to seek any form of relief from an emergency arbitrator that would bind a third party, such as making premises available for inspection,

or compelling the attendance of witnesses, as the arbitrator only has jurisdiction between the contracting parties.

A further and overriding consideration is the extent to which any order given by an emergency arbitrator would actually be enforceable and therefore effective. This is because only final, not interim, arbitral awards are enforceable under the New York Convention. As an award rendered by an emergency arbitrator can be varied or lifted by the main tribunal once constituted, there is an argument that it is not truly final and binding in accordance with Article V.I(e) of the Convention. As the New York Convention does not define an 'arbitral award', whether an award rendered by an emergency arbitrator could be recognised and enforced as if it were a court order is dependent on national legislation. Although some institutions have included provisions that explicitly confirm the binding nature of awards rendered by emergency arbitrators, this is unlikely to be sufficient in practice.

As a result, some jurisdictions have enacted legislation recognising the enforceability of orders and directions of emergency arbitrators. For instance, Singapore amended its International Arbitration Act to recognise the enforceability of emergency arbitrator's orders.³⁸ Similarly, the Hong Kong Arbitration Ordinance has been amended.

The ACA is silent on the enforceability of the orders of emergency arbitrators. In the absence of specific provisions for the recognition and enforcement of an award by an emergency arbitrator, there will always be doubts as to whether such an award would be enforceable by Nigeria's courts under the New York Convention.

Similarly, the English Arbitration Act contains no specific provision recognising the enforceability of orders of emergency arbitrators. The question of whether interim relief granted by an arbitral tribunal would be effective was considered by the English court in *Starlight Shipping v Tai Ping Insurance*,³⁹ against the background of Section 44(5) of the English Arbitration Act, which provides that a court shall only act: 'if or to the extent that the Arbitral Tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively'. Although the decision in that case was not made in the context of awards

granted by emergency arbitrators, the judge held that while an arbitral tribunal could act effectively by rendering a final award, this was not the case for an interim award, which would not be enforceable under the New York Convention.

The recent case of *ZCCM Investments Holdings v Kanasanshi Holdings Plc and Another*,⁴⁰ suggests that English law will determine whether or not emergency arbitrators' decisions are equivalent to awards or procedural orders before deciding issues on substance or procedure.⁴¹ This judgment may enable English courts to interpret emergency arbitrators' decisions as final and enforceable, using reasoning similar to that found in the US courts.⁴² Alternatively, as in France, it may be found that emergency arbitrators' decisions will not constitute awards, on the basis that they are provisional and may be modified, meaning that they do not finally dispose of claims or issues. Moreover, it is unclear whether an emergency arbitrator can be considered an arbitrator under English law.⁴³

In light of this, it is recommended that reforms to the ACA consider enforceability of orders of emergency arbitrators. This would ensure that parties to both domestic and international arbitration relating to construction disputes can secure urgent remedies pending the constitution of the tribunal.

The effect of the Nigerian Limitation Law on the enforcement of arbitral awards issued under construction contracts

The position of the Supreme Court of Nigeria in *City Engineering Nig Ltd v FHA* on the limitation period for the enforcement of an award has created extreme difficulties for parties to a construction dispute as a result of the complicated nature of dispute resolution in standard construction contracts. In that case, the parties entered into a contract to build houses in Festac Town, Lagos State. During construction, a dispute arose, and the Federal Housing Authority threatened to terminate the construction contract in December 1980. Arbitration commenced a year later and ended in November 1985. The action to enforce the award was filed in 1988. However, the relevant Lagos State limitation law provided that an action to enforce an arbitration award could not be brought after

six years from the date on which the cause of action accrued. Ogundare JSC for the Supreme Court held that:

‘a distinction must be drawn between an action to enforce an arbitral award – this is provided for in the arbitration law itself, and the relief that can be granted in such an action is an order enforcing the award as if it were a judgment of the court. And an action for damages for breach of an implied promise to perform a valid award where it is open to the court to order damages for failure to perform the award or decree, an appropriate case, specific performance of the award or grant an injunction restraining the losing party from disobeying the award or grant a declaratory relief. In my respectful view, the statutory period of limitation in respect of the former form of action runs from the breach that gave rise to the arbitration’.⁴⁴

The effect of this rule is that parties must commence and conclude arbitral proceedings within the period provided under the applicable limitation law in order to enforce such an award under the ACA. If parties are unable to conclude arbitration in a timely manner, they run the risk of their award being barred from enforcement under the ACA having become statute barred.

Standard forms of contract generally provide for a dispute resolution mechanism (pre-arbitral steps) to be followed before an arbitration can be initiated in respect of a construction dispute. For instance, sub-clause 66 of the FMW⁴⁵ Form of Contract requires disputes to be settled by the engineer giving its decision within 90 days, failing which, or should the parties be dissatisfied with the decision, the parties may within 90 days refer the dispute to an arbitrator.

Another instance is the dispute resolution clause in the 2017 FIDIC suite of contracts, which requires the parties to fulfil certain condition precedents before they may resort to arbitration. There is also the Dispute Avoidance Adjudication Board (DAAB) procedure, which provides that the DAAB must deliver its decision within 84 days of a dispute being referred to it.⁴⁶ One striking point is that if one of the parties fail to comply with the DAAB’s decision, the non-defaulting party can refer the non-compliance to arbitration in accordance with sub-clause 21.6.⁴⁷ The effect, therefore, is that parties to construction disputes run the risk of having their arbitral awards being

given the mandatory requirement to comply with pre-arbitration steps prior to initiating arbitral proceedings. There is, therefore, an urgent need to reform the enforcement of arbitral awards, particularly as it relates to construction disputes, to ensure that parties are able to enforce arbitration awards derived under construction contracts.

Suggested improvements to the ACA

It is the author’s view that the ACA is unsuitable to construction arbitration and improvements should be adopted. Although the ACA allows for flexibility on matters of evidence and presentation of a party’s case before the tribunal, it contains no provisions supporting multi-party arbitration, which is critical to construction disputes.

Also, there is a good argument that in compelling parties to adopt the ACA Rules for all arbitration conducted under the ACA, the ACA may be preventing parties from selecting other institutional bodies that may be preferred for construction disputes. The only alternative is for parties to adopt such other rules to augment the existing vacuum

There is an urgent need to reform the enforcement of arbitral awards

in the ACA Rules, which in principle is possible. However, the most efficient approach would be for the ACA to be amended to provide for the optional application of the ACA Rules, thereby allowing parties to select the rules of other institutional bodies preferred for construction arbitration disputes.

