CONSTRUCTION LAW INTERNATIONAL

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

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Cover image: London's evolving skyline, including 22 Bishopsgate, the tallest tower in the City of London at 278m (912ft). Credit: moofushi/Adobe Stock

FROM THE EDITORS

Dear readers,

We are pleased to introduce the December 2022 issue of *Construction Law International*.

In this issue, we continue CLInt's series of diversity and inclusion questionnaires with a contribution from Hojung Jun, a senior associate in the Finance & Projects Group of Baker McKenzie, Singapore.

We also continue our 'FIDIC Around the World' series, with Sharon Vogel sharing her knowledge of the use of FIDIC contracts in Canada and Dr Götz-Sebastian Hök considering their use in Germany.

This issue also includes a look at recent cases and legislative development around the globe: Scott Stiegler, Rupert Coldwell and Rebecca Hilton examine the English Commercial Court's 2022 decision in *Union of India v Reliance Industries Limited*; Nuanporn Wechsuwanarux, David Beckstead and Phalintip Ueprapeepun consider a proposed law in Thailand that would introduce a regime of statutory adjudication proceedings for payment disputes under construction contracts; Shona Frame discusses the United Kingdom's Building Safety Act 2022, a very significant piece of legislation with wide-ranging implications for the construction industry; and Silvia Lazzeretti explains the Italian Court of Cassation's Decision No 17244 of May 2022, in which the court equated lack of appearance to waiver of the arbitration clause.

Moving to our feature articles, Sarah-Jane Fick and Jon Gilbert examine risk in energy transition projects, Scott Stiegler and Yasmin Bailey consider the effect of inflation on construction projects and Wala Al-Daraji provides a study of performance bonds and risk transfer in South African and English case law.

Finally, Bill Godwin KC provides a review of FIDIC Contracts in Europe (Charrett, ed).

We thank our contributors for their efforts and hope this edition provides enjoyable and informative reading. As always, we encourage all International Construction Projects (ICP) members to share your experiences and insights by submitting your articles to CLInt.submissions@int-bar.org.

We also take the opportunity to extend our best wishes for the holiday season.

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FROM THE CO-CHAIRS

We would like to start by thanking each and every one of you who attended the IBA Annual Conference in Miami. After a two-year hiatus, it was a pleasure to be together. Many things changed during the pandemic, and it was good to find that the things that make the IBA International Construction Projects (ICP) Committee special did not. Old friends picked up on conversations right where they left off and new friends joined right in.

As with prior conferences, the ICP Committee had the privilege of hosting five substantive sessions. Our sessions focused on infrastructure in developing countries; collaboration and alliance of agreements; sustainable project decommissioning; risk allocation on infrastructure projects; and ESG in the construction industry. Thanks to the efforts of the moderators and the speakers, each of the sessions was high quality, engaging and educational. Special thanks to all who participated in the sessions including: Aisha Nadar, James Banda, Ricardo Barreiro-Deymonnaz, David Beckstread, Evgeny Smirnov, Bill Barton, Thais Chebatt, Christian Johansen, Claus Lenz, Andreas Roquette, Doug Oles, Katherine Bell, Sarah Biser, Luli Hemmingsen, Tuomas Lehtinen, Bruce Reynolds, Julio Cesar Bueno, Roberta Downey, Rory Kirrane, Richard Shaban, Janet Walker, Aarta Alkarimi, Sara-Jane Fick, Doug Jones and Sarah Sinclair.

In addition to our educational sessions, we enjoyed our committee dinner and excursion. Our dinner had over 80 attendees and all enjoyed conversation and laughs in the warm air of the balmy Miami evening. It was an enjoyable event, as was our committee excursion, during which we viewed alligators and took an airboat ride through the Florida Everglades.

Our next opportunity to be together will be at our 8th Biennial Conference in Berlin on 16–18 March. We look forward to seeing you there. However, before we rush into 2023, we hope you have time to look back on the past year with family and friends, during the upcoming holiday season.

We wish you all happy holidays and a prosperous new year.

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Co-Chairs, IBA International Construction Projects Committee

Diversity Questionnaire

Hojung Jun
Senior associate, Baker McKenzie, Singapore

1. What is your name and current job, role or title?
My name is Hojung Jun and I am a senior associate in the Finance & Projects Group at Baker McKenzie Singapore, seconded from Baker McKenzie Tokyo since October 2022. I worked in Japan for nine years and in Korea for four years, specialising in construction, project development and acquisition in the energy, infrastructure and mining sectors.

2. When starting out in your career, did you have any role models?
Not really. I started my construction career as in-house counsel in 2010 at a major construction company in Korea, which is an affiliate of one of the world's largest steelmakers and was very much male-dominated at that time. I had a supervisor who was leading the international legal group and who remains a good mentor and friend, but I didn't really see her as my role model. I probably learnt the most about being a lawyer in this industry from the external counsel for the major deal I was working on at that time. As a second/third-year lawyer, I was given the opportunity to lead a AU$ 5–6bn deal in Australia where the external counsel was a former engineer turned construction lawyer. He taught me how to read the complicated Australian Standard forms of construction contracts and thousands of pages of scope of works and technical specifications, as well as the essentials of construction law. Thinking back now, I learned a lot from external counsel (not only him but others, too).

3. What advice did you receive which helped you progress in your career?
'Take any and all opportunities – you can always learn something, especially when you are a young lawyer.' I still keep this advice in mind and try to learn from anyone and anywhere. As I get older and more senior, it has been more difficult to be as bold as I was before, but I think all lawyers (probably all human beings) should be open to learning and continuously progressing.

4. Do you think that diversity is improving in your particular professional area?
When I started off in the construction industry in 2010, the majority of project managers and lawyers I encountered in negotiations and at the construction/operation sites were white males. But now I see more female professionals and professionals with diverse ethnic/cultural backgrounds. However, I still rarely seem to see senior female lawyers (particularly of colour) or construction managers in Japan and Korea. I am often still one of very few women, if not the only one, at a negotiation table or client meeting.

5. What positive steps have you seen organisations take to progress diversity and inclusion?
Mainly speaking of Japan, recently I've seen more women on executive boards, particularly those who grew within the organisation and newly appointed foreigners (ie, non-Japanese women) as outside directors specifically chosen for the purposes of diversity and inclusion. Many organisations have implemented policies and encouraged a culture to support working parents. Also, in terms of race/ethnicity and LGBTQ, many have implemented policies taking account of ethnic backgrounds and sexual orientation. This has helped to raise awareness and understanding of these issues and ensure they're more openly discussed compared to the early 2010s.

6. What aspects do you think are still ripe for improvement in organisations?
Despite the improvements mentioned above, there are still few senior female lawyers, executives and board members, especially in Japan and Korea. For women to be promoted to that level, candidates usually have to prove themselves a lot more than their male peers. Sometimes, their personality will be criticised or judged regardless of their performance and capabilities (eg, too strong/aggressive), whereas the same traits would have been perceived as positive in a male candidate (eg,

seen as taking the lead/initiative, making things done/happen). This issue may require changes in the workplace culture, but drastic change also requires top-down policies and managerial commitment to gender equality.

7. What are the indicators of when a reasonable diversity balance is reached?
Personally, I do not think this is only about having a certain number or percentage of women in senior/executive level positions. Of course, numbers and percentages are important to objectively measure the diversity balance, but in my view, diversity balance means fostering an environment where different opinions are heard and people in an organisation respect differences (ie, others with different backgrounds).

8. What do diversity and inclusion mean to you and why are they important?
Diversity and inclusion are important to me because of my background. I am a Korean national who qualified in New York and have worked and lived in various cities such as New York, Washington DC, Chicago, Champaign (Illinois), Seoul and Tokyo, to name a few. Growing up, I never thought I would be treated differently just because I am a woman and Asian or that I could not achieve as much as any man. However, having lived and worked in many places in the world as a foreigner, I have realised that women and Asians are expected to be mild, good listeners, reserved and are under-represented. Also, there are numerous expectations/stereotypes related to gender, race, nationality in society, which I do not agree with. I have been very active with a group called 'Women in Law Japan' (WILJ) and the Inclusion and Diversity Committee within Baker McKenzie Tokyo, where I chair sub-committees for working parents and race and ethnicity. Diversity and inclusion can mean many different things in different environments and for different people. I believe true diversity and inclusion is respecting each individual without trying to categorise or generalise any aspect of that individual.

9. What impact has the Covid-19 pandemic had on diversity in your professional area?
Due to restrictions on international travel, there is a significant lack of talent and diversity in general. Also, it is difficult to negotiate and resolve contracts, disputes and issues, which would have been agreed or resolved easily if we could meet the counterparts in person. For female professionals, the pandemic resulted in more housework and childcare duties, which sometimes resulted in female professionals leaving their firms.

FIDIC Contracts in Canada

Sharon C Vogel
Partner, Singleton Urquhart Reynolds Vogel, Toronto

1. What is your jurisdiction?
Canada. Constitutionally, Canada is a federation, comprised of ten provinces, three territories and the federal government. Each province or territory has its own statutes and common law (with the exception of the province of Quebec, which is a civil law jurisdiction). As a result provinces may have differing and/or conflicting interpretations of common law or statutory concepts. However, to the extent that the Supreme Court of Canada rules on a given issue, that ruling is binding on all provinces and territories.

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?
The FIDIC forms of contract are not widely or commonly used for Canadian construction projects. Instead, the standard forms most widely used across Canada include the Canadian Construction Documents Committee (CCDC) suite of contracts and the Canadian Construction Association (CCA) suite of contracts.

In addition, in relation to public-private partnerships (P3) in Canada, public agencies typically rely on their own template as a basis for creating project agreements for P3 projects.

3. Do FIDIC produce their forms of contract in the language of your jurisdiction? If no, what language do you use?
Yes. In Ontario, English is the official language and the most common business language. In Canada, both English and French are official languages; English is the most common business language in Canada, although French is predominant in the province of Quebec. The FIDIC forms of contract are available in both languages.

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?
No, there are no amendments needed in order for the FIDIC Conditions of Contract to be operative in Canada. However, provincial

and territorial construction lien legislation may modify the common law of construction contracts; for example, in provinces such as Ontario, Manitoba, and Saskatchewan, a construction contract is deemed to be amended in accordance with the relevant statute. Therefore, it is prudent to consider the relevant construction lien legislation, if any, in order to consider how the FIDIC Conditions of Contract may be modified by such legislation.

There are also various relevant statutory and/or regulatory requirements parties must comply with regarding, without limitation, occupational health and safety, building codes, and environmental protection. This is also consistent with the FIDIC suite of contracts – for example, the FIDIC Red Book provides that a contractor must comply with all applicable health and safety laws and regulations, and obtain permits, licences, and/or approvals as required by law.

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?

Because the FIDIC suite of contracts is not widely used in Canada (as noted at Question 2 above), there are no amendments that are common in Canada, either nationwide or specifically with respect to a particular province or territory. To the extent parties wish to employ the FIDIC suite of contracts on a Canadian project, they would be well advised to consult local counsel on the extent to which the FIDIC form of contract will be deemed to be amended as a result of applicable legislation (discussed in more detail at Question 4 above).

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)?

Given the rarity with which the FIDIC suite of contracts is used in Canada, there is no specific authority with respect to whether, and to what extent, Sub-Clause 2.5 is a condition precedent to employer claims. As a result, there has been no judicial consideration of this provision – particularly with respect to what it means for an employer to give notice of its intention to claim 'as soon as practicable', nor what constitutes sufficient particulars for the purpose of such notice.

However, Canadian jurisdictions have developed a robust body of case law in respect of the common law of notice. Generally speaking, Canadian law construes notice provisions narrowly and strictly, insofar as a court is unlikely to overlook a claimant's failure to give notice within the time prescribed in the construction contract, and unlikely to overlook a failure to give notice in accordance with the form prescribed by the contract. Canadian courts are also generally skeptical of the argument that compliance with the strict language of notice provisions can be waived by the parties' conduct.

Where the wording of the notice provision is ambiguous with respect to the requirements for the timing and/or form of the notice, in rare cases the courts have found that constructive notice was given (eg, in the form of meeting minutes). However, such cases are highly uncommon, given that construction contracts in Canada are usually clear with respect to the timing and substance of a valid notice.

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)?

As noted above, given the rarity with which the FIDIC suite of contracts is used in Canada, there has been no authority or judicial consideration specifically with respect to whether, and to what extent, Sub-Clause 20.1 is a condition precedent to claims for additional time and/or money.

Notably, the Canadian common law of notice applies with equal force to contractor claims as it does to employer claims. As a result, the commentary under Question 6 above also applies here.

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?

As explained in response to Question 7, there has been no authority or judicial consideration in Canada with respect to whether, and to what extent, Sub-Clause 20.1 is a condition precedent to contractor claims for additional time and/or money. This is equally true as it relates to contractor claims arising from variations.

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 review boards and/or dispute adjudication boards are becoming increasingly common as an interim dispute resolution mechanism on certain larger construction projects in Canada (eg, infrastructure projects), although they are not yet used as a matter of course. It is more common for a Canadian construction contract to provide for an intermediate stage of dispute resolution before the independent certifier or consultant, in relation to which the contract will typically provide that their decisions are interim. However, particularly in Ontario on P3 projects, dispute review boards and/or dispute adjudication boards are starting to be used and it is possible they will become a standard feature of Canadian construction contracts over the coming years.

