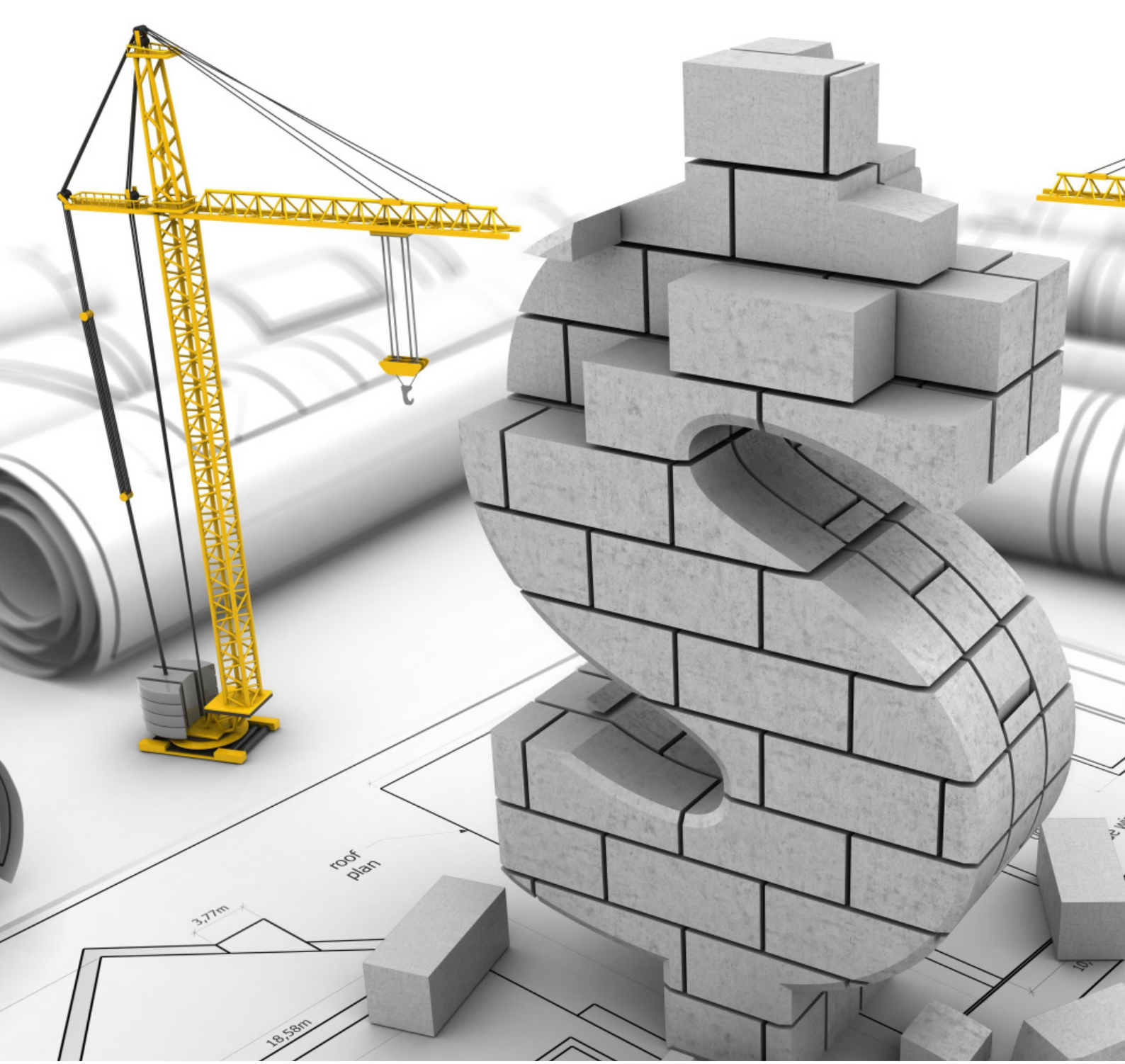
CONSTRUCTION LAW INTERNATIONAL

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

Vol 16 ISSUE 2 ISSN 1819-1371 JUNE 2021



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Contractors' claims for expropriation of contractual rights on the basis of international investment treaties

East European workers: exploitation in the construction industry

Recovery of additional time and money arising from Covid-19 by way of variation clauses

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EVENTS 2021

WEBINARS 2021

Justice, the courts and Covid-19: the need for the judiciary to innovate
2 July 2021 1300 – 1500 BST

Women lawyers supporting women in society
6 July 2021 1300 – 1415 BST

Electronic Communications and Antitrust roundtable: Challenges of regulating the digital economy
7 July 2021 1400 – 1530 BST

Prospects for peace and accountability in Afghanistan as the world withdraws
8 July 2021 1400 – 1500 BST

US immigration: an update
8 July 2021 1600 – 1715 BST

Brexit and the impact on the banking and financial industries: English law and English courts
12 July 2021 1300 – 1400 BST

No jab, no job? The Covid-19 vaccination conundrum
13 July 2021 1200 – 1300 BST

IBA Tax Open Forum – Pillar 2 agreed? A new era of minimum corporate taxation
13 July 2021 1500 – 1600 BST

IBA North American Regional Office: Environmental, Social, and Corporate Governance: The Role of Lawyers in Advising Clients on Effective, Long-term ESG Strategies
14 July 2021 1700 – 1800 BST

Young lawyers' leadership in times of crisis
15 July 2021 1300 – 1400 BST

The role of experts in construction disputes: a practical approach to hot topics and issues
21 July 2021 1400 – 1500 BST

A game-changer in the making: The pending German Corporate Sanctions Law
28 July 2021 1300 – 1400 BST

VIRTUAL CONFERENCES 2021

M&A in Latin America: challenges and opportunities in trying times
30 June 2021 1530 – 1730 BST

IBA Global Influencer Forum
1 July 2021

Professional Ethics Symposium: a taste of what to expect in Milan 2022
22 September 2021

IBA/UBA First International Conference on Agricultural Law
23 – 24 September 2021

IBA Global Showcase
25 – 29 October 2021

CONFERENCES 2021

25th Annual Competition Conference
9 – 11 September, Florence, Italy

23rd Annual IBA Transnational Crime Conference
3 – 5 November 2021, Madrid, Spain

6th IBA Asia Law Firm Management Conference: We survived but is the 'new normal' really the future? Or is there more to come?
5 November 2021, Singapore

7th IBA Asia Pacific Regional Forum Biennial Conference
17 – 19 November 2021, Singapore

Digitising of International Commerce: new trends from product development and purchasing, through to manufacturing, logistics, supply chains and transportation
17 – 18 November 2021, Milan, Italy

Building the Law Firm of the Future
19 November 2021, London, England

7th Annual Corporate Governance Conference
2 – 3 December 2021, Frankfurt, Germany

The New Era of Taxation
2 – 3 December 2021, Dublin, Ireland

Full and further information on upcoming IBA events for 2021 can be found at: **bit.ly/IBAevents**

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CONTENTS

CONSTRUCTION LAW INTERNATIONAL

Vol 16 ISSUE 2 June 2021

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

REGULARS

FEATURE ARTICLES

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Cover image: Mmaxer/Shutterstock.com

FROM THE EDITORS

Dear readers,

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

In this edition, we present the 'diversity and inclusion' questionnaire that is a recurring feature of this journal, along with our 'FIDIC around the world' series. Our first contributor to this feature is Dr Kourosh Kayvani, a Principal at HKA with expertise in specialist engineering, expert witness, and failure investigation, as well as having a distinguished history of directorships, industry accolades, academic appointments and speaking engagements. We are grateful for the insights and personal experiences he offers readers.

For our arbitration updates sections, Gabriel Muleros Clas considers the recent FIDIC new venture, FIDIC Credentialing, and the impact of the introduction of training and certification requirements for industry professionals. Albert Bates Jr, Zachary Torres-Fowler and Hailey Barnett provide an overview of the 2021 International Centre for Dispute Resolution Rules. For our third update, Geoffrey Smith considers the World Bank's new mechanism allocating a specific role to Dispute Avoidance Boards with the aim of reducing the risk of sexual exploitation, abuse and harassment on projects financed by the World Bank.

Moving to our country updates, Stefan Pislevik and Natalie Keir discuss the recent United Kingdom High Court decision in *Republic of Sierra Leone v SL Mining Ltd* on satisfying tiered dispute resolution clauses as a pre-condition to arbitration. We are fortunate to have two updates from India, from Gagan Anand and Shivani Anand. The first considers the introduction of a bill to the Indian parliament that seeks to address corrupt practices in securing contracts or arbitral awards. The second proposes a reform by way of unifying India's construction laws. Lastly, Luis Moreno provides us with an update on the changes to Panama's public procurement law.