The ACA also contains no specific provision on the question of court-ordered injunction in support of arbitration, unlike the UNCITRAL Model Law and the English Arbitration Act. The absence of specific provision on the subject leaves doubts as to the ability of Nigerian courts to grant interim relief, especially in light of the Nigerian Supreme Court’s decision in *NV Scheep v MV S Araz*. It is suggested that the ACA be amended to confer on the courts the specific power to grant interim relief in support of arbitration as this is necessary for the effective and efficient conduct of the arbitration process, irrespective of whether it relates to international or domestic arbitration.

The ACA does not regulate the enforceability of orders and directives of emergency arbitrators. Given the acceptability of emergency arbitrators in the rules of most international and regional arbitration institutions, the absence of regulation on the enforcement of orders of emergency arbitrators continues to cast doubt on the enforceability of such orders in Nigeria under the New York Convention. It is therefore recommended that amendments be introduced to the ACA specifically recognising the enforceability of orders and directives of emergency arbitrators. Such an amendment would settle the question of whether orders of emergency arbitrators are final under Nigerian law for purposes of enforcement under the New York Convention.

Notes

- 1 Ordinance no 16 of 1914.
- 2 Arbitration and Conciliation Decree no 11 of 1988, preamble.
- 3 *Ibid*, s 58.
- 4 See n 2 above.
- 5 Arbitration Law of Lagos State Cap 13, Laws of the Federation and Lagos 1958.
- 6 Arbitration Law of Former Eastern Region Cap 10 Laws of Eastern Nigeria 1963 Vol 1.
- 7 Arbitration Law of Northern Nigeria 1963.
- 8 Arbitration Law cap 12, Laws of Cross River State 1981.
- 9 Arbitration and Conciliation Cap A18 Laws of the Federation 2004.
- 10 Nduka Ikeyi and Ofornze Amucheazi, 'Applicability of Nigeria's Arbitration and Conciliation Act: Which Field Does the Act Cover?' (2013) 57 (1) *Journal of African Law* 126.
- 11 Hamid Abdulkareem, 'The ACA Amendment Bill: A Much-Anticipated Coming' (Africa Arbitration Blog) <https://africaarbitration.org/2018/05/17/the-aca-amendment-bill-a-much-anticipated-coming-hamid-abdulkareem> accessed 12 August 2020.
- 12 See, eg, s 6 of the ACA on number of arbitrators and Art 10 of the Model law on number of arbitrators. Both provisions provide that parties to the arbitration shall determine the number of arbitrators and where no such determination is made, the number of arbitrators shall be three.
- 13 See, eg, s 13 of the ACA, which states that the arbitral tribunal may before or during an arbitral proceeding, at the request of a party, order any party to take interim measures. Art 17 of the Model Law also defines interim measures and the condition for granting an interim measure.
- 14 'Arbitration in Nigeria: Overview and Challenges' (Folashade Alli and Associates) www.faa-law.com/arbitration-in-nigeria-overview-and-challenges accessed 18 August 2020.
- 15 Part II of the second schedule to the Constitution.
- 16 *Ibid*.
- 17 S 6(6) and (7) of the Constitution.
- 18 Amazu A Asouzu, 'Arbitration and Judicial Powers in Nigeria' (2001) *J Int Arb* 617, 631.
- 19 Items 62 and 68 of the Exclusive Legislative List.
- 20 The National Committee on the Reform and Harmonisation of Arbitration and ADR Laws in Nigeria, 'Amended Report' (2005) 13, <http://www.aluko-oyebode.com/files/amended%20report.pdf> accessed 17 April 2016.
- 21 *Ibid*, para 126.
- 22 Paul O Idornigie, *Commercial Arbitration Law and Practice in Nigeria* (Pan-African Institute of Paralegal Studies 2015) 420.
- 23 Peter Hirst and David Brown, 'Interim Relief, including Emergency Arbitration, in Construction Arbitration' in Stavros Brekoulakis and David Brynmor Thomas QC (eds), *The Guide to Construction Arbitration Global Arbitration Review* (Law Business Research Second Edition) p 207.
- 24 *Ibid*.
- 25 ACA, s 13, n 52.
- 26 Faruq Abbas, 'Nigeria: Injunctions Pending Arbitration: A Legal Myth?' (Mondaq, 3 April 2014) www.mondaq.com/nigeria/court-procedure/304226/injunctions-pending-arbitration-a-legal-myth#:~:text=Powers%20of%20the%20English%20Court,and%20determination%20of%20an%20arbitration accessed 7 September 2020.
- 27 *NV Scheep v MV S Arax* (2000) 15 NWLR (Pt 691) 622.
- 28 *Statoil Nigeria Ltd v Star Deep Water Petroleum Ltd & 3 Ors* (Suit No FHC/L/CS/1452/2013) (Unreported).
- 29 *LAC v AAN Ltd* (2006) 2 NWLR (Pt 963) 49.
- 30 See *Statoil Nigeria Ltd v Star Deep Water Petroleum Ltd & 3 Ors* (Suit No FHC/L/CS/1452/2013) (Unreported) 2; and *Lagos State Government v PHCN & 2 Ors* (2012) 7 CLRN 134.
- 31 See n 28 above.
- 32 *Lagos State Government v PHCN & 2 Ors* (2012) 7 CLRN 134.
- 33 English Arbitration Act, s 44(2), n 107.
- 34 Hakeem Seriki, *Injunctive Relief and International Arbitration* (Lloyd's Arbitration Library) English 85.
- 35 See The 2017 International Chamber of Commerce Rules of Arbitration, Art 29 https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_29 accessed 9 September 2020. See also International Centre for Settlement of Investment Disputes Arbitration Rules, Art 39.
- 36 Andrea Utasy Clark, 'International arbitration: selection of the arbitral tribunal' (Pinsent Mason 16 December 2019) www.pinsentmasons.com/out-law/analysis/international-arbitration-selection-of-the-arbitral-tribunal accessed 6 September 2020.
- 37 Elizabeth Kantor (Herbert Smith Freehills LLP), 'Emergency Arbitration of Construction Disputes – Choose Wisely or End Up Spoilt for Choice' (Kluwer Arbitration Blog, 15 February 2017) <http://arbitrationblog.kluwerarbitration.com/2017/02/15/emergency-arbitration-construction-disputes-choose-wisely-end-spoilt-choice> accessed 9 September 2020.
- 38 *Ibid*.
- 39 *Starlight Shipping v Tai Ping Insurance I* [2007] EWHC 1893.
- 40 *ZCCM Investments Holdings v Kanasanishi Holdings Plc and another* [2019] 1285 (EWHC Comm).
- 41 *Ibid*.