In any event, given that dispute review board decisions are not binding, there are no mechanisms by which to enforce such decisions. However, they are often used as a reasoned basis upon which the parties conduct settlement negotiations and avoid the need to pursue binding dispute resolution.

By contrast, given that dispute adjudication board decisions are interim binding, a construction contract that provides for such a board will commonly allow parties recourse to the courts for injunctive relief (ie, in the form of a court order mandating compliance with the dispute adjudication board's decision until the next stage of dispute resolution is concluded).

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?

Arbitration may be used as the final stage of dispute resolution for construction projects across Canada, although this depends on the wording of the construction contract. For example, on large projects, the contract may provide that arbitration is the final stage of dispute resolution, or it may provide the parties to the contract with the ability to choose between arbitration or litigation as the final stage of dispute resolution.

It is rarer in Canada for a construction contract to expressly provide that arbitration is an intermediate stage followed by litigation. However, it bears noting that some domestic arbitration legislation in Canada provides for limited appeal rights from arbitration as default. For example, in Ontario, the Arbitration Act 1991 provides that unless a contract states otherwise, the parties to the contract may appeal an arbitral award on a question of law provided they obtain leave of the court. In that regard, parties must be careful in drafting a construction contract to consider the possibility of appeals from arbitration. By contrast, this ability to appeal does not exist in international arbitration legislation in Canada, given that such legislation is invariably based on the UNCITRAL Model Law.

Insofar as arbitration is used on construction projects in Canada, it is typically ad hoc rather than institutional. It is also uncommon for a construction contract to stipulate the procedural law that will apply to an arbitration. More commonly, the parties will discuss and agree to the applicable procedural law as part of a procedural order after they have initiated the arbitration. In that regard, construction arbitrations in Canada frequently rely upon institutional rules (such as the UNCITRAL Arbitration Rules or the ADR Institute of Canada's Arbitration Rules), supplemented by the *IBA Rules on the Taking of Evidence in International Arbitration*, all of which is typically subject to the discretion of the arbitral tribunal to vary the procedural rules as appropriate.

With respect to the applicable seat, the arbitration is almost invariably seated in the jurisdiction in which the project is situated. It is very uncommon in Canada for a construction arbitration to be seated elsewhere.

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

No. Perhaps because of how rarely the FIDIC forms of contract are used in Canada, there have been only a handful of reported court decisions in which the FIDIC forms were even referenced. Of those decisions, none have interpreted the FIDIC contracts in any depth.

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?

If parties are considering the use of the FIDIC suite of contracts on a project in Canada, they should be mindful of applicable lien legislation and the extent to which it modifies construction contracts and/or creates additional prompt payment obligations and statutory adjudication regimes.

In Ontario, for example, the applicable lien legislation provides that all construction contracts are deemed to be amended to conform with the terms of the lien legislation. As a result, certain terms of a FIDIC contract may be modified notwithstanding the parties' intentions. This proposition is particularly important as it relates to prompt payment and statutory adjudication.

As it relates to payment, the FIDIC Red Book provides for a payment process whereby a contractor provides an application for payment to the project engineer, who must issue an Interim Payment Certificate (IPC) to the employer within 28 days. The IPC will identify the amount which the engineer considers due and owing to the contractor. Thereafter, the employer must pay the contractor the amount certified in the IPC within the period stated in the contract. If the contract is silent, the employer must pay within 56 days. Furthermore, the Red Book is silent in relation to the timeline for payment of subcontractors, sub-subcontractors, etc.

By contrast, under Ontario's lien legislation, an employer must pay a contractor within 28 days following receipt of a proper invoice. Thereafter, a contractor who has received full payment of a proper invoice must pay each subcontractor who supplied services or materials included in the invoice within seven calendar days. The subcontractor is then required to pay its sub-subcontractor(s) within seven calendar days, and this regime continues down the construction pyramid.

As a result, users of the FIDIC suite must be mindful of whether the applicable lien legislation imposes a comparatively quicker payment regime.

Also in Ontario, parties have the right to refer payment-related disputes to adjudication, regardless of whether the same matter is the subject of a court action or an arbitration. By contrast, the FIDIC Red Book states that a Dispute Avoidance/Adjudication Board is to resolve disputes that arise between the parties. Accordingly, if a construction project is carried out in Ontario under a FIDIC contract such as the Red Book, the lien legislation's adjudication provisions will be implied into the contract, creating a potential conflict with the Red Book's dispute adjudication provisions. Accordingly, parties using the FIDIC suite would be well-advised to consider including special provisions within their contract to address those aspects of the lien legislation.

Sharon C Vogel is a partner at Singleton Urquhart Reynolds Vogel in Toronto and co-chairs the firm's construction and infrastructure practice group. She can be contacted at **svogel@singleton.com**. Sharon would like to acknowledge the assistance of **Nick Reynolds**.

FIDIC under German Law

Dr Götz-Sebastian Hök

Partner, Stieglmeier & Kollegen, Berlin

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

1. What is your jurisdiction?

Germany/German law.

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?

The German federal government uses FIDIC forms occasionally for governmental projects abroad; the offshore and marine sector occasionally use FIDIC forms within the German territory including the Exclusive Economic Zone (EEZ).

In Germany, 'Vergabe-und Vertragsordnung für Bauleistungen' (VOB/B) are used almost exclusively. The VOB/B are a German standard set of rules for use in the construction industry. They cover the award (procurement) of construction contracts (Part A), establish general conditions of contract relating to the execution of construction work (Part B) including 18 clauses, and prescribe good building practice in the construction sector (Part C).

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

No, FIDIC does not produce the forms in German. However, a German translation is available from the German Member Association of FIDIC, Verband Beratender Ingenieure (VBI). In the past, FIDIC forms have been used either in English and/or in German translation.

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?

Basically, mandatory German construction contract law and dispositive default rules will apply additionally (as implied by law). Construction contracts fall under section 631 et seq of the German Civil Code with a special chapter on construction contracts in accordance with section 650(a) et seq of the Civil Code. Special amendments are necessary predominantly for special projects, for instance offshore projects (eg, regarding insurance requirements). The legal framework addresses basic aspects of the reciprocal duties under such types of contract and aspects of related risk allocation.

Any type of standard form of contract governed by German law is exposed to a certain legal uncertainty or risk due to the courts' authority to review standard forms against the leitmotivs of the German laws (see section 305 et seq of the German Civil Code). Permanent case law presupposes that standard terms meet the leitmotiv(s) of the German law. Courts have held that, inter alia, the following provisions contradict the leitmotiv(s):

- exclusion of entitlement to the adjustment of unit rates in the event of increased quantities;[1]
- exclusion of entitlement to the adjustment of the contract price in the event of 'frustration';[2]
- indefinite retention monies equal to five per cent;[3]
- performance security securing ten per cent of the contract amount[4] likely to contradict Sub-Clause 4.2 of the FIDIC conditions;
- accumulated ten per cent retention monies and performance security[5] likely to contradict Sub-Clauses 4.2 and 14.9;
- duty to obtain an on-demand guarantee instead of a bond[6] likely to contradict Sub-Clause 4.2;
- duty to provide a security securing defects liability;[7]
- duty to provide the site with gas, water and electricity likely to contradict Sub-Clause 4.19;
- exception from liability for gross negligence and/or deliberate acts.[8]

Bespoke contract wording that contradicts the leitmotiv(s) may be allowed.

Special attention should be paid to section 650(e)–(f) of the Civil Code which provides for mandatory legal instruments aimed at securing the contractor's payment.

Regarding particular amendments that might be appropriate or necessary under German law, reference is made to Dr Götz-Sebastian Hök and Dr Henry Stieglmeier, 'Applying FIDIC Contracts in Germany'.[9]

Apart from occasional statements to the contrary[10] there is no mention anywhere of massive or even significant incompatibilities between FIDIC and German law.[11]

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?

The number of FIDIC-based contracts under German law in the past was relatively limited. German practice did not develop common standards or practices regarding changes to FIDIC forms:

- For practical reasons some model forms as suggested by FIDIC will not be used (eg, the model performance security form, due to German peculiarities).
- Insurance requirements may require adjustments (eg, a problem with indemnity practice regarding special types of damage).
- Clarifications regarding the meaning of taking-over and Clause 11 of the FIDIC conditions may be welcome in order to avoid misunderstandings.

Bespoke FIDIC-based contracts with frequently heavy amendments (purported to be necessary in accordance with German law) prevail. However, in most cases the amendments are not strictly necessary; rather, inexperienced users are ill at ease with FIDIC concepts and English legal terms.[12]

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)?

Without guidance from other jurisdictions on the possible meaning of Sub-Clause 2.5, it would be unlikely that German courts would understand Sub-Clause 2.5 as a condition precedent to employers' claims. However, it might be arguable that Sub-Clause 2.5 contradicts the basic right to withhold performance in the event of defective work. The synallagmatic nature of a contract for works implies the application of the maxim '*exceptio non adimpleti contractus*'.[13]

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)?

Without guidance from other jurisdictions on the possible meaning of Sub-Clause 20.1, it would be unlikely that German courts would understand Sub-Clause 20.1 as a condition precedent to contractors' claims. It is much more likely that German authorities would understand or classify Sub-Clause 20.1 as a short limitation or prescription period. If so, they may be concerned about the comparatively short notice period and sanctions for non-compliance.

According to section 6, paragraph 1 of the VOB/B, the notice of a disruptive event must be given 'forthwith'. The rationale for this requirement is to put the event on record. The notice is dispensable in cases where the client was obviously aware of the event and its impeding effect.[14] However, claim deadlines with foreclosing effects are unusual; prescription rules are deemed to provide sufficient and appropriate protection. The VOB/B do not contain any special cut-off period for claims. Basically, claims can be pursued in the final statement or invoice.[15]

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?

There is no case law available on this question.

Regarding variations, recent statutory law must be taken into account. German law suggests that the judge has the power to reform the contract price. Constraints as imposed by FIDIC in accordance with Sub-Clause 8.4(a) may require special attention in accordance with general principles of law.[16] Due to conceptual differences between common law and German law it is rather unlikely that claims for EOT will be discussed. Instead, excusable delay may result in discharge from liability for penalties. Regarding the financial effects of a variation, it is necessary to treat the unchanged part and the changed part of the works separately. The unchanged part of the works will be evaluated against the existing rates. Concerning varied parts of the works, recent legal developments[17] have prompted a discussion on the prevailing principle (actual costs versus extrapolation of new rates from existing rates). In any case, comprehensible evidence for an extension of the overall time for a completion claim cannot be rejected as inconclusive because individual parts of the delay analysis are unclear or incorrect. Despite the lack of clarity or incorrectness in individual parts, it remains a suitable basis for estimating an extension of the construction time, if necessary, with the help of an expert. Each individual delay must be examined separately and is subject to an independent assessment.[18] A discussion on time bars as a condition precedent of contractor's claims will not usually take place.[19]

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?

DABs are rarely used. Some years ago, there was an intense discussion on the use of DABs without any consequences on past and actual legal practice. In Germany, DABs are likely to be perceived as expert determination boards with similarities to expert determination in accordance with section 317 et seq of the Civil Code. If so, German courts are likely to classify the remedy as one arising out of substantive law and may allow the review of a DAB decision upon the submission of evidence of a manifest error in law or fact (based on section 319 of the Civil Code). This is extremely unlikely to happen, but legally possible.

DAB decisions may be enforceable by means of a special court procedure intended to limit evidence to documentary evidence.[20] However, in my personal view,[21] the DAB decision under

FIDIC does not constitute a document in the proper sense of section 592 of the German Civil Procedure Code.[22] At best, the DAB award proves its existence,[23] but not the existence of the pursued claim, especially since it does not exclude the objection of gross incorrectness. The duty to comply with a DAB award which emerges from the contract wording in Sub-Clause 20.4 should not be confused with the duty as crystallised in the DAB award. Summary proceedings do not exist in German law. Hence, in Germany, the correct approach would be to obtain an interim award in arbitration.

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?

Sometimes, but not as a common practice. German practice frequently relies on the German Institution of Arbitration (DIS) arbitration rules. Most frequently the seat will be in Germany, at least regarding domestic arbitration. Regarding contracts with foreign parties, ICC arbitration is the preferred choice, but also Swiss Chambers' Arbitration Institution (SCAI) and others are used.

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

No, there are no notable German court decisions interpreting FIDIC contracts. However, Germano-roman case law regarding FIDIC forms of contract exists from the Federal Swiss Supreme Court regarding the enforceability of Sub-Clauses 20.2 et seq. It held that direct access to arbitration may be allowed if the appointment of a DAB takes too much time.[24] This decision may have some authority before German courts.

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?

It is specific to the German jurisdiction that courts have the authority to declare standard business terms to be ineffective.