For our feature articles, Marianna Tsatsanifou takes an in-depth look at contractors' claims for expropriation of contractual rights in the context of international investment treaties.

Zia Akhtar considers the impact of Brexit on Eastern European workers in the construction industry, and the implications of the end of free movement in the European Union and restricted migration to the UK. Finally, Mino Han and JB Kim consider whether a contractor is entitled to recover additional costs incurred as a result of the Covid-19 pandemic by invoking a variation clause in the contract.

We include one review in this issue of *Construction Law International*. Dr Donald Charrett reviews Corbett & Co's FIDIC 2017 – A Practical Legal Guide.

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

From our diversity and inclusion series, FIDIC around the world, or country updates and feature articles, we invite you all to contribute your thoughts and insights by submitting your articles to CLInt.submissions@int-bar.org.

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FROM THE CO-CHAIRS

Dear International Construction Projects members,

As we moved into the second year of our two-year term as Co-Chairs, we had very much hoped to be looking forward to meeting with you at a number of the conferences scheduled for 2021. However, as the world works its way through the pandemic, it seems that we will need to be patient for a while longer. We have some light at the end of the tunnel with vaccination programmes being rolled out in many countries and some relaxations of restrictions taking place, so we remain hopeful that we will have that opportunity soon.

In the meantime, we have been contacted by many of you asking how to get involved in ICP activities. There are a number of opportunities, and we welcome involvement from as many people as possible.

We have prepared a programme of online events for 2021, which began with the Networking Session – a purely social event for ICP members, hosted by IBA on the Remo platform, that provided an informal forum to meet and chat in small groups. It was great to see many of you at that.

That was followed by the first two Masterclass events: Practical considerations for mediation of construction disputes on 12 May and Practical aspects of cross examination techniques on 24 May 2021. Those presented excellent training opportunities from senior practitioners sharing practical experience and advice.

Coming up for the remainder of 2021, we have:

- Wednesday 21 July – The role of experts in construction disputes: a practical approach to hot topics and issues
- Wednesday 8 September – Masterclass 3 – Fundamentals of Project Establishment
- Wednesday 22 September – Masterclass 4 – Fundamentals of Project Delivery
- Wednesday 6 October – Sustainable Project Decommissioning: reality or utopia?
- Tuesday 7 December – Beyond Covid-19 – Construction impact, lessons and beyond: What changed? What's better? What are the new trends?

These events are all free of charge for ICP members. We have tried to time the sessions so that all time zones are able to access at least some of them. If the timing is not suitable for a particular event, a recording of the session will be available on the IBA website.

Our subcommittees have been very active and a number of projects are underway.

The Project Execution Subcommittee is preparing a 'Supply Chain Insolvency Ready Reckoner'. The purpose of this Guide is to:

- explain the issues encountered by stakeholders as a result of insolvency in their supply chain;
- set out how stakeholders can protect their interests or pursue the recovery of their losses; and
- provide a list of relevant primary and secondary resources for each issue.

The Subcommittee is looking for volunteers to work on topics (defining insolvency, responding to an event of insolvency, contract drafting to address incidences of insolvency, monitoring for potential insolvency events and business continuity planning). Please contact Erin Miller Rankin or Thiago Fernandes Moreira if you are interested in taking one of these on.

The Dispute Resolution Subcommittee has, for a number of years, been working on the Country Guide project on Alternative Dispute Resolution (ADR) in construction. Guides for 20 countries are already available, with two more in production: see the webpage 'Alternative dispute resolution (ADR) in construction – country guides' at www.ibanet.org/article/ac86fc65-e413-4d55-b2a9-952f30f1655f. If you would like to prepare a Guide for your country please contact the Jane Davies-Evans or Ioannis Vassardanis.

Another opportunity to provide written content is through this publication, *Construction Law International*. If you are interested in contributing an article please contact the ICP Committee Editor, Tom Denehy.

Our Diversity officers are working on content for the IBA website's ICP pages. Their plans are to conduct interviews of a number of senior people to set out their experiences of adopting and managing diversity policies in their workplaces.

If you are interested in getting involved or have an idea or suggestion you would like to share, please do contact us or the relevant officers. Details of all officers are on the ICP pages of the IBA website at https://www.ibanet.org/LPD/SEERIL/Intl_Construction_Projects/Default.aspx.

We wish you and your families, friends and colleagues well.

Shona Frame and Ricardo Barreiro-Deymonnaz
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Questionnaire

Dr Kourosh Kayvani
Principal, Forensic technical services, HKA

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

Dr Kourosh Kayvani, Principal, HKA. I am also an Adjunct Professor at the School of Civil and Environmental Engineering at the University of NSW in Sydney, Australia.

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

I had two uncles in Iran (that is where I am from), who were successful civil engineers. They inspired me to study civil/structural engineering. Later on, I had a couple of professors at Tehran University who were also famous consulting engineers. They were my role models in how to become a successful practising engineer while staying involved in academia. My father was a judge, and my mother was a high school teacher. They have been my role models in so many aspects of my personal and professional life, particularly in acting ethically and treating people equally and respectfully.

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

Keep a positive mindset irrespective of the circumstance. Give it your best and your efforts will be rewarded. Never stop learning. Be the best version of yourself rather than try to compete with others. Build meaningful relationships.

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

Yes, it has been over the last 20 years or so. I started my career in Australia 25+ years ago as a migrant engineer who was from a non-English speaking background. Back then, most of my colleagues were male Australian engineers with European backgrounds. These days, there is much better diversity in the engineering profession in Australia. However, I believe we still have a long way to go. The Aboriginal Australians are particularly under-represented in our workforce.

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

Creating an environment that allows people to bring their whole self to work. Implementing measures that facilitate the return to work of woman professionals after maternity leave. Flexible working policies. Using diverse teams in all decision-making.

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

Addressing conscious and unconscious biases in all settings is something we need to strive for. We need to make sure that the dominant organisational culture (particularly at leadership level) does not stifle freedom of expression and inclusion of people from diverse background. Creating specific pathways for better workforce participation and progression for groups of the society who are from under-represented groups in terms of gender, age, ethnicity, and linguistic and socio-economical background.

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

When participation of all groups of the population in workplaces are representative of their presence and potential in the society. And when these groups are all included in all levels of decision-making.

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

For me, diversity and inclusion are ultimately about equal rights and opportunities. They are about people being valued for who they are as a human being irrespective of their gender, age, ethnicity, and background.

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

The Covid-19 pandemic has had a disproportionate impact on disadvantaged groups in society. As a result, I feel the momentum in achieving better diversity in the workforce has slowed, and may have even reversed, in some sectors of the economy.

The new FIDIC certifications: will they pass the test?

Gabriel Mulero Clas
Corbett & Co International Construction Lawyers, London

In March 2020, the International Federation of Consulting Engineers (FIDIC) launched its new venture FIDIC Credentialing Ltd (FCL) tasked with rolling out certification programmes for industry professionals.[1] While, at first glance, some may view it as an overambitious money-making enterprise, it has the potential to help with some very real problems with the current use of FIDIC forms. This article mainly focuses on one of these programmes to ascertain whether it will address these problems.

The stories about seemingly obvious and therefore very dispiriting misapplications of FIDIC contracts in the field are all too common. Even when governed by the same law, the inconsistent interpretation of some of the better known FIDIC clauses is at times too unpredictable to truly guarantee the level of certainty employers and contractors expect. With the anticipated increase in the use of FIDIC forms worldwide, particularly the 2017 editions by multilateral banks, the demand for professionals whose standardised knowledge of the FIDIC suite will increase, which would promote certainty.

In an attempt to bridge this gap, the FCL introduces five certification programmes (with more potentially to come), all in their early stages.[2] Two of these would be of interest to any relevant industry professional, including lawyers: the Certified Adjudicator and the Certified Trainer. The other three seem suited to engineers, programme managers and other such professionals: the Certified Contract Manager, the Certified Consulting Engineer and the Certified Future Leader. The Certified Adjudicator programme seems ahead of the pack in its development, with legacy members of the FIDIC President's List of Approved Dispute Adjudicators currently receiving training to certify into the new programme. It should be available to new candidates later in 2021.[3] The other programmes are following close behind with certain application details still outstanding for each, although they are also all promised to be available later in 2021.[4]

Fortunately, the people behind these programmes at every level are all of the highest calibre.[5] The Management Board is headed by Sir Vivian Ramsey, the Certification Board is headed by Professor John Uff CBE QC and the Operations Team is led by Dr Nelson Ogunshakin (FIDIC CEO) and Thanos Totsikas (General Manager of Credentialing). In all, the 26 people directly involved feature a robust set of experiences and backgrounds, which is encouraging.