42 US courts have tended to favour enforcement on the basis that judicial enforcement of provisional measures is important to safeguard the efficiency of arbitration. See Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 2513, 2523; B Baigel, 'The Emergency Arbitrator Procedure Under the 2012 ICC Rules: A Juridical Analysis' (2014) 31(1) *J Int'l Arb*, 17; A A Santens and J Kudrna, 'The State of Play of Enforcement of Emergency Arbitrator Decisions' (2017) 34(1) *J Int'l Arb*, citing Blue Cross Blue Shield of Michigan. Medimpact Healthcare Systems [2010] ED Mich WL 2595340 and *Draeger Safety Diagnostics v New Horizon Interlock* [2011] ED Mich WL 653651.

43 N Variyar, 'Tribunal Ordered Interim Measures and Emergency Arbitrators: Recent Developments Across the World and in India' (2015) 4(1) *Indian Journal of Arbitration Law*, 38–39.

44 *Ibid*, p 245.

45 Federal Ministry of Works Published Standard Conditions of Contract.

46 *Ibid*.

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Simon Ejiiofor Ossai MCI Arb, CMIO SH, FIIRSM, FRSPH is a consultant at Epinots in London, United Kingdom and can be contacted at s.ossai@epinots.com.



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Duties to warn, advise and provide information: a comparative study of the obligations of contractors and design professionals in French and English law

Philip Lawrenson

Senior commercial manager, Jacobs

In French law, the duty to provide information is a longstanding principle, widely developed through case law. It was not until the French government amended the Civil Code in 2016 that the duty was afforded greater prominence by making it an independent provision. This article undertakes a comparative analysis of the far-reaching duty that exists within the construction sector in France with the current position on the same subject in English law. It argues that notwithstanding certain distinctive legal and cultural nuances, the two legal systems share underlying principles relating to the duty to warn, notify and advise.

Introduction

Parties to a construction project are potentially at risk of a claim that it is in breach of a duty to warn.

In French law, while the duty to inform already substantially existed as a result of judge-made rulings, it was not until the French government amended the French Civil Code in 2016 (the ‘Reform’)¹ that greater prominence was afforded to the now autonomous duty to inform by enshrining in the Code a general duty to provide information (*devoir d’information*) during pre-contractual negotiations.

Article 1112 provides that negotiations must mandatorily satisfy the requirements of good faith. Article 1112-1 states:

‘The party who knows information which is of decisive importance for the consent of the other, must inform him of it where the latter legitimately does not know the information or relies on the contracting party.

‘However, this duty to inform does not apply to an assessment of the value of the act of performance.

‘Information is of decisive importance if it has a direct and necessary relationship with the content of the contract or the status of the parties.

‘A person who claims that information was due to him has the burden of proving that the other party had the duty to provide it, and that the other party has the burden of proving that he has provided it.

‘The parties may neither limit nor exclude this duty.

‘In addition to imposing liability on the party who had the duty to inform, his failure to fulfil the duty may lead to the annulment of the contract under the conditions provided by articles 1130 and following.’²

The duty to inform has been described as ‘an essential principle for ensuring balance in contractual relations’³ and illustrates the moral vision of contract shared by many French lawyers in that parties should refrain from behaving selfishly.⁴

This strategy is in contrast with the approach in English law, where ordinarily, no accountability results if a party fails to reveal information to the other throughout pre-contractual negotiations. The nonexistence of any general disclosure duty is based on the premise that pre-contractual negotiations between parties are carried out at arm’s length. Parties are presumed to serve only

their own interests and information known to one party but not the other may be commercially advantageous to the party holding the information.

However, during the performance of the contract, the situation in English law is different. Ordinarily, there is a duty on participants to a construction contract to warn of defects or dangers in the works or proposed working methods. There are two principal sources for this duty: contractual obligations – construction contracts will usually convey an obligation to carry out work or discharge obligations with reasonable skill and care;⁵ and common law obligations arising in tort, which may impose a duty to warn against hazards to life, limb or property.⁶

In these early introductory statements, reference has already been made to the varying terminology used within both the French and English construction sectors, those being: ‘duty to inform’, ‘duty to warn’, and ‘duty to advise’. It is worth briefly considering the distinctions from the outset. Linguistically, the Cambridge online dictionary provides us with the following definitions: *information* is defined as ‘facts about a situation, person, event, etc.’⁷ Whereas the verb *to warn* is ‘to make someone aware of a possible danger or problem, especially one in the future’.⁸ Finally, the verb *advise* is ‘to tell someone that they should do something’.⁹

In everyday parlance, the verbs are interchangeable according to the situation, and will be used so throughout this paper. However, it is reasonable to attach ‘warn’ to situations relating particularly to safety. In the legal context, there is little by way of clear distinctions between either inform, advise or warn as pointed out by Malaurie et al.¹⁰

The modernisation of the French Civil Code (law of contract) and the codification of duty of information

For many French citizens, the Civil Code (often called the *Code Napoléon* after the First Consul when it was promulgated in 1804) has a central role in French society as well as in French law, and enjoys a cultural significance as well as a legal one.

This section is concerned with the modernisation of the section of the Civil Code on the law of contract. It will consider specifically Article 1112-1 of the newly

codified provisions that came into force on 1 October 2016,¹¹ which imposes a duty to provide information (*devoir d'information*) during pre-contractual negotiations.

For context, it is necessary briefly to clarify the reasons for the reforms and consider the main changes relating to *devoir d'information*. It was apparent that the 1804 Code was no longer an accurate reflection of the law of contract implemented by French courts. Broad judicial interpretation over 200 years resulted in an ever-expanding separation with the body and context of the Code. It was considered that this disconnect was in part responsible for the loss of influence of the French Civil Code internationally. French contract law was additionally observed to be less appealing than some common law administrations as a ruling law of choice in international contracts. The intention was that modernisation would make it more competitive internationally.