Pursuant to section 301(1) of the German Civil Code, section 305(2)–(3), 308 and 309 do not apply to standard business terms which are used in contracts with an entrepreneur, a legal person under public law, or a special fund under public law. Section 307(1)–(2) nevertheless apply to these cases to the extent that this leads to the ineffectiveness of the contract provisions set out in sections 308–309; reasonable account must be taken of the practices and customs that apply in business dealings. In the case of contracts with an entrepreneur, a legal person under public law, or a special fund under public law, section 307(1) as above (2) does not apply to contracts in which the entire Award Rules for Building Works, Part B[25] in the version applicable at the time of conclusion of the contract are included without deviation as to their content, relating to an examination of the content of individual provisions.

It is likely that courts would apply section 310(1) of the Civil Code *mutatis mutandis* to other types of standard forms of contracts for works, meaning that major changes to the standard form of contract which are likely to denature the balanced spirit of risk allocation may trigger the application of section 307(1)–(2).

In German practice, DAB clauses are usually deleted; in public works contracts, ADR provisions are possible[26] but not appreciated and not widely used.

German law permits penalties that do not go along with a limitation of liability. At least it will be possible to claim more than what was agreed subject to the evidence of greater cost incurred. In cross border business it is important to understand that penalty clauses have a different legal nature than liquidated damages. Unfortunately, German courts are likely to confuse English liquidated damages clauses and penalty clauses by wrongly interpreting liquidated damages as penalty clauses.

Notes

1 Federal Supreme Court Neue Juristische Wochenschrift Rechtsprechungs-Report 2016, 29; NJW 1993, 2738.

2 Federal Supreme Court Neue Juristische Wochenschrift 2017, 2762.

3 Federal Supreme Court Neue Juristische Wochenschrift 2003, 2605

4 Federal Supreme Court Neue Juristische Wochenschrift 2011, 2195.

5 Court of Appeal Celle Neue Juristische Wochenschrift Rechtsprechungs-Report 2020, 79.

6 Federal Supreme Court Neue Juristische Wochenschrift 2002, 2388.

7 Federal Supreme Court Neue Juristische Wochenschrift Rechtsprechungs-Report 2014, 814.

8 See Federal Supreme Court Neue Juristische Wochenschrift 2002, 749.

9 See Dr Götz-Sebastian Hök and Dr Henry Stieglmeier, 'Applying FIDIC Contracts in Germany', in Donald Charrett (ed) *FIDIC Contracts in Europe: A Practical Guide to Application* (Informa Law from Routledge, 2023) 290–303, at Ch 10.5.2, and for more details in German Wiesner, Inhaltskontrolle internationaler FIDIC-Bauverträge nach deutschem Recht, 2009.

10 See Kus, Markus and Steding, 'FIDIC's New 'Silver Book' under the German Standard Form Contracts Act, (2009) ICLR, 533.

11 See n 9 above.

12 *Ibid*, at Ch 10.6.

13 See Federal Supreme Court Neue Juristische Wochenschrift 2005, 919.

14 Section 6, No 5 VOB/B.

15 Court of Appeal OLG Dresden, Judgment dated 31 August 2011 – 1 U 1682/10.

16 See section 305 et seq of the Civil Code.

17 *Ibid*, s 650(c).

18 Federal Supreme Court, decision dated 24 February 2005, ref VII ZR 225/03.

19 Federal Supreme Court, (2005) Immobilien- und Baurecht (Zeitschrift) 359.

20 See, eg, Lembcke, Immobilien- und Baurecht (Zeitschrift) 2008, 1198 (online): Rechtsnatur des Adjudication-Verfahrens – Auflösend bedingtes Schiedsgutachten.

21 For more details see Hök (2008) Immobilien- und Baurecht (Zeitschrift) 308.

22 See Federal Supreme Court NJW-RR 1988, 506 regarding an expert determination that was manifestly wrong.

23 Greger/Stubbe, Schiedsgutachten – Außergerichtliche Streitbeilegung durch Drittentscheidungen, Munich 2007, 204.

24 Decision dated 1 October 2014, ref: 4A_124/2014.

25 Vergabe- und Vertragsordnung für Bauleistungen Teil B – VOB/B.

26 See s 18 VOB/B.

Offshore jack-up drilling rig and gas production platform in Indian waters. Credit: Jevgenijs/Adobe Stock

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Bringing your case in arbitration: the unsuccessful arbitral award challenges in *Union of India v Reliance Industries Limited*

Introduction

The English Commercial Court in *Union of India v Reliance Industries Limited and another* [2022] EWHC 1407 (Comm) recently dismissed a challenge of an arbitral award under sections 68–69 of the Arbitration Act 1996 (the 'Arbitration Act'). The case provides an important addition to the jurisprudence for challenges to arbitral awards in the English courts and yet further guidance on the scope and application of sections 68–69 of the Arbitration Act.

The parties and underlying contracts

The underlying contracts were production sharing contracts (PSCs) between two energy contractors, Reliance Industries Limited ('Reliance') and BG Exploration ('BG'), and the Union of India, acting by its Joint Secretary (Exploration) of the Ministry of Petroleum and Natural Gas (the 'government'). The PSCs concerned the granting of exclusive rights of exploitation in respect of the Tapti (gas) and Panna Mutka (oil/natural gas) fields off the west coast of India. The PSCs were governed by Indian law, and provided for London-seated arbitration pursuant to the UNCITRAL Arbitration Rules 1976. Numerous disputes arose under the PSCs, culminating in long-running proceedings involving several awards and related court proceedings.

The relevant arbitral award

In the award in question, the arbitral tribunal held that, on the basis of the principle of *res judicata* under English law, which encompassed the abuse of process principle in the well-known English authority *Henderson v Henderson*,[1] the Government was precluded from relying on matters that could and should have been raised earlier in the proceedings. In particular, the Government was not permitted to rely on certain threshold arguments said to arise under Articles 297 and 299 of the Indian Constitution concerning the vesting of natural resources located in Indian waters, and certain formalities in respect of the execution of Government-related contracts.

The arbitral tribunal made extensive reference to the reasoning in *Henderson v Henderson* and the 2013 UK Supreme Court decision in *Virgin Atlantic*.[2] By reference to these authorities, the arbitral tribunal clarified that *res judicata* applied (except in special cases):

> '…not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time'.[3]

The Tribunal concluded that parties to an arbitration were required to bring forward their entire case, and unless there were special circumstances, a party was not permitted to 'reopen the same subject of arbitration in respect of the part omitted from its case'.[4]

The arbitral tribunal went on to explain the multi-principle nature of *res judicata*, which included (relevantly) the abuse of process principle in *Henderson v Henderson* which 'precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones'.[5] On this basis, the arbitral tribunal concluded that, given the arbitration was seated in London, 'the matter of *res judicata* is to be determined applying the laws of England and Wales',[6] and that the *Henderson v Henderson* rule provided a complete answer to the Government's threshold arguments under the Indian Constitution.[7]

The Tribunal concluded that parties to an arbitration were required to bring forward their entire case

Following the award, the Government requested the arbitral tribunal to clarify whether, under Articles 35–36 of the UNCITRAL Rules, it had applied the *Henderson v Henderson* principle 'as a matter of substantive law or procedural law'.[8] The arbitral tribunal responded by stating that such a question had not been argued before them prior to the award, whether in written or oral submissions, and therefore that it was not able to effectively decide the matter (the 'Clarification Decision').

The Government's challenges under Sections 69–68 of the Arbitration Act 1996

The Section 69 challenge

The Government's appeal of the award under section 69 of the Arbitration Act 1996 gave rise to two questions:[9]

1. Whether the Tribunal was correct to determine that the specific questions of *res judicata* should be decided according to English law merely because the seat of arbitration is London?
2. If the answer to Question 1 was yes, was the doctrine applicable to earlier phases in the same arbitration proceedings (as opposed to separate proceedings)?

In respect of the first question, the Government raised several arguments which essentially sought to demonstrate that the Court should not apply the principle in *Henderson v Henderson*, as the arbitral tribunal had done, including because it was a point of substantive, not procedural, law such that the arbitral tribunal should have tried the Government's threshold arguments under Indian substantive law, not English procedural law.[10] If the arbitral tribunal had wrongfully applied English law, this could constitute an error of law and a ground to challenge the award. The Government accepted, however, that if it was found that the arbitral tribunal had correctly applied the *Henderson v Henderson* principle as a matter of procedural law, this would have been a valid approach because procedural matters are ordinarily determined according to the seat of arbitration (being, in this case, London).[11]

The Court found that Lord Sumption's characterisation in *Virgin Atlantic* of the *Henderson v Henderson* principle as a matter of procedural law was to be followed, and accordingly, in the case of an arbitration, it is the seat of the arbitration that governs its exercise, whatever the proper law of the contract.[12] The Court found, therefore, that the arbitral tribunal had correctly exercised its procedural power by applying English law not Indian law, when dismissing the Government's threshold matters.[13]

In so doing, the Court concluded that the *Henderson v Henderson* principle applies in the conduct of both arbitral and court proceedings, and that it is encapsulated within section 33(1)(b) of the Arbitration Act, which imposes a duty on the arbitral tribunal to adopt procedures avoiding unnecessary delay or expense.[14] For an arbitral tribunal 'to allow a party to advance a claim, a defence or an argument that could have and should have been argued at an earlier phase of an arbitration or in an earlier proceeding' could constitute a breach of the duty (as well as offend the principle of *Henderson v Henderson*).[15]

Several other pertinent points were raised:

- The Court rejected the Government's submission that the principle in *Henderson v Henderson* must be one of substantive law because it can be used as a defence to a claim, on the basis that procedural powers can too be used as a claim, defence and argument.[16]
- Guided by the arbitral tribunal's Clarification Decision, the Court also held that the Government had not raised before the arbitral tribunal, even implicitly, the question of whether the *Henderson v Henderson* principle was one of procedure or substance; indeed, the Court noted that the issue of *res judicata* had been raised before in previous stages in the proceedings, and that the arbitral tribunal had decided that procedural issues were to be determined by English law – as such, it was not likely to be the case that the Government was '*blind-sided*' by the arbitral tribunal's award in this respect.[17]
- Further, the Court found that the arbitral tribunal's determination did not substantially affect the Government's rights, on the basis that the case law appeared to show that the laws in India and England followed similar approaches in relation to the principle in *Henderson v Henderson*, and that regardless it was impossible to say how *res judicata* under Indian law would be 'trumped' by Articles 297 and 299 of the Indian Constitution.[18]

The section 68 challenge

The Government's secondary point on appeal was that, under section 68 of the Arbitration Act, there had been a 'serious irregularity' caused by the arbitral tribunal's failure to apply principles of the Indian Constitution, which had caused a 'substantial injustice'.

The Government argued that the arbitral tribunal did not act fairly as required under section 68(2)(a) on the basis that it prevented the Government from raising new defences/objections, and that Reliance/BG had been allowed to rely on documents not used in the previous case. The Court found no such unfairness on several bases, including that the arbitral tribunal was correct to decide that it was prevented from considering the Government's threshold matters/objections by virtue of the *Henderson v Henderson* principle.[19]

In addition, the Government failed to establish grounds under section 68(2)(d), under which it argued that 'issues arising from Articles 297 and 299 of the Constitution were central and decisive, [...], but in the award were treated as incidental and peripheral'.[20] The Court noted this element had a high threshold which the Government had not met: the arbitral tribunal had dealt with the constitutional points, albeit briefly.

Finally, the Court dismissed the Government's challenge under section 68(2)(g) that the award was contrary to Indian public policy, whilst raising concerns that public policy arguments were being used to re-open the merits of the matter. Indeed, the Court endorsed Reliance/BG's argument that 'the sub-section was never intended to allow parties to attack the conclusions of arbitration tribunals on matters of foreign law under the auspices of public policy, since to do so might open the floodgates to challenges'.[21]

Comment

Most prominently, *Reliance* emphasises to parties the importance of making their case and raising relevant arguments as soon as they are able to in proceedings, or risk losing their right to rely on those arguments later in the proceedings. The Court's decision and reasoning provides further clarity that the abuse of process principle in *Henderson v Henderson* is a matter of procedural, not substantive, law, and that the principle applies to arbitration and court proceedings alike. More broadly, however, the case serves as a reminder of the high hurdle facing a party wishing to challenge an arbitral award in the courts in England and Wales, and the general deference a court will give to the decision-making of an arbitral tribunal.

Notes

1 *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313.
2 See *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46.
3 See para 36 in *Union of India v Reliance Industries Ltd & Anor* [2022] EWHC 1407, citing para 18 of Lord Sumption's judgment in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46.
4 See para 37 in *Union of India v Reliance Industries Ltd & Anor* [2022] EWHC 1407.
5 *Ibid*, citing para 17 of Lord Sumption's judgment in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46.
6 See para 39 in *Union of India v Reliance Industries Ltd & Anor* [2022] EWHC 1407.
7 *Ibid.*
8 *Ibid*, paras 47–49.
9 *Ibid*, para 50.
10 *Ibid*, paras 59–64.
11 *Ibid*, para 53.
12 *Ibid*, para 59.
13 *Ibid*, para 58.
14 *Ibid*, para 61.
15 *Ibid.*
16 *Ibid*, para 63.
17 *Ibid*, para 71.
18 *Ibid*, para 76.
19 *Ibid*, paras 90–91.
20 *Ibid*, para 92.
21 *Ibid*, para 95.