The Certified Adjudicator programme is certainly a welcome solution, considering how stale the FIDIC President's List has become since its last assessment in 2015. As of March 2020, the List included a total of just 60 names from 19 countries[6] of which, for example, only four are women, one is black, one is Latin American and a mere 14 are identified as living outside of Europe.[7] The Certified Adjudicator programme should therefore be a resounding success insofar as diversity is concerned if it results in a more inclusive President's List with members from a wider variety of countries and backgrounds.

However, with the promise of an expanded list of adjudicators, the FCL should be careful not to dilute too much the quality of the membership, which is currently quite high. The certification and recertification processes,[8] which the FCL will implement (and for which they aim to receive International Organization for Standardization [ISO] accreditation),[9] seem especially robust, but only time will tell whether quality will be maintained at a desirable level.

On prerequisites alone, the bar is set quite high, including, in summary: a relevant professional qualification; ten years of industry experience; five years of senior level experience in construction disputes; understanding of the FIDIC forms and documents; and attendance at a training course. There is also a list of competences and other requirements, such as letters from referees in the industry.

In addition (and most notably), there will be a multiple-choice test and a two-day assessment, each designed to test FIDIC, construction law and dispute board knowledge, drafting and decision-making skills, ethical standards, management of meetings, hearings and site visits, and more. The two-day assessment will include 'overnight written assignments based on real dispute scenarios, role plays, award writing and essay style assignments.'[10] It will certainly be no easy task to reach the FIDIC President's List.

Once on the List, each member will have to renew their certification every year, requiring five days in FIDIC dispute resolution cases and eight hours of professional development. Each of the other programmes have, to varying degrees of similarity, their own testing and renewal schemes.[11] At the head of these, a Professional Code of Conduct Committee will investigate and assess complaints regarding anyone certified in any of the programmes.[12]

Despite the reassurance that this level of quality control should give FIDIC contracting parties, one aspect of the process puts the lack of diversity issue in question. There is an initial investment of CHF 2,100 (approx. US$2,280) on application and certification fees alone, which may represent a significant barrier to entry to many potential candidates in emerging markets.

Then, there will be a yearly recertification fee of CHF 500, which should more than cover the cost of checking that a certified adjudicator's yearly paperwork is in order. Meanwhile, the fees for the Certified Trainer programme are currently indicated, albeit subject to confirmation, as CHF 2,100 for application and certification, CHF 250 for yearly renewal and CHF 1,500 for recertification every three years.[13] Thirty per cent of the current FIDIC President's List members are also on the current FIDIC Trainers list.[14] Therefore, those who aspire for both certifications, which judging from the current spread are not too few in number, will have to spend CHF 4,200 just to start and then CHF 1,250 per year on average. With such pricing strategies, the certified adjudicators' and trainers' lists may perhaps not expand and diversify as quickly and as proportionately as one would hope.

At a virtual town hall meeting held by the FIDIC and the FCL in February 2021, the question arose of a discount for young engineers or engineers from emerging markets.[15] Anthony Barry (FIDIC President-Elect and the FCL Management Board member) gave assurances that the FCL 'will try to offer assessments […] as close in cost to […] what is locally economically affordable',[16] and that the FCL will not be 'charging so much money for a credential that only those in say the top 20 economies in the world can afford it. That would not be right and that would be counter to FIDIC's objectives.'[17] Dr Ogunshakin added that the Certification Board were in discussions to come up with a recommendation.[18] Hopefully, the recommendation will cover both certification and renewal fees and every one of the certification programmes.

Although training and certification will not eliminate the risk of misuse of FIDIC contracts, it should hopefully, at very least, weed out the slowest in the pack and raise the bar of the minimum requirements to some level. There is a certain degree of skill required for adjudicators and trainers, for example, that a certification programme is simply not equipped to guarantee. Ensuring wisdom, impartiality and proper experience in adjudicators and the ability to communicate and teach in trainers would require more than a standardised test. Comprehensive monitoring and feedback may be needed to maintain the required standard, but a considerably larger number of resources would be necessary for such a campaign. All in all, some work remains outstanding for the FIDIC and the FCL and one can only wish them the success that the industry needs from them.

Notes

1 FIDIC CEO email to FIDIC members via fidic@fidic.org dated 4 March 2021. See also the FCL's website at https://fcl.fidic.org, accessed 25 March 2021.
2 Programmes, FIDIC, see https://fcl.fidic.org/programmes, accessed 25 March 2021.
3 Adjudicator certification programme, FIDIC, see https://fcl.fidic.org/our-programmes/adjudicators, accessed 29 March 2021 (click on 'Dates' on this webpage).
4 Certified Trainer Programme, FIDIC, see https://fcl.fidic.org/our-programmes/trainers; Contract Manager Programme, FIDIC, see https://fcl.fidic.org/our-programmes/contract-managers, Certified Consulting Engineer Programme, FIDIC, https://fcl.fidic.org/our-programmes/certified-engineers; and Certified Consulting Practitioner certificate, FIDIC, https://fcl.fidic.org/our-programmes/future-leaders, accessed 29 March 2021 (click on 'Application requirements' and 'Dates' on these webpages).
5 Governance, FIDIC, see https://fcl.fidic.org/governance; About us, FIDIC, see https://fcl.fidic.org/about-us; and, 'New era for certification and professional development as FIDIC Credentialing is launched', FIDIC News, 2 March 2021, see https://www.fidic.org/node/32516 accessed 25 March 2021.
6 FCL town hall - recording, FIDIC Digital, 1 March 2021, see https://vimeo.com/518039034#t=16m16s, accessed 25 March 2021.
7 President's List of Approved Dispute Adjudicators. FIDIC, see https://fidic.org/president-list, accessed 25 March 2021.
8 Adjudicator certification programme, FIDIC, see https://fcl.fidic.org/our-programmes/adjudicators, accessed 25 March 2021 (click on 'Application requirements', 'Fees', 'Assessment details' and 'Dates' on this webpage for details on information in the following four paras).
9 FAQs, FIDIC, see https://fcl.fidic.org/faqs, accessed 25 March 2021 (click on 'Are the certification programmes accredited?' on this webpage).
10 Adjudicator certification programme, FIDIC, see https://fcl.fidic.org/our-programmes/adjudicators, accessed 25 March 2021 (click on 'Assessment details' on this webpage).
11 Certified Trainer Programme, FIDIC, see https://fcl.fidic.org/our-programmes/trainers; Contract Manager Programme, FIDIC, see https://fcl.fidic.org/our-programmes/contract-managers; Certified Consulting Engineer. FIDIC, see https://fcl.fidic.org/our-programmes/certified-engineers; and Certified Consulting Practitioner certificate. FIDIC, see https://fcl.fidic.org/our-programmes/future-leaders, accessed 31 March 2021 (click on 'Application requirements' and 'Assessment details' on these webpages).
12 Governance, FIDIC, see https://fcl.fidic.org/governance, accessed 25 March 2021.
13 Certified Trainer Programme, FIDIC, see https://fcl.fidic.org/our-programmes/trainers, accessed 29 March 2021 (click on 'Fees' on this webpage).
14 President's List of Approved Dispute Adjudicators. FIDIC, see https://fidic.org/president-list; and Trainer's List, see https://fidic.org/trainers-list, accessed 29 March 2021.
15 FCL town hall - recording, FIDIC Digital, 1 March 2021, see https://vimeo.com/518039034#t=1h13m24s accessed 25 March 2021.
16 FCL town hall - recording, FIDIC Digital, 1 March 2021, see https://vimeo.com/518039034#t=1h14m51s accessed 25 March 2021.
17 FCL town hall - recording, FIDIC Digital, 1 March 2021, see https://vimeo.com/518039034#t=1h15m10s accessed 25 March 2021.
18 FCL town hall - recording, FIDIC Digital, 1 March 2021, see https://vimeo.com/518039034#t=1h15m24s accessed 25 March 2021.

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This article was prepared with the help of contributions and feedback from Edward Corbett, Managing Director at Corbett & Co International Construction Lawyers.