The new Civil Code (law of contract)

The Introductory Provisions of the new Code declare three very general propositions: freedom of contract (Art 1102), the binding force of contract (Art 1103) and that 'Contracts must be negotiated, formed and performed in good faith' (Art 1104).¹² Article 1102 states: 'Everyone is free to contract or not to contract, to choose the person with whom to contract, and to determine the content and form of the contract, within the limits imposed by legislation.'¹³

Freedom of contract is an abiding principle in French law. Nevertheless, its importance was overlooked in the original Code in which it did not appear. It is now installed as the first rule following the definition of contract (Art 1101) to emphasise its importance.¹⁴

In a similar vein, the new Code now formally recognises the binding force of contracts: 'Contracts which are lawfully formed have the binding force of legislation for those who have made them',¹⁵ meaning that agreements must be honoured.

Regarding good faith, it is widely known that English law provides a marked contrast to the position adopted under French law.¹⁶ While the English law of contract embraces freedom of contract and the binding force of contract, it does not assent to accept a general principle of good

faith.¹⁷ Good faith is thought to be incompatible with the relative roles of contracting parties whose interests oppose each other (adversarial rather than collaborative), particularly in the context of contractual negotiations.¹⁸ Whittaker's position is that the 'principles of freedom of contract and the binding force of contracts should not face any counter-principle. Instead, the courts must justify any exceptions to their application in the particular context, in the absence of a legislative decision to do so.'¹⁹ As Moore-Bick LJ stated in rejecting the comments of Leggatt J at first instance,

'The better course is for the law to develop along established lines rather than to encourage judges to look for what the judge, in this case, called some "general organising principle" drawn from cases of disparate kinds [...] There is [...] a real danger that if a general principle of good faith were established, it would be invoked as often to undermine as to support the terms in which the parties have reached agreement.'²⁰

In other words, the black letter provisions of the contract must come first.²¹

Pre-contractual duty of information

While in French law, the duty to inform was already well established by case law, in the context of pre-contractual negotiations, Article 1112-1 gave *devoir d'information* enhanced significance by making it an independent and separate duty.²²

A general duty to provide information operates seamlessly alongside good faith.²³ Nevertheless, the Report to the President affirms that this new pre-contractual information duty is independent in relation to good faith.²⁴ Despite this prominence, it has been suggested that the effectiveness of this duty has been diminished. The Report to the President of the Republic presents this requirement as a 'matter of public policy',²⁵ which appears to reinforce the importance attributed to the duty. However, Article 1112-1(5) does not declare that the duty to provide information is a matter of public policy, (unlike good faith at Art 1104). Rather, it states that a duty to provide information duty cannot be limited or excluded, which might be considered a slightly weaker obligation.

GENERALITY

On closer inspection, the generality of the pre-contractual duty of information, becomes questionable. A pre-contractual duty of information will arise if one party has information that the other can legitimately ignore, or if one party legitimately relies on the other to provide information. French law, therefore, accepts that parties at the time of pre-contractual negotiations may not be on an equivalent informational basis. While such a duty may exist in certain circumstances, it does not necessarily follow that it is a general duty in the context of it being the status quo in most cases. The requirement established for the existence of the duty is significant. It follows that the pre-contractual duty of information may be less beneficial than intended.

Features of Article 1112-1

EXISTENCE OF DUTY

For a pre-contractual duty of information to exist, two fundamental circumstances must be present: (1) one party has knowledge of information (the ‘information-giver’) which is of decisive importance; and (2) the other party is legitimately ignorant of the information or relies on the information giver to provide it (the ‘recipient of the information’).

DECISIVELY IMPORTANT INFORMATION

Article 1112-1 is quite precise about when a negotiating party is under the duty of information. It states: ‘Information is of decisive importance if it has a direct and necessary relationship with the content of the contract or the status of the parties.’²⁶

NATURE OF DUTY

What defines a breach of Article 1112-1 and the consequent liability incurred is now considered. In the absence of an intention to fraudulently deceive,²⁷ a breach of a general pre-contractual duty of information will therefore equate to either a negligent omission to inform, or to have negligently provided incorrect or inaccurate information.²⁸

REMEDIES

Recognising that a breach of the duty of

information can follow either a negligent provision or a negligent omission will assist in the understanding of the remedies attached to this article of the Code and their association with Article 1130ff.

In the event of a breach of the duty, the due recipient of the information may claim damages; such an event may occur when the party who was under an obligation to provide the information has either negligently omitted to present the information at all, or has given it, but in a negligent fashion, that is, given incorrect or inaccurate information.

Article 1112-1(5) states that a duty to provide information duty cannot be limited or excluded

If the negotiations subsequently fail as a result of such a breach to the extent that no contract is concluded, the beneficiary or due recipient of the information is able to bring a claim for damages restricted to wasted incurred costs and the loss of opportunity.

Should a breach of the duty of information occur, and the parties have reached an agreement (contractually), the potential remedies are greater, in that the claimant (recipient of the information) can claim damages and also have the contract annulled. Prima facie, the scope of the pre-contractual duty of information is considerable. However, the claimant can claim nullity only if the provisions of Article 1130ff are met, that is, by demonstrating that the negligent failure to provide information, or the negligently provided information, had induced a mistake.

As observed by one legal academic:

‘Once you start thinking about it, this might not be so easy to prove: an intended recipient of information has to demonstrate that she should have received the information, with which she would not have concluded the contract, or only on different terms, and since the information was not received, she made a mistake. In other words, in order to annul the contract, the claimant has to prove the existence of the duty, the breach and the mistake. In my view, this difficult evidential obstacle may mean that in practice bringing claims for breach of an information duty make it less useful than it at first appears. If there is any overtone of fraudulent information-giving or fraudulent concealment, such a breach falls under article 1137 on fraud. Either

there was an intention to deceive, or there was not. It is axiomatic that negligently given information cannot become or turn into something fraudulent.’²⁹

It might be considered that negligent misrepresentation under English law is more protective than the pre-contractual duty of information provision established in the Civil Code, subject to an important reservation regarding when misrepresentation is generated since within English law a general pre-contractual duty of information does not exist.