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Thailand – proposed law relating to payment disputes under construction contracts

Introduction

At present, there are no specific statutes governing construction contracts in Thailand. Construction services fall under the general category of 'hire of works' under section 587 of the Thai Civil and Commercial Code (CCC) and the provisions under sections 587–607 of the CCC apply. Given the complex nature of construction agreements, it is unsurprising that these 21 general provisions of the CCC provide minimal guidance on how to resolve practical disputes that often arise in the sector. Thai law allows for the parties to agree on the terms and conditions of their contract, in either verbal or written form, to the extent that those terms are not contradictory to mandatory laws, public order or the good morals of Thailand, which would render the contract or certain provisions void.

Construction contracts in Thailand often allow the project owner to withhold payment of the contract price if a delay in the execution of the works occurs, or to impose a delay penalty or delay liquidated damages on the contractor. Further, 'conditional payment' clauses are often included in subcontracts, whereby the main contractor is not obligated to pay the contract price to its subcontractor(s) until it is paid by the project owner (sometimes called the 'pay-when-paid' principle). These conditional payment clauses are generally enforceable under Thai law in accordance with the principle of freedom of contract.

Payment issues are a major cause of disputes in the construction industry. Related court or arbitration proceedings can be quite lengthy and costly, and often result in contractors or subcontractors being denied full recovery of payments due. The current state of the law may have a negative influence on the Thai construction industry, with construction works being suspended or even abandoned. As a typical construction project involves multiple parties at different tiers, including the main contractor, subcontractors, suppliers and the project engineer, any delays arising from payment disputes can result in huge damages and a domino effect to parties on lower tiers. In practice, the Dispute Adjudication Board (DAB) concept as contemplated under FIDIC contracts is not a typical interim dispute resolution mechanism utilised in Thailand; meaning if a dispute cannot be settled through amicable discussions among the parties, a court or arbitration process has to be initiated.

To mitigate problems relating to delayed payments, Thai lawmakers have introduced a bill governing construction contracts under which a regime of statutory adjudication proceedings would take place.

The draft bill

A draft bill, the 'Act on Settlement of Disputes relating to Payment under Construction Contracts' (the 'Bill'), has been introduced and is presently undergoing mandatory public hearings. Under the Bill, there are significant features that enable payment disputes to be resolved promptly with fewer transaction costs, thus responding to the parties' real-time requirements. Some of the key features of the Bill are set out below.

Scope of application

The Bill strictly applies to any construction contracts (including consultancy agreements) that are made in writing and where the construction works are carried out in whole or in part in Thailand, regardless of whether the contract is governed by Thai law. The Bill does not apply to verbal construction agreements, which continue to be governed exclusively by the CCC. Further, the Bill explicitly states that any contractual provision contrary to, or inconsistent with, the Bill or any agreement seeking to exempt the construction contract from falling under the provisions of the Bill will be invalidated. Accordingly, although a construction contract for work to be carried out in Thailand may still be governed by a foreign law, its provisions would need to comply with the terms of the Bill, as the Bill would be considered a law relating to public order.

any delays arising from payment disputes can result in huge damages and a domino effect to parties on lower tiers

Pay-when-paid prohibition

An inclusion of a pay-when-paid provision in a construction contract would be prohibited by the Bill. The purpose of this restriction is to ensure that the contract price is properly paid to the contractor pursuant to the contract, thereby minimising its cash-flow problems. This clause will enable subcontractors and suppliers to receive payment from the main contractor pursuant to the payment terms agreed by the parties, regardless of whether the main contractor has already been paid by the project owner. In addition, payment obligations that depend on the project owner's financial position or the existence of funding would also be deemed void.

Adjudication proceedings

Most significantly, the Bill provides for the statutory right of a party to a construction contract to refer a payment dispute to an adjudication institution as an alternative form of dispute resolution. It is likely that the adjudication proceedings under the Bill will result in Thailand converting to a 'pay now argue later' jurisdiction; the adjudicator's decision gives rise to an immediate payment obligation even though it is not final, as the adjudication proceedings do not prejudice the parties' right to pursue arbitration or court proceedings thereafter. This mechanism should enable main contractors and subcontractors to continue carrying out works under their respective contracts without the need to resort to the suspension or abandonment of the works.

Some salient features of the adjudicative mechanism introduced by the Bill are discussed below.

When can adjudication proceedings begin?

Once a payment default has occurred, the creditor may initiate the adjudication proceedings by giving a demand notice to the debtor. The debtor's failure to make a payment pursuant to the demand notice allows the creditor to submit the dispute to the adjudication institution. Subject to any objections from the debtor, the institution will appoint an adjudicator who must be a specialist, capable of dealing with the complexities of construction contracts, to decide on the dispute and issue an award.

Can the debtor object to the dispute?

Yes. Within three days from the date the case is accepted by the institution, the creditor must submit a dispute notice to the debtor so that the debtor may raise objections along with relevant legal grounds within seven days from the date of receipt of the dispute notice. Given this tight timeline, it is debatable whether the seven-day period is practicable for the debtor to submit a meaningful objection along with the necessary supporting documents.

How long does it take to issue an award?

The Bill envisages that the whole process of adjudication until the issuance of an award will take approximately 40 days. This would be an expedited procedure compared to court proceedings in Thailand, which can take anywhere from six months to two years for a ruling on first instance.

Is an adjudication award binding upon the parties?

The adjudication award will be binding upon the parties and their guarantors (if any), save for: (1) where the award is revoked by the Court; (2) if the payment dispute is finally settled by the parties; or (3) if it is superseded by a subsequent decision reached in court or via arbitration proceedings initiated by one of the parties. Under the Bill, when an award is issued, the debtor is required to make a payment within 15 days from the award date or as otherwise specified in the award, without a right to appeal the decision. The debtor's failure to make a payment within the stipulated period will provide grounds for the creditor to execute the award against the debtor and/or its guarantor, including by suspending its works under the construction contract in proportions equivalent to the unpaid amount, until the due and payable amount is fully paid, but in any event no longer than 30 days. It is questionable whether the 30-day time limit for work suspension will be able to solve payment problems arising out of the withholding of payment by the employer.

Conclusion

As the Bill is still undergoing public hearings and has not yet become law, it is unclear when, if ever, the Bill will be enacted. Based on the current drafting of the Bill, there are a number of issues that need to be reviewed further in order to ensure that the interests of the construction industry are being appropriately addressed. However, if adopted, the resolving of disputes relating to payment disputes in the Thai construction industry may be significantly improved by the Bill.

FEATURE ARTICLE

Grenfell tower fire, London. Credit: Adobe Stock

Building Safety Act 2022

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The United Kingdom's Building Safety Act 2022 is a very significant piece of legislation with wide-ranging implications for the construction industry both in terms of the regulatory framework for building safety going forward but also the increased liability landscape with long extensions to limitation periods, including bringing into play retrospective liability covering many years.

The origins of the Act stem from the Grenfell Tower fire in London on 14 June 2017. Following that, the UK government commissioned an independent review which was conducted by Dame Judith Hackitt.

Published in May 2018, the final version of the report, 'Building a Safer Future: Independent Review of Building Regulations and Fire Safety', built on the conclusion of the interim report that the current system of building regulations and fire safety is not fit for purpose and that a culture change is required to support the delivery of buildings that are safe, both now and in the future. The 2018 report set out a new regulatory framework designed to tackle the issues identified.

The UK government then published its 'Building a Safer Future' policy in December 2018, followed in July 2020 with the publication of a draft Building Safety Bill. The Bill was introduced to Parliament on 5 July 2021 and, following its passage through the various parliamentary stages, received royal assent on 28 April 2022.

It is described as being an Act 'to make provision about the safety of people in or about buildings and the standard of buildings, to amend the Architects Act 1997, and to amend provision about complaints made to a housing ombudsman'.

The Act is in six Parts:

- Part 1 – Introduction and Overview.
- Part 2 – Provisions related to the new role of Building Safety Regulator.
- Part 3 – Amendments to the Building Act 1984.

- Part 4 – Provisions about occupied higher-risk buildings and duties on accountable persons.
- Part 5 – Provisions related to remediation and redress, introduction of a new homes ombudsman scheme, powers related to construction products, fire safety, regulation of architects and housing complaints.
- Part 6 – General provisions such as liability of company officers and the commencement provisions.

The Act applies mainly in England but there are also provisions that apply to Wales, Scotland and Northern Ireland.

Some parts of the Act have already come into force and others will come in later. A number of pieces of secondary legislation will also follow to flesh out and supplement various aspects of the Act.

There is a requirement for the building control authority to establish and maintain registers of building inspectors and building control approvers

Building Safety Regulator

The BSR is the Health and Safety Executive. The overriding role of the BSR is to secure the safety of people in or about buildings in relation to risks arising from buildings and improving the standard of buildings (section 3.1).

The BSR is to establish and maintain committees including the Building Advisory Committee (section 9.1); Industry Competence Committee (section 10.1); and residents of higher-risk buildings or others who promote residents' interests (section 11.1). Higher-risk buildings for this purpose are defined as buildings in England that are at least 18m in height or with at least seven storeys and that contain at least two residential units.

Amendments to the Building Act 1984 (BA)

The BA is amended to include a definition of higher-risk buildings which, for the purposes of the BA, is a building in England of at least 18m in height or at least seven storeys and is as described in regulations made by the Secretary of State. There is provision for the definition of higher-risk buildings to be widened in future.

There is currently a consultation on the draft Higher Risk Buildings (Descriptions and Supplementary Provisions) Regulations in which it is proposed to define higher-risk buildings under section 120D of the Building Act 1984 as including buildings that contain at least two residential units (which would include, for example, a flat or rooms in a university hall of residence where amenities are shared), care homes and hospitals.

There are several other amendments to the BA, such as allowing for Building Regulations to be introduced to provide for documents to be provided with applications for building control approval; for inspection and testing of work, buildings and services provided to buildings; prohibiting covering up of work; and allowing work to be opened up or taken down (section 33).

The BA is also amended to allow issue of compliance notices where building regulations have been contravened and stop notices if work would contravene regulations (section 38). Criminal penalties are introduced for individuals and businesses contravening building regulations including imprisonment and fines (section 39).

There is a requirement for the building control authority to establish and maintain registers of building inspectors and building control approvers and to set out a Code of Conduct for those on the inspector register and professional conduct rules for approvers (section 42).

Construction gateways

Government guidance issued alongside the Act states that a new regulatory framework is to be introduced for higher-risk buildings including two new approval stages known as 'Gateway 2' and 'Gateway 3', with 'Gateway 1' being the current planning approval process. The purpose of this is said to be to provide rigorous inspection of building regulation requirements and ensure that building safety is considered at each stage of design and construction.

The final detail is awaited but a consultation paper has been released by the government. This paper sets out a detailed process for Gateways 2 and 3, as well as other approvals required during the course of construction.

Gateway 2 will apply prior to commencement of building work and requires the BSR to be satisfied that designs and construction proposals satisfy the requirements of the Building Regulations and the Act. Gateway 2 will be a stop/go point and building control approval must be obtained from the BSR before relevant building work starts. Early engagement with the BSR is encouraged prior to submitting an application in order to avoid this step causing delays. There is also some suggestion that a staged approach can be taken to the obtaining of building control approvals. Once an application is approved, the BSR will agree a bespoke inspection schedule with the applicant and the BSR will need to be notified at these stages for inspection to take place.

Variations instructed during the course of construction work may also need to be submitted for Gateway 2 approval if they amount to 'major changes', albeit with a faster turnaround time of six weeks instead of 12 weeks for an initial Gateway 2 application. However, this is something that could well bring with it the risk of delay to a project and that risk allocation will need to be considered when entering into building contracts.

Gateway 3 will apply when building work is complete and requires the BSR to be satisfied that the works as built comply with the Building Regulations and that the finished building is safe to occupy. Full as-built drawings must be submitted with the application. Gateway 3 will also be a stop/go point; that is, building control approval must be obtained from the BSR before registering and commencing occupation of a higher-risk building. The proposed period for the BSR to make a decision on an application is within 12 weeks of the application or such longer period to which the applicant agrees.

Once Gateway 3 has been passed, the BSR will issue a completion certificate. The Act makes it a criminal offence for a building to be occupied prior to this certificate being issued.

Again, this is something to be considered in contracts in terms of whether practical completion is to be dependent on the Gateway 3 approval having been granted and who will bear the risk of delays due to, for example, administrative delay by the BSR as opposed to refusal to approve due to quantity of work. In any event, the +12-week period to have the application determined, obtain the certificate and register the building will need to be taken into account upon completion of the build stage before the building can be occupied.

Higher-risk buildings

The Act also introduces new duties for 'higher-risk buildings' during the occupation phase of a building. Higher-risk buildings are those at least 18m in height or with at least seven storeys and that contain at least two residential units (section 65) but, again, there is provision for this to be extended if the regulator considers the building safety risk justifies it (section 69). Building safety risk is defined to include risk to safety due to spread of fire or structural failure (section 62).

The Act provides for there to be an accountable person and, if more than one, a principal accountable person (sections 72–73). The accountable person must carry out an initial assessment of building safety risks and then further assessments on a regular basis (section 83). They have duties to prevent a building safety risk materialising and to reduce the severity of any incident that does occur including by carrying out work to the building (section 84).