The 2021 ICDR Arbitration Rules: a welcome update for international construction arbitration

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On 1 March 2021, the International Centre for Dispute Resolution (ICDR), the international division of the American Arbitration Association (AAA) and a leading provider of dispute resolution services to businesses in matters involving cross-border transactions released the 2021 update to its international arbitration and mediation rules (the '2021 ICDR Rules').[1] The 2021 update marks the first time the ICDR's arbitration rules and mediation rules have been revised since 2014 and 2008, respectively, and is of particular note to the construction industry both in the United States and elsewhere.

As many construction-dispute practitioners will acknowledge, during the last decade, the construction industry has increasingly favoured arbitration over other forms of dispute resolution. This has been particularly true for international construction projects where, given the varying jurisdictions and nationalities involved, international arbitration is all but a necessity to ensure an efficient and enforceable resolution of disputes.

The numbers bear this trend out. The statistics from nearly all of the leading international arbitration centres around the world, including the ICDR, show that construction disputes make up an increasing proportion of their caseloads.[2] Given the volume of construction disputes overseen by the ICDR, international construction practitioners should be aware of the ICDR's rule changes. This is particularly significant because, while many US construction entities and firms are likely to be familiar with the AAA's Construction Industry Arbitration Rules (the 'AAA Construction Rules'), the ICDR's arbitration rules differ in often subtle but important ways to reflect practices more commonly seen in international arbitration proceedings.

While the ICDR has published a very helpful summary of the individual changes to its arbitration and mediation rules on its website,[3] this article highlights some of the most relevant rule changes as they apply to international construction arbitration disputes and what they may mean in practice. As explained below, the ICDR's arbitration rule revisions are sound and practical efforts to provide users guidance on what to expect and how to manage an ICDR arbitration proceeding.

Definition of international arbitration (the Introduction)

Among the first and easiest to overlook changes to the ICDR Rules comes in the Introduction to the rules themselves.[4] Specifically, the 2021 ICDR Rules include additional language that explains when a case is deemed 'international' for purposes of applying the ICDR Rules.

This is critically important in cases where the arbitration agreement selects the AAA without designating which of the various AAA arbitration rules the parties intended to apply (eg, the Commercial Arbitration Rules, Construction Arbitration Rules). Indeed, according to Article 1 of the ICDR Rules, the ICDR's international arbitration rules will apply to an 'international dispute' where the parties have provided for arbitration 'by either the International Centre for Dispute Resolution ("ICDR"), the international division of the American Arbitration Association ("AAA"), or the AAA *without designating particular rules* […]'.[5] As a result, if a dispute is 'international', the parties will be deemed to have agreed to arbitrate pursuant to the ICDR's international arbitration rules unless the parties expressly agreed to arbitration pursuant to a specific set of the AAA's arbitration rules (eg, Construction Arbitration Rules) or other arbitration rules, such as the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.

According to the 2021 ICDR Rules' Introduction, the ICDR relies on the UNCITRAL Model Law's definition of an international arbitration to determine whether a dispute is 'international' in nature.[6] Using this definition, the ICDR may deem an arbitration to be 'international' if the parties to the arbitration agreement have:

- their places of business in different countries;
- the place where the substantial part of the obligations of their commercial relationship to be performed is situated outside the country of any party;
- the place with which the subject-matter of the dispute is most closely connected is situated outside the country of any party;
- the place of the arbitration is situated outside the country of any party; or
- one party with more than one place of business (including parent and/or subsidiary) is situated outside the country of any party.[7]

Accordingly, to the extent the parties satisfy one or more of the requirements above, the AAA/ICDR may deem the dispute to be international and, as a result, apply the ICDR Rules if no other rules were specified.

Additionally, the ICDR's Introduction includes a helpful outline of the principal features of the ICDR's Rules that reflect practices more common to *international* arbitration proceedings rather than domestic US arbitration proceedings.[8] Arguably, the most noteworthy of these differences includes the ability of the 'tribunal to manage the scope of document and electronic requests, and to manage, limit, or avoid US

litigation-style discovery practices.'[9] Indeed, limited document exchange is the norm in international arbitration proceedings and substantively differs from the approaches seen in the US courts and domestic arbitrations.[10]

While thoughtful arbitration clause drafting should generally enable parties to avoid confusion over which set of the ICDR/AAA rules should apply, the ICDR's clarification of the term 'international' refines what parties should expect.

International Administrative Review Counsel (Article 5)

The revised 2021 ICDR Rules incorporate an entirely new Article 5 which defines the role of the ICDR's International Administrative Review Counsel (IARC).[11] The IARC is an internal administrative body within the ICDR/AAA composed of a group of former and current AAA-ICDR executives with extensive arbitration and case administration experience.[12] As Article 5 explains, the IARC serves as an administrative decision-making body which may resolve early procedural disputes between the parties including, for example, challenges to the appointment or continuing services of an arbitrator, decisions regarding the number of arbitrators to be appointed, determinations over whether a party has satisfied the administrative requirements to initiate or file an arbitration, and questions concerning the place of arbitration.[13]

While the inclusion of a new Article 5 and reference to the IARC might be interpreted to mean that the IARC is a new invention of the ICDR, in truth the IARC (as well as the Administrative Review Counsel for AAA arbitrations) has existed within the ICDR for nearly a decade. By including the new Article 5, the ICDR has clarified the important role the IARC plays in the early administration of international arbitrations under the ICDR Rules.

Joinder (Article 8) and Consolidation (Article 9)

The 2021 ICDR Rules update the joinder and consolidation rules in articles 8 and 9 (formerly articles 7 and 8).[14] As explained below, these updates streamline the joinder and consolidation procedures under the ICDR Rules and are of particular importance for construction disputes that commonly involve multiple owner/employer, designer, contractor, and subcontractor/supplier relationships.

First, under the previous joinder provision of the ICDR Rules (2014 ICDR Rules), a party to an arbitration could *only* join a new party if all parties to the dispute (eg, claimant and respondent) and the additional party, consented to the joinder.[15] The updated 2021 ICDR Rules now include an additional basis to join a new party to a pending arbitration. Specifically, according to Article 8(1), a new party may be joined to the proceedings if 'the arbitral tribunal once constituted determines that the joinder of an additional party is *appropriate*, and the additional party consents to such joinder.'[16] In other words, even if a party (ie, claimant or respondent) objects to the joinder of a new party, the tribunal can nevertheless order the joinder of an additional party provided that doing so would serve the interests of justice and the additional party consents to joinder.[17]

Second, the 2021 ICDR Rules update the consolidation process under Article 9.[18] While the former ICDR consolidation provisions have largely remained intact, Article 9 now permits the case administrator to appoint a consolidation arbitrator – a sole arbitrator with the authority to consolidate two or more proceedings – *on the sole arbitrator's own initiative.*[19] Previously, a case administrator could only appoint a consolidation arbitrator at the request of a party.[20] As a matter of practice, however, it is unlikely that a case administrator, even with the support of the IARC, would appoint a consolidation arbitrator without the support of at least one party to an arbitration.

More significantly, the updated consolidation rules in Article 9 permit a consolidation arbitrator to consolidate arbitrations pending under the ICDR or AAA that involve 'related parties'.[21] Specifically, under the 2014 ICDR Rules, arbitration proceedings could only be consolidated if: (1) the parties agree to the consolidation (Art. 8(1)(a)); (2) all of the claims/counterclaims arise out of the same arbitration agreement (Art. 8(1)(b)); or (3) in the event the arbitration arises out of different arbitration agreements, the arbitrations involve *the same parties*, the dispute arises out of the same legal relationship, and the consolidation arbitrator finds the arbitration agreements to be compatible.[22] The 2021 ICDR Rules modify the final ground for consolidation to clarify that the arbitrations at issue may be consolidated if they involve 'the same *or related parties.*'[23] The phrase 'or related parties' is an addition that expands the authority of the consolidation arbitrator to consolidate proceedings involving different, but related, parties. In doing so, the ICDR Rules streamline the ability of parties to rely on arbitration to resolve complex multi-party disputes without the need to refer to the courts and risk potentially inconsistent determinations.

Third-party funding (Article 14)

Consistent with broader trends across various other international arbitration rules,[24] the 2021 ICDR Rules include a new Article 14(7) to address questions concerning third-party funding arrangements.[25] Specifically, given the need for arbitrators to render independent and impartial decisions, the rise of third-party funding arrangements

have raised concerns over potential conflicts between third-party funders and arbitrators.