It is given that a claim for negligent misrepresentation can arise under the Misrepresentation Act 1967³⁰ (damages) or at common law (rescission) whereby inaccurate information has negligently been given and a contract concluded. The comparison between French Civil Code and English law can only be made in circumstances whereby the information has positively been given (albeit negligently), as opposed to the negligent failure to provide information. Under English law, the claimant does not need to prove a mistake to rescind the contract. Under English law, the claimant asserting a misrepresentation must only demonstrate that the pre-contractual information received is inaccurate or incorrect, and that when concluding the contract he substantially relied on it.

If it can be established that either a negligent, or even an innocent, misrepresentation has been given, then the claimant (the recipient of the information) can rescind the contract *and* seek for damages under the Misrepresentation Act 1967.

In reality, the courts do not always rescind the contract in such circumstances but may instead award damages in lieu if it is equitable to do so.

It can therefore be seen that under English law there is no requirement to establish that the misrepresentation induced a mistake (although this might be the case). The requirement to positively provide true and accurate information is one of strict liability. This is important from a comparative position. Having considered the restrictive conditions, the evidentiary difficulties associated with establishing a pre-contractual duty of information and the need to identify a mistake, in order to be able to claim an annulment of the contract under the new Code, it is, therefore, questionable that the new pre-contractual

duty of information under French law is as protective as initially intended.

COMPARISON WITH OTHER SYSTEMS

By comparison to the laws of other European countries, the recognition of a general duty of information is uniquely French. It is a truism that all continental legal systems acknowledge the presence of a pre-contractual obligation to inform, but by means of the requirement of good faith in pre-contractual negotiations, rather than by establishing a legal duty independent of good faith as is the case under the new French Civil Code. The contrast is clearly even starker with the position under English law, which does not accept any general pre-contractual duty of information.³¹

Duty to warn, inform and advise in English law

In English law no pre-contractual duty of information or disclosure exists. ‘Silence is golden, for where there is no obligation to speak, silence gives no hostages to fortune.’³² However, during the *performance* of a construction contract there commonly exists obligations to warn of design defects, unsafe working methodologies, or other dangers to life, limb or property.

It is given that many standard building contracts impose contractual obligations on contractors by way of discrepancy clauses.³³ However, this section is largely concerned with the circumstances in which such duties are *implied* in construction contracts.

Who has a duty to warn?

CONTRACTORS

Duty to warn proceedings involving contractors have usually been determined by restricting the contractor’s obligations to their workmanship obligation. The accepted benchmark for such a duty is that of an ‘ordinary competent contractor’ to undertake the works with ‘reasonable care and skill’.

In the case of *EDAC v Moss*³⁴ HHJ Newey QC held there to be an implied term that the contractor, either as a result of experience or on examination of drawings, would warn of design defects as soon as they came to believe that they existed.

The same judge in *Lindenberg v Joe Canning and Ors*³⁵ found that a reasonably competent contractor would have warned the employer that the plan was defective.

In the case of *Plant Construction v Clive Adams Associates (first defendant) and JMH Construction (second defendant)*³⁶ the claimant, Plant, contracted with Ford Motor Company to construct pits for engine mounts at its research, development and engineering centre. Ford's own engineer ignored JMH's design proposal and instead instructed JMH to place temporary propping in specified positions to support the roof trusses. As competent engineers and contractors, both Clive Adams and JMH realised that the props were woefully inadequate but proceeded as per the instructions of the owner. Following heavy rain, the roof subsequently collapsed, entirely due to the inadequacy of the temporary supports.

It was held that JMH had an obligation to alert Plant that the system proposed by Ford's engineer was inadequate as part of its implied contractual duty of reasonable care and skill. To discharge this duty, it should have 'protested more vigorously'.

In his judgment May LJ said:

'These temporary works were, to the knowledge of JMH (sub-contractor), obviously dangerous to the extent that a risk of serious personal injury or death was apparent. JMH were not mere bystanders and, in my judgment, there is an overwhelming case on the particular facts that their obligation to perform their contract with the skill and care of an ordinary competent contractor carried with it an obligation to warn of the danger which they perceived.'

The slightly later decision in *Aurum Investments Ltd v Avonforce Ltd*³⁷ emphasised that it must be reasonable to impose a duty to warn in the circumstances.

Professional consultants

A professional consultant's involvement in a construction project might be from the early design concept through to the end of the defects liability period. It is entirely possible that the consultant might have an overarching role that involves approving the contractor's proposals for the design of temporary and permanent works. This makes professional consultants particularly exposed to a claim that it has breached a duty to warn. As a

competent professional with an advisory role, its obligation to apply skill and care may be interpreted widely.

The duty to warn usually arises in respect of errors in design and methods of working. Generally, case law shows that the duty extends only to dangers to life, limb or property.

Ordinarily, a design professional may be held accountable for permanent works, whereas the building contractor is accountable for its method of working and temporary works.

The leading case of *Goldswain v Beltec Limited*,³⁸ involving a professional engineer's duty to warn on temporary works, Judge Akenhead considered five guiding principles regarding the duty to warn:

'(a) Where the professionals are contractually retained, the Court must initially determine what the scope of the contractual duties and services were. It is in the context of what the professional person is contractually engaged to do that the scope of the duty to warn and the circumstances in which it may in practice arise should be determined.

(b) It will, almost invariably, be incumbent

The courts do not always rescind the contract... but may instead award damages in lieu

upon the professional to exercise reasonable care and skill. That duty must be looked at in the context of what the professional person is engaged to do. The duty to warn is no more than an aspect of the duty of a professional to act with the skill and care of a reasonably competent person in that profession.

(c) Whether, when and to what extent the duty will arise will depend on all the circumstances.

(d) The duty to warn will often arise when there is an obvious and significant danger either to life and limb or to property. It can arise however when a careful professional ought to have known of such danger, having regard to all the facts and circumstances.

(e) In considering a case where it is alleged that the careful professional ought to have known of danger, the Court will be unlikely to find liability merely because at the time that the professional sees what is happening there was only a possibility in future of some danger; any duty to warn may well not be

engaged if all there is, is a possibility that the contractor in question may in future not do the works properly.

The kind of hazard or risk about which the professional designer has a duty to warn depends on its contractual obligations and the scope of services it is providing.