Once Gateway 3 has been passed, the BSR will issue a completion certificate

The principal accountable person must prepare a safety case report containing an assessment of risks and a description of further steps taken by the accountable person (section 85). There are further duties to provide details of the report and any other information related to building safety risk to the regulator (section 87) and to keep copies of relevant information concerning the building (section 88). There are also requirements to engage with residents to allow their involvement in building safety decisions (section 91) and to provide information to residents when requested (section 92). Where there is more than one accountable person, each has a duty of cooperation and coordination (section 109). Residents have a duty not to create a building safety risk or to interfere with safety items (section 95).

The regulator has enforcement powers and may issue compliance notices to the accountable person requiring contraventions to be remedied, with criminal sanctions for failure to do so (section 99). The regulator may also issue guidance (section 108).

All occupied 'higher-risk buildings' must be issued with a completion certificate before being occupied (section 76) and they must be registered with the BSR by October 2023 (section 77). It is a criminal offence if a building is occupied but not registered after this date.

It is anticipated that Regulations will require, among other things, the ongoing management of a digital 'golden thread' of information throughout the building lifecycle of higher-risk buildings.

Remediation of defects

There are provisions related to remediation of defects in 'relevant buildings', those being self-contained (or structurally detached) buildings or part-buildings that contain at least two dwellings and that are at least 11m high and with at least five storeys (section 117).

The Act makes provision in relation to service charges payable under leases. Some charges will not be payable by leaseholders such as costs relating to cladding remediation (section 122, Sch 8). This means that landlords will have to pay this cost unless they can recover from developers, contractors, manufacturers or from any government funding available.

It may be possible for landlords to recover the costs of remedying other non-cladding-related fire-safety defects from leaseholders, but this is subject to a statutory cap and will only be possible if the 'landlord's group' does not meet the net-worth threshold (currently £2m for each building in scope). The group includes any person associated with that landlord which (in relation to a body corporate) may capture directors, companies with common directors, subsidiary companies and companies with a controlling interest (Sch 8).

Liability for defects and construction products

The Act changes the liability landscape significantly. Existing rights under the Defective Premises Act 1972 (DPA) have been expanded. The DPA at section 1.1 sets out duties to undertake work in connection with the provision of a dwelling in a workmanlike or professional manner with proper materials and so that the dwelling is fit for habitation when the work is completed. Those duties are owed to the person who ordered the work but also to any person who acquires an interest in the dwelling. That is now extended to cover work to any part of a 'relevant building' (a building consisting of one or more dwellings) (BSA, section 134 adding DPA, section 2A).

Importantly, the Limitation Act 1980 is revised to add a 'special time limit' for actions related to damage to, or defects in relation to, buildings. This extends the limitation period to 15 years from the date on which the right of action under the DPA accrued. In addition, that period is extended to 30 years where the right of action accrued before the BSA came into force. That is a very significant extension to the previous six-year period under the DPA.

Direct rights of action have also been introduced in relation to construction products (section 148). There is a four-stage test to establish liability:

- a failure to comply with a construction product requirement (in essence, regulations related to the products), where misleading statements are made or where a manufacturer makes a product that is inherently defective;
- the product is used on a relevant building (a dwelling or a building with two or more dwellings);
- the dwelling (or any dwelling in the building) is unfit for habitation; and
- one of the above factors was the cause or one of the causes for the building being unfit for habitation.

The party at fault has liability to pay damages to a person with a right or interest in the building for personal injury, damage to property or economic loss suffered.

There are similar provisions related specifically to liability for cladding products (section 149).

In addition, a statutory cause of action for breach of the Building Regulations will be brought into force.

In both England and Scotland, the BSA applies the same extended limitation periods as above of 15 years and 30 years (sections 150–151) in relation to construction product and cladding liability as well as for breach of the Building Regulations. The Act also allows liability under the DPA, for breach of the Building Regulations or for other building safety matters to be passed on to related companies by orders obtained from the High Court, referred to as 'Building Liability Orders' (sections 130–132). Clearly the aim of this is to prevent businesses with substantial liabilities from hiding assets in related companies to avoid liability.

Comment

The importance of the Building Safety Act 2022 and associated secondary legislation to developers, landlords, contractors, subcontractors, manufacturers and suppliers cannot be understated. Not all of the Act is in force yet, but there has been a very clear drive by the government to bring the Act onto the statute books and the direction of travel is clearly towards further tightening the position in relation to wider categories of buildings.

Grenfell Tower, London. Credit: Kinuyo/Adobe Stock

Grenfell tower, London. Credit: Kinuyo/Adobe Stock

Supreme Court of Cassation, Italy. Credit: Pawel Pajor/Adobe Stock

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Italian Court of Cassation equates lack of appearance to waiver of arbitration clause

Decision No 17244 of May 2022 by the Italian Court of Cassation, in a case where the contract included an international arbitration clause and the defendant had not appeared in the proceedings (thus had not challenged the state court jurisdiction in favour of arbitration), ruled that the defendant's failure to appear in the court proceedings implies acceptance of the jurisdiction and the will not to avail itself of the arbitration clause, with the consequence that the state court shall decide the case.

The case at issue involved an Italian company (the Seller) and an Algerian company (the Purchaser), who entered into an agreement concerning the sale of a plant (the Sales Agreement), which included an international arbitration clause.

The Seller granted to the Purchaser a bank warranty bond (ie, an independent on-demand guarantee) warrantying the proper functioning of the plant for a certain period of time.

After the delivery and start-up of the plant, the Purchaser detected (alleged) operational defects and, thus, enforced the warranty bond.

The Seller promoted urgency proceedings against the Bank aimed at obtaining an interim injunction to prevent the Bank from paying the amount of the warranty bond alleging that the call of the warranty bond was an abuse of rights. The interim injunction was initially granted by the court, but then annulled by the court in the subsequent challenging proceedings brought by the Purchaser, where the court did not qualify the call of the warranty bond as abusive. Thus, the Bank paid the amount of the warranty bond to the Purchaser and debited it to the Seller.

Then, irrespective of the fact that the Sales Agreement contained an international arbitration clause, the Seller promoted a lawsuit against the Purchaser and the Bank before the state court to ascertain the proper functioning of the plant and, consequently, to recoup the amount of the warranty bond that had been paid by the Bank to the Purchaser and reimbursed by the Seller to the Bank.

The Purchaser did not appear in court, while the Bank appeared in court and challenged the state court's jurisdiction by virtue of the arbitration clause contained in the Sales Agreement.

The court ruled as follows:

- as to the Sales Agreement relationship between the Seller and Purchaser, it declared on its own motion its lack of jurisdiction towards the Purchaser because of the arbitration clause contained in the Sales Agreement;
- as to the warranty bond relationship, while confirming its jurisdiction towards the Bank, it rejected the Seller's claims against the Bank.

The Court of Appeal confirmed the decision.

The Court of Cassation, reverting the first and second instance courts' decisions, confirmed jurisdiction of the Italian state court also with respect to the Sales Agreement relationship by ruling that:

> 'The lack of jurisdiction of the Italian court by virtue of an arbitration clause for international arbitration cannot be declared by the judge on his own motion, given the voluntary nature of arbitration under which the parties, even in the presence of an arbitration clause, may always agree to opt for a decision by the state court and this can occur even tacitly, by initiating the state court proceedings in which the exception of arbitration is not raised...'.

By this decision the Court of Cassation emphasised the voluntary nature of arbitration and on this ground equated lack of appearance in court by the defendant to revocation of arbitration choice and implicit acceptance of the state court's jurisdiction.

The possibility for the defendant, who did not appear before the state court, to invoke the arbitration clause at a later stage when enforcement of such decision is sought in its or another jurisdiction may present uncertainties. This depends on international conventions, if any, or applicable state procedural rules of the addressed jurisdiction, which may or may not include jurisdiction challenge for international arbitration as a ground to refuse enforcement of foreign court decisions.

For instance, while Italian conflict of laws rules, where applicable, would allow the defendant to challenge recognition and enforcement of a decision issued in a foreign (non-European) jurisdiction because of lack of jurisdiction, instead Regulation (EU) No 1215/2012 does not include lack of jurisdiction among the limited grounds for refusal of recognition and enforcement of another Member State decision, in compliance with the principle of mutual trust in the administration of justice applied by the European Union.

The Court of Cassation emphasised the voluntary nature of arbitration

Equally, the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters of 2 July 2019 (the 'Judgments Convention'), recently ratified by some of the Contracting States, admits refusal of recognition and enforcement by the addressed state court 'if the proceedings in the court of origin were contrary to an agreement [...] under which the dispute in question was to be determined in a court of a State other than the State of origin' (Article 7(d)), but it could hardly be interpreted as to include arbitration clauses in addition to state jurisdiction clauses. Especially considering that the same Convention expressly excludes from its field of application arbitration and related proceedings.

In light of the above, it is advisable for a defendant who is summoned before a state court in breach of an applicable international arbitration clause to appear before the court and challenge its jurisdiction in favour of arbitration, instead of relying on the possibility to invoke the arbitration clause at a later stage.

Credit: Phuc/Adobe Stock

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Powering the energy transition: managing risk in zero/low carbon energy projects

What are energy transition projects?

Energy transition projects support the move away from carbon-intensive power generation to zero or lower-carbon alternatives. This transition in energy generation is vital if ambitious national emissions targets (many of which are legally binding) are to be achieved.

Obvious examples of energy transition projects are those that provide for power generation using renewable energy sources; for example, the construction of an offshore wind farm, solar plant or tidal facility. However, the energy transition is wider than renewables. It includes projects aimed at reducing the carbon intensity of conventional oil and gas assets such as carbon capture, utilisation and storage (CCUS) and those relating to energy storage (eg, battery and pumped storage hydropower). As nuclear energy production does not directly involve burning fossil fuels, it will also play an important role in the transition to less carbon-intensive energy generation.

Many of these projects are groundbreaking. They use cutting-edge technology, are being planned and constructed in unpredictable climatic and political conditions and accordingly raise new legal risks. Effective management of these risks is critical to ensuring the ongoing promotion of energy transition projects in the face of regional energy security fears. In recent months, energy shortages and increased prices for consumers have seen states turn away from innovative energy solutions, towards lower-cost and lower-risk investment in expanding existing fossil fuel extraction and processing projects.

What are these risks and how can they be mitigated?

First, energy transition projects face many of the same legal risks as can arise on traditional construction projects. Construction of any project can entail issues such as quality deficiencies with design or workmanship, disruption, issues affecting the timely achievement of milestones, price escalation of materials and labour, unforeseen ground conditions, unforeseen external factors (such as extreme weather events), the impact of changing local legislation, poor contract administration and ambiguities in contract documents.

Such risks have the potential to:

- Delay ultimate completion – if the critical path of the works is changed, this could have a knock-on effect to the required completion date (or a milestone date). Delay damages may become payable by the contractor, and the employer will likely face onward liability and/or incur its own losses;
- Increase costs – of obtaining materials (sometimes at short notice and/or in a high demand scenario), labour or equipment. Cost impacts can also result from currency fluctuations as well as supply and demand dynamics;
- Impact the quality of the project – defects in the works could result in the asset failing to perform as anticipated (which may in turn result in further delay and/or costs as rectification measures are taken); and/or
- Disruption to project cash flow – for example, because an asset is delayed in becoming operational and generating income.

In the context of energy transition projects, it pays at the stage of contract negotiations to consider the following additional risks and issues, which can exacerbate anticipated construction risks:

Emerging technologies and engineering innovation

Capital cost is generally perceived as the major barrier to investment in energy transition projects. By nature, they involve new technologies and engineering, and project stakeholders cannot rely on decades of proven performance records before electing to invest in these types of ground-breaking and often unique projects. For instance, off-takers of any energy project will be reluctant to invest if there is uncertainty over the start date for commercial operation of assets with untested performance.

As the saying goes, 'perfect planning prevents poor performance' and feasibility studies, the development and maintenance of a safety case and environmental assessments, and training staff in the use of new technologies are all important preparatory steps to mitigate disputes arising during project delivery. A lack of developed industry standards provides an opportunity for new technology adopters to prepare detailed specifications tailored to the specifics of the project at hand. It may also be difficult to obtain planning or regulatory approvals for truly ground-breaking projects without some level of governmental investment.

> *Energy transition projects face many of the same legal risks as can arise on traditional construction projects*

The move towards allocating risk for innovation in construction projects generally is gathering momentum. Apportionment of risks should be clearly set out, with parties considering the potential for disputes to arise across all stakeholder interfaces. Pan-project dispute resolution agreements that involve blanket joinder and consolidation provisions for disputes arising between project stakeholders may reduce the risks of protracted legal action.

Sensitivities in supply chains

Recent world events have demonstrated the fragility of international supply chains and the impact supply chain disruption can have on project delivery, incuding cost, schedule and even feasibility.

Pricing has traditionally been used to mitigate supply chain risks:

- if the risk at issue is one of material availability and price, a lump sum contracting arrangement with spot-price contracts further down the supply chain can insulate project stakeholders from overspend; or

- if a closed labour pool is likely to be an issue for constructability, fully reimbursable contracts for labour, staff and associated costs (such as recruitment, housing and travel in less accessible geographies) over a project duration can give project owners greater flexibility on manpower in exchange for less certainty on project cost.