Accordingly, while previous versions of the ICDR Rules were silent on the question of third-party funding disclosures, the updated ICDR Rules now permit the tribunal to require the parties to disclose the existence and identity of: (1) a third-party funder who has undertaken to pay or contribute to the cost of a party's participation in the arbitration; or (2) a non-party (such as a funder, insurer, parent company, or ultimate beneficial owner) that has an economic interest in the outcome of the arbitration.[26] While third-party funding arrangements are not particularly common in international construction arbitrations,[27] the involvement of subrogated insurance carriers and complicated ownership structures, including special purpose entities and joint ventures, are. As a result, parties to construction arbitration disputes under the ICDR Rules must understand their additional disclosure obligations under the new Article 17(7).

Arbitral jurisdiction (Article 21)

In large part a product of peculiar US Supreme Court precedent, the updated Article 21(1) of the 2021 ICDR Rules further clarifies the arbitral tribunal's ability to rule on its own jurisdiction 'without any need to refer such matters first to a court.'[28] While many other major arbitral jurisdictions approach the issue of *competence-competence* by affording the arbitrators the right, in the first instance, to decide questions concerning their jurisdiction, the default approach in the US is the opposite. According to the US Supreme Court in *First Options of Chicago, Inc. v. Kaplan*, 514 U S 938, 944 (1995), arbitrators only retain the right to rule, in the first instance, on questions such as arbitrability and the existence, scope or validity of an arbitration agreement *if* the arbitration agreement contains 'clear and unmistakable evidence' of an intention to delegate questions of arbitrability to the arbitrators instead of the courts.

Commonly, parties to arbitration agreements that select a US jurisdiction as the place of arbitration explicitly incorporate a delegation provision in their arbitration agreements to satisfy the *First Options* standard. However, there is an ongoing debate in the US over whether reference to a particular set of arbitration rules in an arbitration agreement is, in and of itself, sufficient to delegate questions of arbitrability to the arbitrators as required by *First Options*. While the US Supreme Court has flirted with this issue in recent years, the question remains undecided.[29]

In 2019, the authors of the *Restatement of the US Law of International Commercial and Investor State Arbitration* (the 'Restatement') weighed in on this matter and concluded that:

> 'In theory, parties can make such a clear and unmistakable agreement by incorporating by reference in their arbitration agreement arbitration rules that include language sufficient to foreclose judicial consideration of certain defenses to enforcement of the agreement. Many institutional arbitration rules give the arbitral tribunal the authority to rule on such defenses to enforcement, and specify that the tribunal's award is final and binding. *These rules, however, do not expressly give the tribunal exclusive authority over these issues.*'[30]

Therefore, according to the authors of the Restatement, the previous version of the ICDR Rules *did not* contain language adequate to satisfy the US Supreme Court's 'clear and unmistakable evidence' standard.

In an effort to rebut the Restatement's conclusion, the revised Article 21(1) of the 2021 ICDR Rules seeks to establish that reference to the ICDR Rules is, *ipso facto*, 'clear and unmistakable evidence' of an intent to delegate the question of arbitrability to the arbitrators.[31] While the US courts have yet to have their say on whether Article 21(1), in fact, satisfies the *First Options* standard, the intent of the ICDR is clear.

Use of video, audio, or other electronic means (Article 22 and 26)

The Covid-19 pandemic required the international arbitration community to adapt rapidly to the use of remote hearing technology to manage ongoing international arbitration proceedings. As a result, arbitral institutions and related entities responsible for promulgating soft international arbitration guidelines (eg, *IBA Rules on the Taking of Evidence in International Arbitration*), have incorporated rules relating to the use of remote hearing technology in international arbitration proceedings.[32] Articles 22 and 26 of the 2021 ICDR Rules are an extension of this trend and a recognition that remote hearing practices are unlikely to disappear completely even after the Covid-19 pandemic has passed.[33]

According to Article 22(2) of the ICDR Rules, the tribunal is required to conduct an initial procedural hearing at the outset of an arbitration to discuss various organisational, scheduling, and other logistical matters.[34] Article 22(2) has been revised, however, to clarify that 'the tribunal and the parties may consider how technology, including video, audio, or other electronic means, could be used to increase the efficiency and economy of the proceedings.'[35] While many practitioners may long for the days of in-person hearings, Article 22(2)'s gentle reminder reflects the ICDR's belief that remote or hybrid arbitration proceedings can generate significant cost savings and efficiencies under the right circumstances.

More significantly, the 2021 ICDR Rules include an entirely new provision on remote hearing technology under Article 26(2).[36] There, the ICDR makes explicit that a hearing may be conducted in video, audio, or other electronic means by: (1) agreement of the parties; or (2) if the tribunal determines, after consulting with the parties, that 'doing so would be appropriate and would not compromise the rights of any party to a fair process.'[37] Moreover, Article 26(2) also clarifies that the 'tribunal may at any hearing direct that witnesses be examined through means that do not require their physical presence.'[38] While the ICDR has elected to refrain from imposing specific remote hearing procedures or guidelines, the new Article 26(2) establishes that a tribunal retains the authority to order a remote hearing over the objection of one or more parties.

Early disposition (Article 23)

A common criticism of international arbitration procedure is the lack of a uniform mechanism for the early disposition of claims akin to a motion to dismiss or even summary judgment as seen in US court proceedings. As a result, some users complain that an unnecessary amount of time and effort is wasted by allowing a party to prosecute otherwise unmeritorious claims for the entire duration of an arbitration proceeding. This is particularly true in construction arbitrations where the ability to narrow or dispose of subsets of claims may be potentially advantageous. Accordingly, consistent with a broader trend among leading arbitration rules,[39] the 2021 ICDR Rules have incorporated a new Article 23 to address the early disposition of claims.[40]

While previous versions of the ICDR Rules also permitted the early dismissal of unmerited claims,[41] the novelty of Article 23 is that the ICDR has outlined a specific early disposition procedure.[42] Indeed, the ICDR's Article 23 is somewhat unique among international arbitration rules in this respect because, while most other leading arbitration institution rules afford tribunals the authority to make early determinations on particular claims, they often refrain from outlining a specific process to do so.

According to Article 23, to seek the early disposition of an issue, a party must first request leave from the arbitral tribunal to submit an application for the early disposition of a claim or claims.[43] Thereafter, the tribunal will allow the early disposition application if the tribunal determines that the application: (1) has a reasonable chance of success; (2) will dispose or narrow one or more issues in the case; and (3) is likely to lead to a more efficient and economical outcome than would be the case if the issue were to be determined at the merits stage of the arbitration.[44] Article 23 also ensures that both parties will have the right to be heard on whether the tribunal should grant: (1) leave to file the application; and (2) the application itself.[45]

While some arbitral tribunals have historically held reservations about the affirmative use of early disposition procedures out of concerns over potential challenges to a final award, the 2021 ICDR Rules reinforce the authority of tribunals to dispose of non-meritorious claims and narrow the issues in dispute prior to a final hearing.

Witness statements (Article 26)

In addition to the revisions concerning remote hearing technology, Article 26 – specifically, Article 26(4) – includes another important revision related to the use of witness statements under the ICDR Rules. Article 26(4) now states that 'evidence of witnesses *should* be presented in the form of witness statements […]', whereas the former provision simply stated that witness evidence '*may*' be presented in the form of witness statements.[46] For international arbitration practitioners, this revision is uncontroversial because it is extremely common for parties to rely on witness statements in lieu of oral direct testimony in international arbitration proceedings.[47] The revision in Article 26(4) therefore brings the ICDR Rules in line with international arbitration practice. However, for US practitioners who may be more comfortable and familiar with oral direct witness testimony, the ICDR Rules' support for the use of witness statements is a change of practical note.

Deposits (Article 39)

Consistent with past versions of the ICDR Rules, according to Article 39, the ICDR's case administrator has the authority to request that the parties deposit a particular amount of funds with the ICDR in advance of the proceedings to cover the costs associated with, among other things, fees of the arbitrators and administrator.[48] That said, the issue of administrative fees can become a contentious dispute in the event of one or more parties failing to pay their share.

While the failure of a party to pay its share of the deposit may result in the withdrawal of that parties' claim or counterclaim, sometimes a respondent, with no counterclaims at issue, will refuse to pay its share of the deposit in an effort to frustrate the proceedings. Under these circumstances, the respondent cannot be precluded from defending itself in the proceeding,[49] but the ICDR has limited ability to compel that party to pay its share of the deposits. Consequently, in an effort to ensure the proceedings continue, the case administrator will offer the other party (or parties) the opportunity to pay the outstanding balance of the deposit.[50] Indeed, consistent with the previous ICDR

Rules and the AAA Construction Arbitration Rules, if no party is willing to pay the outstanding deposits, the arbitral tribunal (or case administrator if no tribunal has been appointed) may order the suspension or termination of the proceedings.[51]

The revised Article 39(4) makes clear that, under these circumstances, '[i]f any such deposit is made by one or more parties, the tribunal may, upon request, make a separate award in favor of the paying party(s) for recovery of the deposit, together with any interest.'[52] The revision helps to clarify the recourse that a party may have in the event another party to the proceeding refuses to pay its share of the deposit.