In *Hart Investments Limited v Fidler*,³⁹ it was held by the court that an engineer had an obligation to warn the contractor and the client in respect of the inadequacy of the temporary works solution. The engineer was employed in connection with the permanent construction works, which included an implied duty to inspect the permanent structural works and also included a duty to warn ‘if it observed a state of temporary works that was dangerous and causing immediate peril to the permanent works’.⁴⁰

Case law provides that the duty to warn obligation extends to other professional consultants. *Chesham Properties v Bucknell Austen Project Management Services and Ors*⁴¹ considered to what extent the duty to warn obligation concerning other professionals applies. In this case,

The kind of hazard or risk about which the professional designer has a duty to warn depends on its contractual obligations and the scope of services that it is providing

Chesham made allegations of professional negligence against its project managers and other members of its professional design team. Chesham asserted that its project managers owed them a duty to warn of actual or potential deficiencies in the performance of the architect, engineer and/or quantity surveyor.

In his judgement, HHJ Hicks QC held that: ‘The Project Manager was under a duty to inform their Client (Chesham) of actual or potential deficiencies in the performance of others. This arose out of its contractual obligation to “implement all monitoring procedures including the performance of consultants.” Monitoring in such a context could not sensibly be confined to passive observation only; it must include reporting to the principal on the performance being monitored by reference to the standards that should be achieved.’

However, where a claimant made a similar allegation as in the case of *Royal Brompton Hospital NHS Trust v Hammond (No 7)*⁴², the Judge found that it was not part of the Project Manager’s duty to second-guess the decisions of the Architect.

Duty to warn in tort

When parties are not in contract, duty to warn obligations are limited. In the case of *Cleightonhills v Bembridge Marine Ltd & Ors*,⁴³ a case involving severe injuries to an employee and where several third parties were sued, Akenhead J stated:

‘In conclusion on this topic, I consider that an obligation to warn may arise in the context of a tortious duty of care, certainly in the case of a danger to people, known to exist by the person who it is said should be giving a warning. This will depend on all the facts and the circumstances, including what function and role the person said to be required to warn is fulfilling. All other aspects of the law relating to whether duties of care exist at all and the scope of such duties apply to the issue of whether warnings should be given. It is at least possible that where someone is charged, contractually, with an obligation to ascertain or check whether designs or works are safe for human beings, his or her tortious duty of care may extend to warning or advising about inherent dangers of which he or she should have been aware.’

In *Stagecoach South Western Ltd v Hind*,⁴⁴ Coulson J was concerned with the accountability of a tree surgeon (who was retained by the land owner) following the collapse of a tree onto a railway track. It was argued that the tree surgeon should have realised that there was a danger of the tree collapsing and owed a duty to warn to the claimant. In addressing the duty to warn, Judge Coulson said:

‘However, it does not seem to me that such a duty arises on the facts of this case. First, the “duty to warn” cases all arise in the context of a contractual relationship: there are no reported cases in which this kind of duty to warn is said to arise in tort, owed to a third party. There is no reason, either on the facts or as a matter of policy, to extend the duty in this case, particularly as [defendant] was a contractor, not a professional. That conclusion may be another way of expressing the conclusion I have reached above about the absence of sufficient proximity.’

Conclusions

In French law, the duty of information imposes obligations on the client to thoroughly appraise the building contractor about the project in terms of its precise deliverables, specifications, requirements to be achieved and general purpose. However, the extent of this duty needs to be nuanced. The courts will always attempt to reach a balance when considering the parties' responsibilities. It is widely accepted and non-controversial that an experienced and competent building contractor would always seek to establish all relevant information, especially where the client is inexperienced in the particular type of project to be undertaken.⁴⁵ In all situations, the building contractor must carry out appropriate enquiries about the requirements of the employer and the purpose of the project.⁴⁶ Furthermore, the position established by case law is that the pre-contractual duty of information imposed on one party does not exempt the other party from discharging its responsibility of care and prudence. As pointed out by Rosher, the 'French courts have even considered that the duty of using reasonable skill and care may result in an obligation to search for information and advice.'⁴⁷

Legal systems are derived from legal theories, heritage and cultures. The difference between French contract law and the English legal system on the approach to the application of a pre-contractual duty of information at contract formation is an example of this reality.

As discussed, French law embraces an overarching principle that, as a matter of public policy, the parties negotiate, form and perform their contracts in good faith. Autonomous to good faith is the newly codified provision of a pre-contractual duty of information that 'must mandatorily satisfy the requirements of good faith'.⁴⁸ Under English law, however, there is no such pre-contractual duty of information, often referred to as disclosure, nor is there recognition of a general guiding principle of good faith, which was unequivocally rejected by Lord Ackner in *Walford v Miles*⁴⁹ in which he famously said 'the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations'.

Notwithstanding the foregoing, several comparative elements appear. First, both systems recognise the important principles of freedom of contract and the binding force of contract; second, both espouse the value of contractual certainty.

French law has culturally forced on parties a greater degree of contractual loyalty. Pre-contractual duty of information is an aspect of such loyalty and follows in this tradition. Sensitive to perceived inequality of control between contracting parties, French law endeavours to guard a contracting party whom it regards as vulnerable so as to restore the status quo.

The modernisation of the Civil Code has achieved its stated objective of making French contract law more practicable and user-friendly. Its text is undoubtedly a more comprehensible, contemporary and reliable account of contract law in the 21st century. The codification of legal principles established in case law has achieved enhanced contractual certainty. No longer does one need to trawl through masses of case law developed over two centuries to understand the code.

However, while the new legislation introduces a fresh equilibrium between the contracting parties, and enhances accessibility and legal certainty in contract, it does not radically change the state of the law in this area; nor does it upset dramatically the traditional philosophical foundations of the law of contract. The reform looks more like a tidying-up operation rather than a far-reaching transformation of the law. Therefore, it is questionable whether the new law, which was also intended to increase France's attractiveness against the background of a world market dominated by the common law, will keep its promise.⁵⁰

In general, the duty to inform, advise or warn in French contract law is more onerous and far-reaching than English law in the fact that due to the pre-contractual nature of the obligation that exists in French contract law, attention is sometimes drawn to the inaction or failure of the construction client. This is not the case in English law, where claims for breach of such duties are generally directed towards contractors or professional consultants during or after the performance of the contract.