Energy transition projects are potentially more susceptible to supply chain risks

However, energy transition projects are potentially more susceptible to supply chain risks for the following reasons:

- Certain raw materials may be critical for delivery of the project. The sheer volume of a specific material required may be significant enough to impact the general market for it, affecting both price and availability. Requirements for certain raw materials can also have environmental implications which could, ultimately, present reputational risk to end users.
- As the technology and engineering involved in many planned energy transition projects is innovative, contracting parties must work on a project-by-project basis to assess what risks are posed by these innovations and how those risks can (and should) be shared.
- Coupled with new technologies come new parts and equipment necessary for implementation, as well as associated limitations on worldwide availability. New market entrants may find it difficult to scale quickly enough to deliver services and compete with established manufacturers. This can lead to unexpected insolvencies, and procurement difficulties with alternative suppliers.

Understanding the regulatory context surrounding a planned project at the outset of contract negotiations is key and can more easily lead to the inclusion of due diligence requirements passed down a supply chain to manage some of these risks. Project stakeholders can protect themselves with contractual provisions including representations, warranties and indemnities, while contractors and subcontractors are likely to negotiate provisions concerning pricing certainty (including price escalation, currency fluctuation and general payment structuring clauses). There has also been an increased focus on applying circular economy thinking to projects to maximise opportunities for recycling, refurbishing and repurposing materials and equipment.

Workforce issues

Where energy transition projects are pencilled to take place in geographies with developing employment and human rights regimes, particular consideration at contracting stage will be required in relation to bribery and corruption, forced labour, child labour and worker health and safety risks. Each of these issues can be the source of disputes between project stakeholders (particularly where international stakeholders are legally required to make human rights-related disclosures) and cause significant reputational damage. Increasingly, states are legislating requirements to conduct modern slavery and supply chain due diligence in a similar way to the widespread adoption of anti-bribery legislation concerning corporate disclosure requirements. As a result of these laws, project participants are increasingly required to ensure that their labour force is free from human rights abuses, or risk significant fines or legal challenges.

In geographies with developed labour laws, workforce risk on energy transition projects tends to lie in working conditions and the commitments to safety precautions and reporting adopted by project participants. Specific health and safety issues are raised by offshore projects and due to land scarcity and environmental issues, natural resource-intensive projects are increasingly carried out in remote locations with minimal or non-existent social infrastructure. Project stakeholders may need to develop relationships with unions and other third-party employment organisations to develop locally acceptable employment packages for labour and staff that will minimise the risks of direct actions by employees once the project is under way.

Joint venture partnering

Joint ventures (JVs) are an increasingly popular form of business partnership on energy transition projects. In recent years, many oil and gas majors have formed some of the largest consortia, in some cases partnering with smaller partners brought in for strategic reasons – for example their specialist technological or local expertise.

JVs typically take the form of a special purpose vehicle, which is incorporated to enter into the principal contracts for the project and own the resulting assets.

They allow businesses to tap into their collective resources, including funding, know-how, technology, network and knowledge of the local market.

However, there are some specific risks that should be considered:

- State of the art technology utilised on energy transition projects is often the result of significant capital expenditure. There is a risk of disputes arising in relation to the ownership and treatment of intellectual property (IP) where this is not properly considered. The JV agreement should clearly address issues such as the retention of ownership of pre-existing IP, the support services to be supplied in relation to technology, the scope of ownership of IP advancements during the course of the project and the specific steps to be taken at the end of the project (or on termination of the JV) in relation to ownership of IP and return of confidential information. Parties should also consider the impact of an insolvency, bearing in mind that any partner brought on board for its IP may be in a more precarious financial position.
- Disputes can arise between JV partners absent a clear allocation of risk and delineation of responsibilities in connection with the project's scope of work. This is particularly relevant on energy transition projects where untested technology or unusual site conditions may increase the risk of cost overruns and delay. Setting out rights and obligations clearly in the JV agreement, as well as efficient expert referral and dispute resolution mechanisms, can go some way to mitigate this risk.
- It is common on energy transition projects for one of the JV partners (or an affiliated company) to be a supplier, operator and/or contractor on the project, particularly where it provides the technology. In such cases, conflict can arise, for example, if the contractor's works cause delay to project completion and delay damages need to be triggered. Accordingly, the JV's decisions need to be carefully managed, potentially via the use of a non-conflicted JV committee and/or an efficient deadlock resolution mechanism.

Collaborative delivery structures

Collaborative delivery structures could potentially play a role in ensuring that, where one of the above risks materialises, the likelihood of it jeopardising successful project delivery or damaging relationships between owners, contractors and suppliers (potentially resulting in a dispute) is reduced.

JVs allow businesses to tap into their collective resources, including funding, know-how, technology, network and knowledge of the local market

A range of options could be considered, including:

- Partnering: The parties agree to work in a cooperative manner, in good faith and to achieve mutual goals. Partnering obligations can include the requirement to work together to achieve the employer's and other partners' objectives, share information, give early warning of matters that could impact other partners and implement core group decisions.
- Alliancing: This is an extension of the partnering model. The employer, contractor and parties in the supply chain enter into a single alliance agreement, which includes measures to incentivise participants and promote positive contractor behaviour. These are reinforced by financial incentives (in the form of a carrot or stick); that is, if the project is completed by a target date or costs come under a certain amount. Of particular note is that the parties agree not to bring claims against each other, although an alliance board can be put in place to encourage amicable resolution.
- 'Sweat equity': This colloquialism refers to a person's or company's unpaid contribution to a business venture. In a project context, 'sweat equity' may refer to the contribution of design services, construction work or technology development in return for an equity stake in the project or deferred payment for that contribution. Although a 'sweat equity' approach has historically been seen in other sectors (such as real estate) or smaller projects, the overall shift towards alliance-based contracting structures could mean this model is on the horizon for energy transition projects, too.

The above examples may not be appropriate for every energy transition project, but the principles behind these models could help to guide the parties' approach to balancing risk and reward on such projects. Ultimately, having clarity between project participants regarding risk allocation at the conclusion of a contract should reduce the potential for surprises during the delivery of innovative energy transition projects.

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Addressing inflationary pressure on construction contracts

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In recent years, a series of significant events have impacted the availability of materials and labour globally. This has had a direct effect not just on planning projects but also on the delivery of domestic and international construction projects alike. Inter-related with this is the pressure from inflation at rates the world has not experienced for decades. Inflation in the United Kingdom exceeded ten per cent in July 2022, the highest it has been in 40 years. In developing regions, the situation is sometimes far worse.

Profit margins have, of course, always been tightly controlled on construction projects, so even slight pricing fluctuations can have a significant impact. This is not only true for live projects, but also for those in their early feasibility stages.

Prior to the pandemic and Brexit, the price of materials and labour in the UK had been relatively stable, and at least predictable. As a result, fixed-price lump sum contracts were a viable option as they were founded on the premise of an existing stable supply chain, meaning that the risk of rising prices was predictable and relatively low. Until recently, this was also true of many international construction contracts: it would not be unusual for a form of price adjustment mechanism to be adopted to cater for specific situations relevant to the project or jurisdiction in question but the review period that traditionally was measured in years is now too long to wait.

The industry as a whole has entered new territory where many aspects of the pre-existing paradigm are no longer appropriate. This article looks at how parties to construction contracts can approach the rising risk of inflationary pressure on existing and future contracting structures in the current climate.

Existing contracts and the fixed price lump sum model

The lump sum contracting model is well known and understood and is regularly employed. Lump sum fixed-price contracts will usually include mechanisms that cater for adjustments to the contract price only for specific and defined events. However, the starting point is that the contractor generally bears the risk of price escalation on the contract price itself. This model is obviously appealing to employers, but often brings with it a heightened risk of disputes arising over those events providing time and cost relief. In the current uncertain and unpredictable climate, this type of arrangement may no longer be a viable starting point.

The impact of inflation in a traditional lump sum contract is often unaddressed. In the absence of specific price fluctuation or escalation mechanisms, increased costs in materials, labour and other inflationary pressures that impact the contract price are a risk borne by the contractor. In a common law context, it might be that the only options are for the parties to either renegotiate the terms of their contract or to carve out some of the scope and address that by using a different contractual arrangement (eg, on a cost-plus basis as further discussed below). This means compromise from the employer. Of course, if the parties were to find themselves in dispute, a damages claim may include damages for inflation-related costs resulting from, for example, delay, although this will depend on the circumstances and the relevant contractual provisions – often such losses are excluded by consequential loss provisions. In an international context, avenues for contractors may exist under principles of civil law for equitable rebalancing, such as where contracts are in jurisdictions that cater for such options.

The industry as a whole has entered new territory

When it comes to addressing pricing escalation for change events, while there are limited examples in standard form contracts, one example is the NEC3 Engineering and Construction Contract (the 'NEC3 contract') Option A (priced contract with activity schedule). The NEC3 contract provides for a fixed-priced contract with an activity schedule, meaning the contractor generally takes the risk of any change to expenditure, including those that may arise from changes in the price of labour, plant and materials as a result of inflation.

However, a mechanism may permit the contractor to account for subsequent price escalation for compensation events. Clause 60 of the NEC3 contract prescribes the available compensation events. Under the NEC3 contract, the contractor is to provide a quote for the relevant compensation event to the employer, which is essentially a proposal from the contractor to change the contract price or to extend the time as a result of the compensation event.[1] Ordinarily, assessment of a compensation event will be based on the quotation, except in circumstances where the contractor fails to follow the contractual mechanisms.

Clause 63 of the NEC3 contract sets out the manner in which such compensation events are to be assessed. In particular, clause 63.1 provides that changes to the prices (defined as the lump sum price for each of the activities on the activity schedule) are to be assessed as the effect of the compensation event upon:

1. The actual defined cost of the work already done. The 'defined cost' is defined as the cost of the components in the Shorter Schedule of Cost Components whether work is subcontracted or not excluding the cost of preparing quotations for compensation events.
2. The forecast defined cost of the work not yet done.
3. The resulting fee. The fee is defined as the sum of the amounts calculated by applying the subcontracted fee percentage to the defined cost of subcontracted work and the direct fee percentage to the defined cost of other work.

While under NEC3 Option A, it is the contractor that bears the risk for increases in expenditure (including inflation-related increases), when assessing compensation events, the contractor is entitled to make an allowance for matters that have a significant chance of occurring and that are at the contractor's risk under the contract. This is expressly provided for in clause 63.6 of the NEC3 contract, which provides that 'Assessment of the effect of a compensation event includes risk allowances for cost and time for matters which have a significant chance of occurring and are at the Contractor's risk under this contract.' This could include inflation and is recognised in the NEC's guidance notes.

The High Court of Justice in Northern Ireland considered whether the assessment of the effect of a compensation event is to be calculated by reference to the forecast or the actual cost incurred (in circumstances where the assessment is being made after the impacts of a compensation event are known) in the case of *Northern Ireland Housing Executive v Healthy Buildings (Ireland) Limited*[2] specifically by reference to the assessment process under the NEC3 contract. The Court considered two specific questions:

1. Should the assessment of the effect of the compensation event be calculated by reference to the change in forecasted charges under the contract or the actual cost incurred?
2. Were actual costs relevant to the assessment process for compensation events?

The Court held that an actual cost approach was to be preferred with regard to both questions. This was, of course, in the context of the facts at hand, where the compensation event was being assessed after the event.

Quoting from *Keating on NEC*, the judgment highlighted that there are:

> 'indications of a broader approach within the wording of the contract. First, Clause 63 requires the effect of compensation events to be assessed. Every clause uses the words "assessment", "assess", "assessing" or "assessed". Assessment suggests an idea of appraisal or judgment'.[3]

The Judge decided that when assessing the compensation event, the actual costs were most relevant, stating: 'Why should I shut my eyes and grope in the dark when the material is available to show what work they actually did and how much it cost them?'[4]

The Court also held that:

> 'to give an efficacious and business-like interpretation to the contract a quotation which arises in those circumstances, rather than as a genuine forecast, ought to be informed by the best information available as to the actual cost and time incurred'.

This situation may be different if the compensation event is being assessed contemporaneously, and whereby an assessment needs to be made of the forecast defined cost. The subsequent assessment is often the subject of much debate, and the selection of applicable indices for the assessment of inflation is a forum usually for expert submissions.

Similarly, in a common law context, it has been held that damages based on the cost of repair should be assessed as of the date the repairs ought reasonably to be carried out, rather than at the date of the breach. This prospective approach can of course be significant in times of rising inflation.[5]

Outside of the NEC3, mechanisms for inflationary adjustment are also contemplated in certain JCT contracts. However, international forms are usually less developed in addressing this aspect of risk allocation.

> *Parties to existing contacts may wish to consider the terms of their contracts in detail*

Parties to existing contacts may wish to consider the terms of their contracts in detail in order to determine whether the provisions, even in a lump sum fixed-price contract, may provide the opportunity to seek relief for inflationary-related cost increases.

Negotiation of construction contracts in the current climate

Contractors and employers negotiating construction contracts in the current climate have a number of possible approaches available to them which will assist in managing the risks of price increases and inflationary pressures.