International Expedited Procedures (Article E-5)

Most major international arbitration rules include a subset of rules commonly referred to as 'expedited procedures.'[53] In theory, these expedited procedure rules allow parties and tribunals to adopt procedures that will make the proceedings more cost-effective and timely. In doing so, they afford parties an opportunity to resolve low-value disputes that might otherwise be too costly to prosecute under the standard ICDR arbitration procedures.

Prior to the 2021 update to the ICDR Rules, the expedited procedures would apply by default to claims that did not exceed US$250,000.[54] The 2021 ICDR Rules have now doubled this amount to US$500,000.[55] The revision is important for construction arbitration disputes because it provides parties an arguably quicker and more cost-effective method for resolving a greater number of low-value disputes in arbitration. However, because the increase to the threshold amount in controversy will now cause the expedited procedures to apply to a larger number of potential disputes, there is also a greater chance that parties may find themselves operating under a set of procedures they may find undesirable. For example, the expedited procedures will require the parties to complete the proceedings within a condensed timeframe. As a result, although the expedited procedures may represent a cost-effective means of resolving low value claims in arbitration, practitioners need to be aware of when these procedures apply and how they affect the presentation of their case.

Conclusion

While the 2021 ICDR Rules include numerous other subtle changes, the key message is that the ICDR has successfully refined and clarified its already popular international arbitration rules. For construction industry representatives and international construction dispute practitioners, the 2021 updates to the ICDR rules should be welcome news. Indeed, although the practical revisions contained in the 2021 ICDR Rules will be of assistance to nearly any industry or sector, for the reasons discussed above, the construction industry, in particular, stands to gain from the ICDR's efforts.

Notes

1 'International Dispute Resolution Procedures', International Centre for Dispute Resolution, 1 March 2021, ('2021 ICDR Rules').

2 *See, eg*, ICDR, 2018 ICDR Case Data Infographic, available at https://www.icdr.org/sites/default/files/document_repository/2018_ICDR_Case_Data.pdf?_ga=2.10242102.222755826.1615226284-2095386157.1611007004, which shows that the construction sector made up the second largest segment of the ICDR's caseload; 2018 was the final year in which the ICDR formally published statistics on industry caseload numbers, accessed 20 March 2021; *see also* ICC, ICC Dispute Resolution 2019 Statistics available at https://iccwbo.org/publication/icc-dispute-resolution-statistics, 'Disputes within the sectors of construction/engineering (211 cases) and energy (140 cases) generated the largest number of ICC Arbitration cases […]'), accessed 20 March 2021.

3 *See* Ann Ryan Robertson and Alan R Crain, *The 2021 ICDR International Dispute Resolution Procedures*, 2021, available at https://go.adr.org/rs/294-SFS-516/images/AAA343_International_Dispute_Resolution_Procedures.pdf, accessed 20 March 2021.

4 2021 ICDR Rules, pp 5–6.

5 2021 ICDR Rules, p 17 (Arts 1, 3) (emphasis added).

6 2021 ICDR Rules, p 5.

7 *Ibid.*

8 2021 ICDR Rules, pp 7–8.

9 *Ibid.*

10 *See, eg*, Albert Bates Jr and R Zachary Torres-Fowler, 'Internationalizing Domestic Arbitration: How International Arbitration Practices Can Improve Domestic Construction Arbitration,' (June 2020) 74 Disp Res J 1, 22–26.

11 2021 ICDR Rules, p 19.

12 *See, eg*, Ann Ryan Robertson & Alan R Crain, *The 2021 ICDR International Dispute Resolution Procedures* (2021) *available at https://go.adr.org/rs/294-SFS-516/images/AAA343_International_Dispute_Resolution_Procedures.pdf*, accessed 20 March 2021.

13 2021 ICDR Rules, p 19.

14 2021 ICDR Rules, pp 21-22.

15 International Centre for Dispute Resolution, International Dispute Resolution Procedures at 17 (1 Jun 2014) [hereinafter "2014 ICDR Rules"].

16 2021 ICDR Rules, p 21 (emphasis added).

17 *See also* Ann Ryan Robertson & Alan R. Crain, *The 2021 ICDR International Dispute Resolution Procedures* (2021) *available at https://go.adr.org/rs/294-SFS-516/images/AAA343_International_Dispute_Resolution_Procedures.pdf*, accessed 20 March 2021.

18 2021 ICDR Rules, pp 21–22.

19 *Compare* 2021 ICDR Rules, p 21, *with* 2014 ICDR Rules, p 18.

20 2014 ICDR Rules, p 18.

21 2021 ICDR Rules, p 21.

22 2014 ICDR Rules, p 18.

23 2021 ICDR Rules, p 21.

24 *See, e.g.*, International Chamber of Commerce, 2021 Arbitration Rules, Art. 11(7) (1 Jan 2021); Singapore International Arbitration Centre, *Practice Note, Administered Cases Under the Arbitration Rules of the Singapore International Arbitration Centre, On Arbitrator Conduct in Cases Involving External Funding*, PN-07/17 (31 Mar 2017); Hong Kong International Arbitration Centre, 2018 Administered Arbitration Rules, Art. 45.3(e) (1 Nov 2018).

25 2021 ICDR Rules, p 25.

26 *Ibid.*

27 Queen Mary University of London & Pinsent Masons, *International Arbitration Survey – Driving Efficiency in International Construction Disputes: How can international construction disputes be resolved more efficiently whilst maintaining fairness and access to justice?*, at 36 ("third party funding and insurance/third-party indemnity

arrangements is in its early stages in international construction arbitration.").
28 2021 ICDR Rules, p 28.
29 *See Schein v. Archer & White Sales, Inc.*, 586 U.S. (2019).
30 Restatement, The US Law of International Commercial and Investor-State Arbitration, § 2.8, Competence of the Tribunal to Determine its Own Jurisdiction (2019).
31 *See also* Ann Ryan Robertson & Alan R. Crain, *The 2021 ICDR International Dispute Resolution Procedures* (2021) *available at https://go.adr.org/rs/294-SFS-516/images/AAA343_International_Dispute_Resolution_Procedures.pdf*, accessed 20 March 2021.
32 *See, e.g.*, International Bar Association, IBA Rules on the Taking of Evidence in International Arbitration, Art. 8.2 (Dec 2020); Albert Bates & R. Zachary Torres-Fowler, *Int'l Arbitration Rule Revision Reflects Flexible Approach*, Law360 (25 Feb 2021); Albert Bates & R. Zachary Torres-Fowler, *2020 Update to the IBA Rules: Modest Changes For Challenges New and Old*, Mealey's Int'l Arb. Digest (forthcoming).
33 2021 ICDR Rules, pp 28, 31.
34 2021 ICDR Rules, p 28.
35 *Ibid.*
36 2021 ICDR Rules, p 31.
37 *Ibid.*
38 *Ibid.*
39 *See, e.g.*, London Court of International Arbitration, LCIA Arbitration Rules, Art. 22.1(viii) (1 Oct 2020); Hong Kong International Arbitration Centre, 2018 Administered Arbitration Rules, Art. 43.1 (1 Nov 2018); Singapore International Arbitration Centre, Arbitration Rules, Rule 29 (1 Aug 2016); International Chamber of Commerce, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration*, 16–17 (1 Jan 2021).
40 2021 ICDR Rules, p 29.
41 2014 ICDR Rules, pp 24, 27.
42 2021 ICDR Rules, p 29.
43 2021 ICDR Rules, p 29. The procedures outlined in Article 23 of the 2021 ICDR Rules generally mimic US practice as it applies to the early dismissal of claims and are also permitted under the AAA's Construction Arbitration Rules. *See* American Arbitration Association, Construction Industry Arbitration Rules, R-34 (1 July, 2015).
44 2021 ICDR Rules, p 29.
45 *Ibid.*
46 *Compare* 2021 ICDR Rules, p 31 (emphasis added) *with* 2014 ICDR Rules, p 24 (emphasis added).
47 *See, e.g.*, International Bar Association, IBA Rules on the Taking of Evidence in International Arbitration, Art 4 (Dec 2020); *Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration* at p 27 (Jan 2021).
48 2021 ICDR Rules, pp 35–36.
49 2021 ICDR Rules, p 36.
50 *Ibid.*
51 *Ibid.*
52 *Ibid.*
53 2021 ICDR Rules, pp 38–40.
54 2014 ICDR Rules, p 33.
55 2021 ICDR Rules, p 38.