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- 5 *Goldswain and Hale v Beltec Ltd* [2015] EWHC 556 TCC, 159 Con LR 46.
- 6 *Cleightonhills v Bembridge Marine Ltd & Others* [2012] EWHC 3449 (TCC).
- 7 Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/essential-british-english> accessed 7 June 2020.
- 8 *Ibid.*
- 9 *Ibid.*
- 10 Relating to the French *obligation d'information*, a variety of terms are sometimes used, including *obligation de renseignement*, which is relevant to the supply of information as opposed to advice; *obligation d'avertir*, which is used in the context of warnings against possible dangers; and *obligation de conseil*, which is utilised for advice. Notwithstanding the foregoing, there are no fixed distinctions between them. P Malaurie, L Aynès and P Stoffel-Munck, *Droit civil: les obligations*, (2nd edn) (Defrénois 2005), 251–52, as cited in J Bell, S Boyron and S Whittaker, *Principles of French Law* (2nd edn, OUP 2008) 309.
- 11 See n 1 above.
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- 17 See, eg, Sir Rupert Jackson, 'Does good faith have any role in Construction Contracts?' *Society of Construction Law*, January 2018, 207.
- 18 *Walford v Miles* [1992] 2 AC 128, HL.
- 19 Simon Whittaker, 'Contracts, Contract Law and Contractual Principle' in John Cartwright and Simon Whittaker (eds), *The Code Napoléon Rewritten: French Contract Law after the 2016 Reforms* (Hart 2017) 45.
- 20 *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789. Leggatt J had developed a view supportive of good faith in *Yam Seng Pte v International Trade Corp Ltd* [2013] EWHC 111 (QB).
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- 23 Ruth Sefton-Green, 'Formation of Contract: Negotiation and the Process of Agreement' in John Cartwright and Simon Whittaker (eds), *The Code Napoléon Rewritten: French Contract Law after the 2016 Reforms* (Hart 2017) 61.
- 24 See n 22 above.
- 25 *Ibid.*
- 26 *Ibid.*
- 27 Fraudulent deceit is a provision in the Civil new Code at Art 1137 (*réticence dolosive*). Although briefly mentioned here, it is beyond the scope of this article.
- 28 See n 22 above.
- 29 See n 23 above, at 64.
- 30 Misrepresentation Act 1967 s 2(1).
- 31 See n 18 above.
- 32 Lord Justice Rix in *ING Bank NV v Ros Roca SA* [2012] 1 WLR 472 at 92.
- 33 See, eg, the JCT SBC/Q 2016 Contract clause 2.15. However, such clauses impose a duty to notify (in the event of becoming aware of) rather than a positive duty to find.
- 34 *Equitable Debenture Assets Corporation v Moss* (1984) 1 Const L J 131.
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- 36 *Plant Construction Plc v Clive Adams Associates and JMH Construction Services Ltd* [2000] BLR 137 EWHC Tech 119.
- 37 *Aurum Investments Ltd v Avonforce Ltd and ors* [2000] 2 All ER 385.
- 38 *Goldswain and Hale v Beltec Ltd* [2015] EWHC 556 TCC, 159 Con LR 46.
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- 41 *Chesham Properties v Bucknell Austen Project Management Services and Ors* [1997] 82 BLR 92.
- 42 *Royal Brompton Hospital NHS Trust v Hammond (No 7)* 76 Con LR 148.
- 43 *Cleightonhills v Bembridge Marine Ltd and Ors* [2012] EWHC 3449 (TCC), 78-79
- 44 *Stagecoach South Western Ltd v Hind* [2014] EWHC (TCC)
- 45 *Cass 3e civ*, 3 November 2011, no 09-13.575. After undertaking works on a residential property, the client asserted that the building contractor was culpable for defects, particularly relating to the floor joists on the first floor, which prevented the property being fully used as intended. The *Cour de cassation* held that the building contractor should have made appropriate enquiries as to the final use of the project and advised the client on potential problems and the measures to be taken.
- 46 *Cass 3e civ*, 6 October 2010, no 09-68.989. This case related to the construction of a warehouse. The second floor was intended to be used to store heavy goods. The building contractor was not made aware of its intended use and constructed a floor incapable of withstanding the intended loads. Similarly, the *Cour de cassation* found that it was the duty of the building contractor to enquire as to the intended use and build accordingly.
- 47 Peter Rosher, 'Good faith in construction contracts under French law and some comparative observations with English law' (2015) *The International Construction Law Review*, 302.
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Philip Lawrenson is a senior commercial manager at Jacobs. He can be contacted at phil.lawrenson@jacobs.com.

FIDIC Contracts in Asia Pacific – A Practical Guide to Application

by Donald Charrett

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Reviewed by Kiri Parr, Vice-Chair of International Federation of Consulting Engineers (FIDIC) Contracts Committee, independent consultant and academic

In 2020 Dr Charrett published *The International Application of FIDIC Contracts* for which I wrote a review. At the end of that review I noted that ‘we should all keep our eyes out for future editions of this text as it keeps up with local changes in law and hopefully expands to include even more countries’.¹

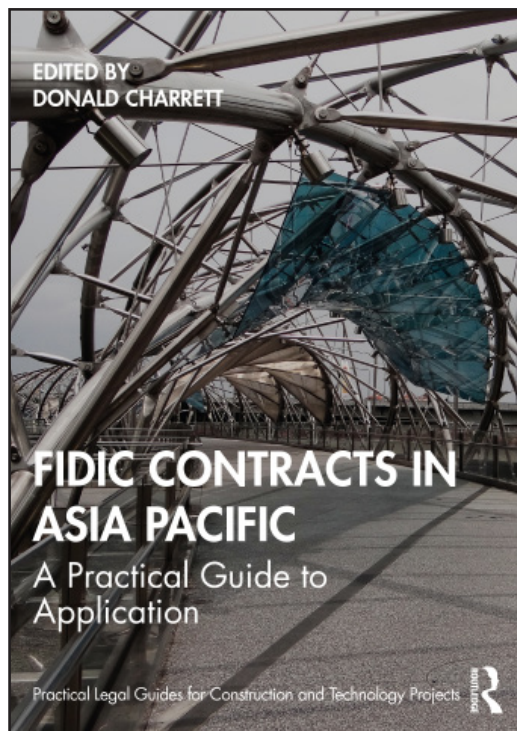
Well, Dr Charrett has demonstrated his industriousness by the publication, just a year later, of the next book in the series: *FIDIC Contracts in Asia Pacific*.