Sticking to the lump sum model will likely not appeal to all contractors. This option may result in tenderers submitting cost proposals that cater for pricing uncertainty through increased prices or may even result in fewer bids being received. The consequence for the employer is that it is faced with less choice, higher costs, and likely a more proactive approach from contractors to claims management aimed at ensuring that any additional costs are subject to recovery steps.

To temper this, employers may wish to consider including specific price escalation provisions in their contracts. Escalation clauses may work in a number of different ways. These could be structured, for example, to trigger at a certain level for the contract price as a whole, or be aimed specifically at compensation events like the approach taken in the NEC3 contract (Option A) discussed above. It will be important to prescribe carefully how such clauses operate, including what formula or indices are to be used. For example, a 'base date' from which the price escalation clause is to apply will usually need to be specified in the contract. Drafting of these clauses could also be tailored for specific circumstances, for example, only allowing fluctuations for specific materials. Whether an escalation clause is appropriate will depend on the project at hand, for example, long-term contracts in particular are likely to benefit from such clauses. Other factors that may be relevant are the location of the project and the materials being used.

Instead of a 'stick', an employer may want to offer a 'carrot' through the payment of a bonus

There are alternative contracting models that address the consequences of inflation. Parties may choose to enter into a cost reimbursable contract, also known as a 'cost plus' contract, where the contractor is reimbursed for the actual costs incurred in carrying out the works, plus an additional fee (usually to account for the contractor's indirect costs such as overheads, as well as profit). This places the risk of price fluctuation with the employer and is a model obviously favoured by contractors. This model generally requires a significant amount of cost management to ensure that the costs claimed by the contractor are properly due. For the employer, it would be prudent to include measures that control the incurring of costs by the contractor. At the very least, obligations ought to be placed on the contractor to ensure costs are reasonably and necessarily incurred, and that appropriate audit provisions are adopted to ensure costs can be scrutinised and verified. Further, the contract ought carefully to define the allowable costs reimbursable to the contractor, exclusions from the reimbursable costs and how the resulting fee is calculated. A benefit of the reimbursable contract is that it represents a simple contracting model which eliminates the need for complicated rules relating to price adjustment and the payment of claims and pricing risk is largely eliminated for the contractor. Instead of a 'stick', an employer may want to offer a 'carrot' through the payment of a bonus where reimbursable costs are, for example, kept below a pre-agreed target cost. However, while prudent, incentivisation of the contractor through such risk/reward sharing mechanisms can quickly become complicated, particularly when pricing risk is comingled with risk allocation provisions on quality of performance and time.

An alternative approach may be to break the contract price into several portions, with some elements being fixed and other elements being either 'cost plus' or even nominated as a provisional sum.

A provisional sum is usually included in the contract as a specific sum or a definable amount, but generally the original contract sum is adjusted according to whether the actual expenditure ordered is greater or less than the provisional sum accounted for in the contract. The price risk for provisional sums is therefore an employer risk under this arrangement, which creates some cost uncertainty for employers, especially if the provisional sum relates to a large element of the works to be done. Parties choosing to contract on the basis of provisional sums will also need to ensure that this is done in a clear and certain manner. There have been some cases in the English courts holding parties to estimates as a fixed price quotation rather than an indication of expected costs. These cases highlight the fact that the specific circumstances and terms of the contract will always be relevant.[6]

Conclusion

The current climate indicates that construction contracts not yet entered into or currently under negotiation will likely need to consider moving away from a fixed price lump sum model, shifting what has traditionally been a contractor risk into perhaps a shared risk. As illustrated above, there are a number of options parties may choose from to manage price risk in the current volatile market conditions. Whichever method parties choose to address in the current climate, it is likely that some sort of risk-sharing to deal with inflationary pressures and price increases may be the most beneficial for all parties. Good relations between contractors and employers will be essential in navigating these challenging market conditions. Where complicated mechanisms are being incorporated into construction contracts, it is imperative that clear drafting is used to ensure that they operate in the intended manner.

Notes

1 Clause 62 of the NEC3 contract.

2 [2017] NIQB 43.

3 See para 47 of the judgment and 7-109 of David Thomas, *Keating on NEC* (Sweet & Maxwell 2022).

4 See para 54.

5 See *Dodd Properties (Kent) Ltd v Canterbury CC* [1980] 1 All ER 928.

6 See, eg, *The Sky's the Limit Transformations v Mirza* [2022] EWHC 29 (TCC).

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Performance bonds and risk transfer in construction: URDG, South African and English case law

Introduction

Performance bonds are contracts of guarantee used in many industries including construction. In 1977, a performance bond was considered a 'new business transaction',[1] however, it was still perceived to be similar to a letter of credit. Lord Denning defined it as 'a guarantee by a bank that suppliers will perform their obligations under the contract'.[2] He further described them as 'promissory notes payable on demand'.[3]

There are different forms for performance bonds provided by different professional bodies and contract types. One example is the International Chamber of Commerce (ICC) Uniform Rules for Demand Guarantees (URDG).[4] The use of the URDG in construction is worth considering as it reinforces the autonomy principle, which is fundamental in drafting, execution and judicial interpretation of bonds in many jurisdictions. The URDG is also considered to 'reflect international standard practice' and 'balance the legitimate interests of all parties'.[5]

While on-demand bonds are expected to be paid out without challenge, case law shows exceptions. Contractors are normally unsuccessful in preventing a demand for payment except for fraud. However, the decision in *Simon Carves Ltd v Ensus UK*[6] shows that courts may restrain payment without finding fraud. In contrast, the Supreme Court of South Africa, in *Aveng-Strabag JV v Sanral* [2020], maintained the traditional approach of refusing contractor's action to restrain payment.

This article will highlight the main features of the URDG that may make it attractive in construction projects and presents a comparison between the South African and the English approach in relation to performance bonds. It will also address when a call upon a bond can be restrained and answer the question whether performance bonds are efficient risk allocation tools taking into account the case law presented.

ICC URDG

The URDG provides for the autonomy principle under Article 5 Independence of Guarantee and Counter-Guarantee.[7] 'A guarantee is by its nature independent of the underlying relationship [...] A reference in the guarantee to the underlying relationship for the purpose of identifying it does not change the independent nature of the guarantee.'[8] In the construction industry, the underlying relationship is the main contract between the contractor and the employer. In addition, Article 5 provides that the guarantor is only bound by the relationship between itself and the beneficiary and is not concerned with claims arising from other contracts. Thus, the autonomy principle is catered for under the URDG. Furthermore, payment to the beneficiary is protected from claims or counterclaims made under the underlying contract.

Another important provision under the URDG is that demand guarantees are documents only, thus guarantors are not concerned with performance under the main contract or goods provided.[9] Article 15 deals with Requirements for Demand and it requires that, when making a demand, a beneficiary shall provide documents as specified in the guarantee. There is no requirement to check whether contractual performance took place or not. Arguably, this makes it easy to cash a bond based only on documents without getting into the nature of the dispute between the parties. The URDG also requires a statement by the beneficiary explaining breach in the underlying contract; however, this requirement can be waived if it is excluded from the guarantee. Thus, while the autonomy principle is valued, there is a requirement to inform the guarantor of what went wrong in the underlying relationship. Article 27 provides indemnification to the guarantor from liability for the form of document, the description of performance, goods or services, and good faith of any person issuing or referred to in any document presented to it.[10] However, it is worth highlighting that fraud is not mentioned under the rules and the guarantor is not exempt for failing to act in good faith.[11]

Performance bonds in South Africa

In *JV Aveng Strabag v SANRAL*,[12] the contractor, a joint venture (JV), claimed force majeure due to civil unrest that stopped work on site for 84 days. The employer, SANRAL, denied force majeure and instructed the JV to resume works. The JV did not return to site and the dispute was referred to arbitration. The FIDIC Contract (Red Book) was used by the parties. It defined four events under sub-clause 4.2 which allowed SANRAL to make a claim under the performance bond.[13] The events included failure by the JV to extend the validity of the bond, to pay the employer an amount due, to remedy a default and circumstances that entitle the employer to terminate. The last event, or rather, category, arguably provides the employer with room to use the bond more than the others.[14] Circumstances entitling termination would include breach of the contract's express and implied terms. For example, late delivery of specialist equipment may allow termination.

Guarantors are not concerned with performance under the main contract or goods provided

When the JV asked SANRAL for assurances that the second will not call upon the bond until arbitration proceedings are complete, SANRAL confirmed that it intends to call upon the guarantee. Accordingly, the JV applied for an interlocutory interdict which was dismissed but then allowed to appeal. In the appeal, Judge Makgoka confirmed that the autonomy principle of the guarantee from the main contract is recognised in South African law. J Makgoka referred to *Edward Owen* where Lord Denning emphasised the principle by explaining that a bank is not concerned with the relationship between the supplier and customer, whether there is default or not. The appeal was dismissed as the JV failed to show that the parties have intended that the employer is entitled to payment prior to determination of any dispute between them. The existence of an ongoing arbitration did not affect the judge's decision as a dispute in the underlying contract does not automatically translate to stopping a beneficiary from calling upon the performance bond. The autonomy principle was also recognised in *Loomcraft*.[15] Scott AJA referred to it as 'documentary credit'[16] and emphasised that fraud is the only exception that would allow a bank not to honour a performance guarantee.

Kwikspace[17] is another South African case. In this case, Australian law was the law of contract. Cloete JA confirmed that under Australian common law, a contractor can restrain an employer from making a call on a bond if it proves that there would be a breach of the main contract. This arguably means that the autonomy principle is not absolute in Australia as a performance guarantee may be subject to a contractual qualification in the main contract.[18] Thus, prior to cashing a bond, the main contract conditions must be fulfilled first. This undermines the liquidity of the bond as the beneficiary may be denied sums based on the main contract conditions. It also makes it a less effective guarantee in some jurisdictions than others. The URDG does not permit non-documentary conditions; the only condition it allows is either a date or lapse of a period of time.[19]

Prior to cashing a bond, the main contract conditions must be fulfilled first

Performance bonds in England

Turning to England, the case of *Edward Owen Engineering v Barclays Bank* is considered an important authority to review.[20] The claimant brought action to restrain the bank from paying its performance bond, which stipulated 'payable on demand without proof or conditions'.[21] The claimant argued that as there was no default, the bond cannot be cashed. They further argued that bad faith exists where a bondholder cashes a bond knowing there is no default. The appeal failed as sufficiency of performance was not required. Browne LJ quoted Lord Denning: 'the bank here is simply concerned to see whether the event has happened upon which its obligations to pay has arisen'.[22] The decision concurs with other decisions where injunctions to stop payment are refused except for fraud.

In contrast to *Edward Owen*, a recent case shows that a contractor can succeed in restraining an employer from making a call on a performance bond. In *Simon Carves v Ensus*,[23] an injunction was granted on the basis that there was a reasonably good arguable case that the bond had become null and void.[24] The case involved a process plant construction project under a contract incorporating the Institution of Chemical Engineers General Conditions of Contract. Issues arose in relation to responsibility for rectifying defects raised in enforcement notices issued by the Environment Agency.

The wording of the bond was of an unconditional bond, stating 'The Bank hereby irrevocably and unconditionally undertakes to pay to the Purchaser.'[25] J Akenhead highlighted the problem of seeking to restrict a call on a bond where there is no fraud, stating: 'There has been little jurisprudence on the circumstances which arise in which there are contractual provisions between contractor and purchaser/employer which impose restrictions or which prevent calls being made on bonds or letters of credit.'[26] The special conditions of the contract provided that under sub-clause 3.7 the bond shall become null and void upon the issue of the Acceptance Certificate.[27]

J Akenhead concluded that if the underlying contract prevents the beneficiary from making a demand under the bond, the court will restrain such demand. He then went on to say that the court can decide to restrain the beneficiary either as it is in breach of the underlying contract or because it is fraud 'in that the beneficiary is seeking to call on the bond when it knows or can be taken to know that the underlying contract forbids it from doing so'.[28] Thus, the illegitimacy of making a call upon a bond can qualify as fraud. The action succeeded because upon issuing the Acceptance Certificate by the employer, the bond has become null and void in respect of 'any pending or previously notified claims'.[29]

When can a call upon a performance bond be restrained?

As mentioned above, the main exception where a performance bond may not be called is fraud. The strict rule was established in the

United States case of *Sztejn v J Henry Schroder Banking Corporations*.[30] The case emphasised separability of the letter of credit from the main contract between the seller and the buyer; that is, the autonomy principle. The bank is concerned with documents presented rather than the actual goods or services. Performance or lack thereof under the underlying contract was not the test. The case further stressed that a letter of credit is important for trade and it is important to preserve its efficiency. The argument for honouring letters of credit as important instruments in international commerce was also highlighted in other cases such as *R D Harbottle (Mercantile) v National Westminster Bank*.[31] J Kerr argued: 'The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged.'[32]

Different authorities show that a contractor seeking an injunction to stop a call upon payment of a bond has to overcome three barriers: knowledge of the beneficiary's call, fraud and bank knowledge of fraud.[33] The contractor needs to be aware of a potential call on the bond, which may not be easy to know. There is a game theory interpretation here as there is information asymmetries unless the employer makes an explicit 'threat' to call upon the bond. Otherwise, the contractor arguably has no way of knowing if a call will be made or not.