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The World Bank expands the role of the Dispute Avoidance/ Adjudication Board

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In November 2020, the World Bank officially launched a new mechanism[1] which will allocate a specific role to the Dispute Avoidance/Adjudication Board (DAAB) established under the FIDIC 2017 suite of contracts, with the aim of reducing the risk of Sexual Exploitation and Abuse (SEA) and Sexual Harassment (SH) (the 'SEA/SH mechanism'). The DAAB will be called on to monitor and decide whether the contractor complies with its contractual obligations in this respect. In the event of a negative finding, the contractor may be disqualified from further projects financed by the World Bank for a two-year period.

This article sets out the background to the mechanism, describes the obligations borne by the contractor and explains the role of the DAAB and the steps following a DAAB finding of non-compliance by the contractor.

Background to the SEA/SH mechanism

Construction companies, employers and the engineers under FIDIC contracts tend to focus their attention on the design and construction of the works from the point of view of time, quality and price. The Multilateral Development Banks (MDB) (the 'Framework'), which often finance the design and construction of infrastructure executed under FIDIC contracts, take a much wider view. For the MDB, the design, execution and completion of the infrastructure jointly represent only one element in a larger project, aimed at the development and wellbeing of the local, regional or even larger community. It is therefore understandable that the MDB attaches great importance to the environmental and social aspects of the overall development project and the works contracts that are intended to facilitate the development. The MDB seek to avoid or minimise the potentially negative impact of construction on the local community which the infrastructure is intended to serve.

The concerns of the MDB with respect to social issues are immediately evident to anyone who compares the *Conditions of Contract for Construction for Building and Engineering Works designed by the Employer, Multilateral Development Bank Harmonised Edition, June 2010* (the Pink Book) with its parent, the FIDIC *Red Book* 1999.[2] While the Red Book 1999 contains 11 sub-clauses which address social aspects, the Pink Book contains 24 sub-clauses. The additional clauses cover matters such as forced labour, child labour, workers' organisation, non-discrimination and equal opportunity but not SEA/SH. However, it is unusual for either of these, or the social aspects covered by the Red Book 1999, to be raised as issues in front of the DAAB.[3]

Unfortunately, incidents of SEA/SH have been encountered on projects financed by the World Bank, one of which led to the Bank cancelling a large road project at the end of 2015.[4] This led to the appointment of an independent Global Gender-Based Violence Task Force[5] to advise the Bank with respect to the prevention, mitigation and management of SEA/SH risks. In October 2017, the Standard Procurement Documents (SPD) published by the World Bank were initially modified to include provisions on sexual exploitation and abuse and gender-based violence.

In parallel, the World Bank had been developing an Environmental and Social Framework (the 'Framework'), which came into effect on 1 October 2018.[6] Under the Framework, borrowers are required to commit[7] to achieving ten Environmental and Social Standards through the identification of environmental and social risks and the establishment of Environmental and Social Management Plans to manage and mitigate the impact of such risks.

Annex 3 of the Framework addresses the management of contractors and states:

> 'The borrower will require that all contractors engaged on the project operate in a manner consistent with the requirements of the Environmental and Social Standards, including the specific requirements set out in the Environmental and Social Commitment Plan. The borrower will manage all contractors in an effective manner, including:
>
> (a) Assessing the environmental and social risks and impacts associated with such contracts;
>
> (b) Ascertaining that contractors engaged in connection with the project are legitimate and reliable enterprises, and have knowledge and skills to perform their project tasks in accordance with their contractual commitments;
>
> (c) Incorporating all relevant aspects of the Environmental and Social Commitment Plan into tender documents;
>
> (d) Contractually requiring contractors to apply the relevant aspects of the Environmental and Social Commitment Plan and the relevant management tools, and including appropriate and effective non-compliance remedies;
>
> (e) Monitoring contractor compliance with their contractual commitments; and
>
> (f) In the case of subcontracting, requiring contractors to have equivalent arrangements with their subcontractors.'"
>
> (Emphasis added)

Soon after the Framework came into effect, the World Bank signed

a licence agreement with FIDIC to replace the Pink Book with the FIDIC 2017 suite of contracts. With effect from July 2019, the use of the Pink Book was disbanded, and revised SPD were issued for use with the Red Book 2017.[8,9] These SPD incorporated the Framework, as well as providing enhanced support for the use of the DAAB.[10]

The Particular Conditions imposed by the revised SPD include extensive obligations on the contractor with respect to environmental and social matters, such as requirements for an Environmental and Social Performance Security, for Management Strategies and Implementation Plans, a code of conduct to be signed by all workers and provision of worker training on SEA/SH prevention. However, the SPD issued in July 2019 did not impose a mechanism addressing non-compliance, the need for which had been identified under item (d) of Annex 3 of the Framework.

After extensive discussions with borrowers, contractors' organisations, FIDIC and DAAB practitioners, the World Bank has now developed such a mechanism for use on projects for which the risk of SEA/SH is assessed by the Bank to be high. For such projects, the contract will impose obligations on the employer and the contractor to prevent, monitor and handle incidents of SEA/SH. In the event of a suspected non-compliance or an allegation, the employer must refer the matter to the DAAB for a decision on whether the contractor had failed to comply with any of its obligations. If the DAAB finds such a failure, the World Bank may disqualify the contractor and any defaulting subcontractor, from bidding for further World Bank-financed projects for a two-year period. The contract might also be terminated.

The new scheme came into effect on 1 January 2021 and a specific set of SPD has been published for use in relation to projects identified as being at high risk of SEA/SH.

The World Bank is currently in the process of identifying and selecting DAAB practitioners for borrowers and bidders to consider for such projects. Those selected will be provided with training by the Bank before taking up their roles.

The contractor's SEA/SH obligations

The Special Provisions, which form Part B of the Particular Conditions, impose a series of obligations on the contractor (SEA/SH Prevention and Response Obligations) which were designed to reduce the risk of SEA/SH and improve the handling of any alleged incidents. However, several of the obligations relate to documents submitted by the successful bidder during the bid phase.

The relevant documents that the bidder must submit include the following:

Code of conduct for contractor's personnel

The bidder is required to submit its code of conduct that will apply to contractor's personnel (subcontractors as well as directly employed workers and supervisors). For this purpose, the bidding documents provide the base code of conduct, to which bidders may introduce additional requirements. Once finalised, the code of conduct becomes one of the documents forming part of the contract.

Management Strategies and Implementation Plans

The bidder must submit Management Strategies and Implementation Plans to show how it intends to manage the key environmental and social risks, including SEA/SH. These strategies and plans must detail the actions, materials, equipment, management processes and so on, that will be implemented by the contractor and its subcontractors. The Management Strategies and Implementation Plans will serve as the basis for further strategies and plans to be developed by the contractor (C-ESMP) during the execution of the works.

Construction schedule (Outline Works Programme)

The outline programme to be submitted with the bid, as part of the bidder's technical proposal, must include the following key milestones prior to mobilisation:

- engineer's non-objection to the contractor's Management Strategies and Implementation Plans;
- constitution of the DAAB; and
- the holding of a so-called 'SEA/SH conference'.

Key personnel schedule

The bidder's schedule of key personnel must include an expert with relevant experience in addressing SEA/SH cases. After contract award, the contractor will be bound by this schedule.

SEA/SH declaration

Bidders are required to submit a declaration (using the form included in the bidding documents) accepting that, if awarded the contract, the World Bank may disqualify them (including any non-complaint subcontractor) from being awarded a World Bank-financed contract for a period of two years, following a DAAB decision confirming non-compliance with the SEA/SH Prevention and Response Obligations.

The SEA/SH Prevention and Response Obligations to be applied after award of the contract, are set out under the following sub-clauses of the Special Provisions:

2.7 SEA/SH Conference
4.1 Contractor's general obligations

4.2 Environmental and social performance security
4.20 Progress reports
4.25 Code of conduct
5.1 Subcontractors
6.9 Contractor's personnel
6.12 Key personnel
6.27 Contractor's SEA/SH response mechanism; receipt of SEA/SH allegations; and contractor's non-compliance
6.28 Training of contractor's personnel

SC 2.7 – SEA/SH conference

The contractor is required to participate in a 'SEA/SH conference' to be organised by the employer as soon as possible after the constitution of the DAAB and before mobilisation. The DAAB is to be constituted within 35 days of receipt of the employer's Letter of Acceptance by drawing from a list of six candidates named in the contract. The list is composed of three candidates proposed by the employer in the bidding documents and three candidates proposed by the contractor in its bid. The list will be reviewed by World Bank before contract award.