The book largely follows the same structure as the previous text, focusing on 16 countries across the Asia Pacific region: Australia, China, Fiji, Hong Kong, India, Indonesia, Japan, Malaysia, Nepal, Pakistan, Papua New Guinea, the Philippines, Singapore, Sri Lanka, South Korea and Vietnam.

The authors of each country chapter are all highly regarded and it is testament to the value of this book that it is so well supported by the region’s legal community. Their detailed jurisdiction-based analysis provides users of these contracts with an in-depth understanding of the legal issues that affect a contract’s interpretation and application, including in the areas of governing law and dispute resolution.

The subject matter of the book is clearly defined in the introductory chapter of the book as the standard form Conditions of Contract published by the *Federation Internationale des Ingeineurs–Counsels* (FIDIC), known in English as the International Federation of Consulting Engineers.

The introduction explores the FIDIC suite of contracts, the underlying drafting



principles and their operation across both common law and civil jurisdictions.

Chapter 2 explores one of the key contextual pieces for the FIDIC Contracts: the FIDIC Golden Principles. In short, these principles are the fair and equitable allocation of risk between the parties, clear definition of scope, duties, roles, rights and responsibilities, and contract documents that constitute a contract management manual for best practice international project execution. As Bill Howard, FIDIC President 2019–2020, points out in the foreword:

‘I am especially pleased to note that Donald has included in this book a chapter on the FIDIC Golden Principles. In the complex world global firms practicing in the infrastructure space, their clients and the various funding agencies they work with operate in, there is a need to delineate some basic principles regarding the use of FIDIC Conditions of Contract. These Golden Principles address this need, and we encourage everyone to follow. We firmly believe that following these five principles will dramatically increase the probability of a successful project. The principles are designed to protect everyone’s interests. We respectfully suggest that not following them can lead to serious project problems as well as negatively albeit unfairly impact the perception of FIDIC’s Conditions of

Contract. Thus, we strongly encourage everyone to follow them and, again, are pleased that Donald has featured them in the text.’

Each jurisdiction’s chapter specifically considers:

- the legal environment of that jurisdiction;
- the construction industry in that jurisdiction;
- the impact of Covid-19 on the execution of construction projects and the operation of construction contracts;
- the applicable legislation, if the governing law is of that jurisdiction, considering both constraints on the governing law of a construction contract and any formal requirements;
- which special provisions in the particular conditions are necessary for consistency with applicable laws;
- which special provisions are desirable for consistency with the applicable laws;
- applicable legislation if the governing law is of that jurisdiction;
- applicable legislation if the site/country is in the jurisdiction;
- applicable legislation if the ‘seat’ of the dispute or determination is of that jurisdiction;
- issues that a court or arbitrator may construe differently to that expected from the words of the contract because of local law or custom; and
- reference material.

The specific questions crafted by the editor and which are addressed for each jurisdiction provide a high level of consistency and discipline across the book, which highlights the value and importance of local knowledge and advice.

The sections on the construction industry in each jurisdiction are a new component.

They provide unique insight into the history and drivers of the construction industry in each country as well as the challenges they face. For example, the chapter on China’s construction industry discusses the uncertainty which has emerged since rules relating to the participation of foreign contractors in China were abolished in 2020.

As a sign of the times, each of the country summaries specifically covers the impact of Covid-19 on the execution of construction projects and the operation of construction contracts. A review of these sections reveals how the pathways through Covid-19 are varying greatly from country to country. Impacts of mobility of international expertise is a recurring theme and it is interesting to observe the wide range of government responses and interventions.

Overall, the detailed and exhaustive analysis of the law of each of the jurisdictions considered in this book provides an invaluable resource from which to approach the task of drafting or reviewing Particular Conditions to the FIDIC Suite of Contracts as well as to any other construction contract in that jurisdiction.

For construction lawyers practising in the Asia Pacific region, this book provides a ready guide and insight into the laws of the region.

I can highly commend this book on multiple levels – from its intention to provide a practical tool by which to draft the Particular Conditions to a FIDIC Contract to its secondary benefits providing invaluable insight into the operation of construction law and the context in which projects are delivered across the region.

Note

1 (2020) 193 *Australian Construction Law Newsletter* 58.

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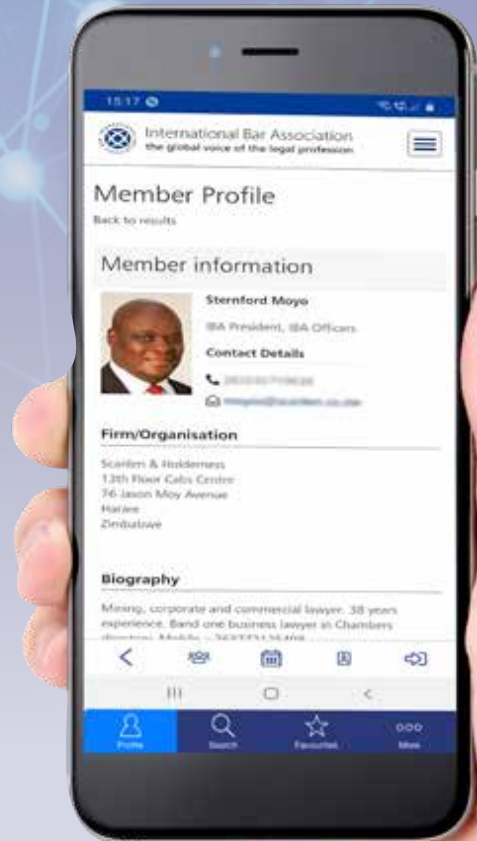
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eyeWitness to Atrocities begins with a simple vision: a world where the perpetrators of the worst international crimes are held accountable for their actions. As an initiative of the **International Bar Association (IBA)**, with the support from **LexisNexis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

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

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

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

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

The eyeWitness to Atrocities app is available to download for free on Android smartphones. For more information, visit www.eyewitnessproject.org, follow [@eyewitnessorg](https://twitter.com/eyewitnessorg) on Twitter or [Facebook](https://www.facebook.com/eyewitnessorg), or watch the eyeWitness [YouTube channel](https://www.youtube.com/channel/UC...).