Eveleigh LJ said: 'in principle I do not think it is possible to say that in no circumstances whatsoever, apart from fraud, will the court restrain the buyer. The facts of each case must be considered'.[34] Thus, fraud is not the only exception but also 'if the contract is avoided or if there is a failure of consideration between buyer and seller'. The underlying contract can be relied upon to restrain a buyer from calling upon the bond as witnessed in *Simon Carves* and Australian case law. Another area where the courts may grant a beneficiary making a call on a bond is where there is a risk of assets being moved to another jurisdiction to the detriment of the other party. In *Mavera Compania Naviera SA v International Bulkcarriers SA*,[35] the Mavera principle was established, which provides for securing assets of the defendant so that the claimant is not left with nothing.

Are performance bonds efficient risk allocation tools?

Having reviewed case law from England and South Africa, we now turn to the efficiency of bonds. Are bonds efficient tools to transfer risk between contractors and employers in construction? The risk in question is not only that of a contractor defaulting but also the risk of bringing a contractor to ruin. Lundberg's collective theory of risk can be used to determine a contractor's probability of 'ruin'[36] if all or some of its performance bonds are called upon within a period of time. However, given the different parameters involved in each construction contract, such probability may not be easy to quantify. Pareto's efficiency has one criterion, which is 'any change that puts one member of society in a better position without making somebody else worse off is a Pareto improvement'.[37]

Bonds are there for two reasons: security and risk allocation

A performance bond is arguably beneficial for the employer as it provides a security of usually 10–20 per cent of the contract value, which in theory is cashable on demand regardless of the existence of a dispute. However, it is arguably inefficient because contractors have to provide an equivalent security to the bank for the duration of the project. Accordingly, the contractor has to find 10–20 per cent of its contract value and place it as a security with the guarantor. This places a contractor working on multiple projects under financial pressure as it has to provide 10–20 per cent for each contract value it is working on as a security for the bank. There is an opportunity cost for contractors to use these sums more efficiently and innovatively instead of having them tied down to be released and then blocked for the next project. Performance bonds exist in a string of guarantees, between banks of suppliers and buyers, suppliers and their banker, and buyers and their banker. This increases transaction costs for both suppliers and buyers as they negotiate the terms of such guarantees among themselves and with their respective bankers.

One may ask why we are still using bonds despite their impact on transaction costs. Bonds are there for two reasons: security and risk allocation as to 'who shall be out of pocket pending resolution of a dispute'.[38]

A performance bond could be seen as a 'liquidated damages' where there is a substantial breach of contract. It provides the buyer with a quick remedy as opposed to suing the supplier as long as the value of the bond is sufficient to cover the damage. Lord Denning warned that it could even be used when the breach is 'insubstantial or trivial',[39] in which case it can be classified as a penalty. Thus, the possibility of using performance bonds as liquidated damages is 'so real'.[40] Accordingly, construction contractors need to allow for such possibility in their price. Naturally, given the low profit margins of construction contractors, there is pressure on contractors to submit a low bid to win the works. However, such low price may prove to be insufficient to deal with such high possibility. Moreover, calling a bond carries 'a very real risk of damage to the commercial reputation, standing and creditworthiness' of a contractor.[41] This may affect their ability to pre-qualify for other tenders as well as being able to obtain finance.

Conclusion

While performance bonds are here to stay, their efficiency is questionable and their transaction costs are arguably high. Comparative case law from South Africa and England shows similarities and differences in judicial approach when dealing with actions to restrain a call upon a bond by a beneficiary. Despite the similarities, there is still a grey area as to when an action to restrain a call in the absence of fraud or Mavera can be successful. The decision in *Simon Carves* may give contractors a higher chance of success in restraining action subject to the particulars of each case. The costs involved in restraining calls upon bonds cannot be ignored given the contracting industry's typically low profit margins. The autonomy principle is arguably undermined when the main contract decides whether a bond can be cashed or not. Judicial clarity on what constitutes grounds to restrain calling upon a bond is needed. Moreover, the use of documents-only bonds such as the URDG may limit litigation between contractors and employers as disputes between the parties within the underlying contract have no say in restraining or granting a call upon a performance bond. A balance is needed between allowing actions to restrain a call upon a bond on the one hand and preserving the important role of bonds in international trade on the other.

Notes

1 *Edward Owen Engineering v Barclays Bank* [1978] QB 159, 164
2 *Ibid,* 166.
3 *Ibid,* 170.
4 ICC Academy, ICC Uniform Rules for Demand Guarantees (URDG 758) eBook Summary at https://icc.academy/urdg-758 accessed 9 October 2022. The URDG was officially endorsed by the United Nations Commission on International Trade Law (UNCITRAL) in 2011 and is also recognised by FIDIC.
5 The World Bank, Public Private Partnership Legal Resource Center at https://ppp.worldbank.org/public-private-partnership/library/icc-uniform-rules-demand-guarantees accessed 9 October 2022.
6 *Simon Carves Ltd v Ensus UK Ltd* [2011] EWHC 657 (TCC), 2011 WL 1060082.
7 ICC Uniform Rules for Demand Guarantees (URDG 758) www.cipcic-bragadin.com/wp-content/uploads/2015/09/ICC-URDG-758.pdf accessed 9 October 2022.
8 *Ibid*, Art 5(a).
9 *Ibid,* Art 6.
10 *Ibid,* Art 27(a), (c)–(d).
11 *Ibid,* Art 30 Limits on Exemption from Liability.
12 *Joint Venture between Aveng (Africa) (Pty) Ltd and Strabag International GmbH v South African National Road Agency Soc Ltd and Another* (Case no 577/2019) [2020] ZASCA 146 (13 Nov 2020).
13 *Ibid,* 19.
14 *Ibid.*
15 *Loomcraft Fabrics CC v Nedbank Ltd and Another* (70/94) [1995] ZASCA 127.
16 *Ibid,* 5.
17 *Kwikspace Modular Buildings Ltd v Sabodala Mining Co Sarl and Another* [2010] ZASCA 15; 2010 (6) SA 477 (SCA).
18 *Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd* [1998] 3 VR 812.
19 See n 7 above, Art 7.
20 See n 1 above.
21 *Ibid,* 159.
22 *Howe Richardson Scale Co Ltd v Polimex-Cekop* [1977] EWCA Civ J0623-1
23 See n 6 above.
24 *Ibid.*
25 *Ibid.*
26 *Ibid,* 29.
27 *Ibid.*
28 *Ibid,* 34.
29 *Ibid,* 37(a).
30 (1941) 31 NYS 2d 631.
31 [1978] QB 146.
32 *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146, 156.
33 Issaka Ndekugri, 'Performance Bonds and Guarantees: Construction Owners and Professionals Beware'

[1999] 125 Journal of Construction Engineering and Management 6, 428–36.

34 *Potton Homes Ltd v Coleman Contractors Ltd* [1984] 28 BLR 19 CA, 28.

35 [1975] 2 Lloyd's Rep 509.

36 Karl Borch, 'The Theory of Risk' [1967] 29 Journal of the Royal Statistical Society 3, 432.

37 Klaus Mathis *Efficiency Instead of Justice? Searching for the Philosophical Foundations of the Economic Analysis of Law* translated by Deborah Shannon (Springer 2009), 33.

38 *Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd* [1998] 3 VR 812, 826.

39 See n 1, 170.

40 *Ibid*.

41 See n 6, 41.

BOOK REVIEW

FIDIC Contracts in Europe: A Practical Guide to Application

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Since their publication in 1999, the FIDIC rainbow suite of the Red, Yellow and Silver Books (first edition) have become the most widely used engineering standard form contracts internationally, and among the best regarded. Although having their origins in the UK ICE Conditions of Contract, via a series of amended and updated previous forms, FIDIC contracts are used whatever the background of the parties or their familiarity with common law.

A major reason for this success has been the perception that the contracts strike a reasonable and appropriate balance between the interests of contractors and employers respectively; I say 'appropriate', because, although the Silver Book (for which there was no ancestor in the FIDIC family tree) contains a radically different risk allocation from the other two books, placing substantially all of the risks of procurement, design and construction (with some important exceptions) on the contractor, this form was developed precisely to meet a specific type of project financing need and filled a gap that had previously been filled by often unsatisfactory ad hoc amendments to other forms.

The success of the FIDIC forms has also been due to FIDIC's historical willingness to amend and update the contracts to reflect experience of their use and developments in international contracting. This willingness was no more clearly demonstrated than with the publication, in 2017, of the second edition of the Red, Yellow and Silver Books.

I had the privilege of serving as legal member of the Updates Task Group which drafted the 2017 forms. A key aim of the new contracts was to increase clarity and certainty, so users will find several new definitions, which are now in alphabetical order (Sub-Clause 1.1). 'Claim', 'Dispute', 'Notice' and 'Programme', for example, are now defined terms; 'may', 'shall' and 'consent' are also defined, with the particular aim of assisting those whose first language is not English. 'Plus reasonable profit', as used in the 1999 editions, often caused difficulty. A new definition, 'Cost Plus Profit', now applies, and refers to a percentage for Contractor's profit to be stated in the Contract Data, or in default five per cent.

One very significant procedural change concerns notices. As noted above, 'Notices' is now a defined expression. By a new Sub-Clause 1.3, a notice must be in writing and identify itself as such, among other requirements. Notices are now required in many more situations than previously and, when given, trigger time limits. Other changes include the Engineer's or Employer's Representative's role in agreeing or determining any claim or other matter arising under the contract; this is set out in greater detail than in the 1999 Books, and in a step-by-step fashion with time limits. Claims are now dealt with in a new Clause 20 and in the same way for contractor and employer.

Like many others who act as arbitrators or adjudicators, I have long supported methods of reducing or avoiding disputes when issues arise in a project. In the 2017 contracts, a new Clause 21 sets out a substantially revised disputes process, including an enhanced role for the renamed Dispute Avoidance/Adjudication Board (DAAB) in helping resolve disputes before an arbitration is commenced.

In his introduction to this new book, Donald Charrett places the 2017 FIDIC contracts in the context of construction contracts more generally and the development of the FIDIC forms. In chapter 2, he deals with many of the underlying features of the contracts when examining the FIDIC Golden Principles. This book is part of a series covering the application of FIDIC contracts globally, with the focus here being on their application in Europe. Dr Charrett brings to this task a wealth of experience and knowledge of the contracts and of international construction.

Experts from several European jurisdictions describe the legal and regulatory aspects relevant to major projects; those covered are specifically Austria, Belgium, Czech Republic, Denmark, England & Wales, France, Germany, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Scotland, Sweden and Switzerland. The individual authors have written clear and often detailed guidance, indicating where further information might be obtained. The diversity of legal systems relevant to implementing not just a FIDIC but any major project in Europe is one of the most striking features of this work, and the contributions of the many individual authors will make it a valuable source of information to anyone involved in such projects.

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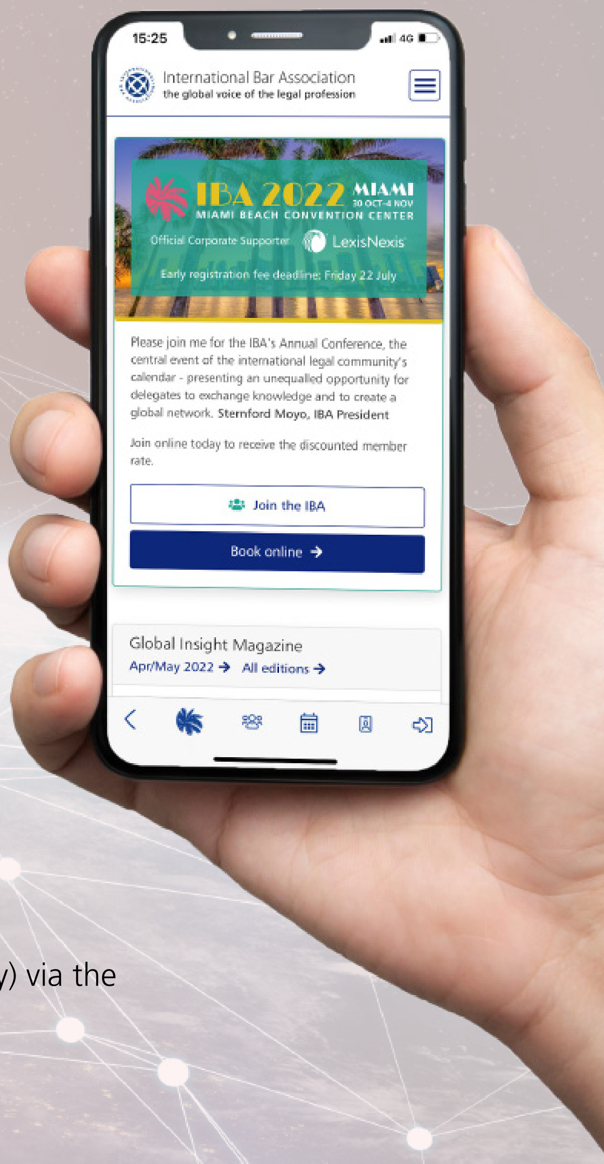

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