The SEA/SH conference is to be attended by the employer, the engineer, the contractor and its subcontractors, the DAAB and other relevant persons. The purpose of the SEA/SH conference is to ensure that the SEA/SH obligations and remedies are fully understood.

SC 4.1 – Contractor's general obligations

Appointment of the DAAB is one of the 'conditions precedent' to be satisfied before the commencement date can be fixed by the engineer. Once the commencement date is fixed, the time for completion begins to run but the contractor is not permitted to mobilise before obtaining a Notice of No-Objection from the engineer with respect to the measures that the contractor proposes for the management of the environmental and social risks, based, as a minimum, on the Management Strategies and Implementation Plans and code of conduct submitted with the bid and forming part of the contract. The Management Strategies and Implementation Plans must include processes to verify compliance of the contractor's (and subcontractor's) obligations with respect to the code of conduct under Sub-Clause 4.25. The contractor must also put in place its 'SEA/SH response mechanism' required by Sub-Clause 6.27.1 (see below) so that any allegations of SEA/SH can be properly recorded and promptly addressed.

When appropriate, the contractor is to submit for review by the engineer any additional Management Strategies and Implementation Plans that become necessary to manage the environmental and social risks associated with major activities and elements of the works. The contractor's Environmental and Social Implementation Plan (C-ESMP), of which the Management Strategies and Implementation Plans are part, are to be updated not less than every six months and submitted to the engineer for review in accordance with the usual procedure for review of contractor's documents.

SC 4.2 – ES performance security

The contractor is to provide an environmental and social performance security along with the usual performance security, within 28 days of receipt of the Letter of Acceptance. This is to be in the form of a 'demand guarantee', the text of which is provided in the contract. It is to be in the amount(s) and currency(ies) stated in the contract data (normally one to three per cent of the accepted contract amount). The sum of the performance security(ies) and environmental and social performance security(ies) is normally not to exceed ten per cent of the accepted contract amount.

SC 4.20 – Progress reports

Within its monthly reports, the contractor must include an environmental and social section, which is to follow a structure set out in Part D of the particular conditions and provide, inter alia, information with respect to SEA/SH training, the code of conduct, allegations of SEA/SH incidents, a statement of compliance or a list of issues and actions to be taken to achieve compliance.

In addition, the contractor must inform the engineer immediately of any allegation of SEA/SH. The type of allegation (sexual exploitation, abuse or harassment), gender and age of the person who experienced the alleged incident must be included in the information without disclosing the identity of those involved.

SC 4.25 – Code of conduct

The contractor must ensure that each member of the contractor's personnel[11] is aware of the code of conduct including banned behaviour and the consequences of engaging in such behaviour. Instructions and documentation must be easily understood by the contractor's personnel and the contractor must endeavour to obtain the person's signature acknowledging receipt of such instructions and/or documentation.

Copies of the code of conduct must also be visibly displayed in various locations on the site and any associated areas, as well as in areas outside the site which are accessible to the local community and project-affected people. The posted code of conduct must be written in languages that can be understood by contractor's personnel, employer's personnel and the local community.

SC 5.1 – Subcontractors

The contractor must ensure that its subcontractors comply with the relevant environmental and social requirements and the SEA/SH Prevention and Response Obligations. All subcontracts must state that the subcontractor accepts that it may be disqualified by the

World Bank from being awarded a World Bank-financed contract for a two-year period if the subcontractor is found to have failed to comply with its SEA/SH Prevention and Response Obligations.

In addition, when seeking a Notice of No-Objection from the engineer with respect to the proposed appointment of a subcontractor, the contractor must include a declaration from the subcontractor, in accordance with the form set out under Part E of the Particular Conditions, by which the subcontractor provides information with respect to its record related to SEA/SH.

SC 6.9 – Contractor's personnel

Under Sub-Clause 6.9, the contractor is to take immediate action to remove (or cause to be removed) any person who undertakes behaviour which breaches the code of conduct.

SC 6.12 – Key personnel

The contractor must appoint natural persons named in the bid to the positions of key personnel, which include the expert with relevant experience in addressing SEA/SH cases. This person must be based at site for the duration of the works.

SC6.27 – Contractor's SEA/SH response mechanism; receipt of SEA/SH allegations; and contractor's non-compliance

Before the contractor's personnel are mobilised, the contractor must put a mechanism in place for handling SEA/SH allegations from the contractor's or employer's personnel or any other person including third parties (SEA/SH Response Mechanism). The contractor's personnel are to be informed of the mechanism at the time of engagement. Details of the mechanism, including how to submit an allegation or concern, and also measures protecting against reprisal, are to be displayed in locations easily accessible to the contractor's personnel, employer's personnel, and the affected communities, in languages they can comprehend.

The contractor must have a dedicated person in place with the necessary skills, experience and training to receive and review allegations or concerns which may be submitted in writing, in person or by phone, with appropriate provision for confidential treatment, or may be made anonymously.

The contractor must implement ethical and safe processes for investigating and addressing allegations and apply appropriate disciplinary measures in the case of the contractor's personnel, which may include removal from site in accordance with Sub-Clause 6.9.

Following receipt by the contractor of an allegation, the employer and the engineer must be immediately informed and provided with details of the alleged incident, but without the names of the persons involved. The employer must then refer the matter to the DAAB for its decision with respect to potential non-compliance with the SEA/SH Prevention and Response Obligations (see below).

SC 6.28 Training of contractor's personnel

The contractor must provide appropriate training to relevant contractor's personnel on environmental and social aspects, including the prohibition of SEA/SH. In particular, training must be provided to supervisors.

The role of the DAAB

SEA/SH conference

As noted above, the DAAB is to participate in the SEA/SH orientation conference, immediately after being appointed and before any work commences on site. The objective of the SEA/SH orientation conference is to ensure a common understanding of all SEA/SH contractual requirements and remedies, including those available under PC 21.9 [*SEA/SH Referrals*], PC 21.10 [*Dissatisfaction with DAAB's decision of SEA/SH Referrals*] and PC 21.11 [*Bank's disqualification of the Contractor and its Subcontractors*]. Although the conference is to be run by the employer, the DAAB must promote the understanding of these provisions and of the DAAB's role, both in relation to SEA/SH and more widely.

Site visit: agenda and report

After work has commenced on site, the DAAB will make regular site visits. However, the maximum period between these visits is less than is fixed in FIDIC 1999 and FIDIC 2017, having been reduced from 140 days to 90 days.[12]

The agenda for each site visit must include a review of the contractor's SEA/SH obligations and the engineer's actions in this respect.[13] This review should normally include:

- management strategies and implementation plans (initial submission and review, updated submission and review);
- code of conduct (number of workers versus number of signed copies of the code of conduct, both for contractor and subcontractors; visibly displayed copies on-site and off-site);
- training (record of sessions held and number of participants);
- response mechanism (displayed visibly on-site and off-site; status of allegations);
- progress reports; and
- notices to correct.

The DAAB must record the outcome of the review in its site visit report.[14] As a potential non-compliance identified in a site visit report might eventually lead to a referral on which the DAAB must issue a decision, its comments must be as neutral as possible.

Referrals

If the site visit report identifies any potential non-compliance, the engineer is to review the potential non-compliance and determine whether a Notice to Correct (the 'Notice') should be issued to the contractor under Sub-Clause 15.1 of the General Conditions.[15]

If the engineer determines that a Notice to Correct is not to be given, the engineer must inform the employer, with a copy to the DAAB, setting out the basis for its determination. Otherwise, the engineer is to issue the Notice to the contractor, copied to the employer and the DAAB. If the contractor fails to comply with the Notice, the engineer must immediately notify the employer and the contractor. On receipt of such a notification, the employer is to refer the non-compliance to the DAAB for its review and decision pursuant to Sub-Clause 21.9 *[SEA/SH referral]*.

Alternatively, if the engineer identifies that the contractor has not complied with the SEA/SH Prevention and Response Obligations, the engineer is to give a Notice to Correct, copied to the employer and the DAAB. Thereafter the procedure is the same as for a potential non-compliance identified by the DAAB during a site visit.

A third trigger for a referral to the DAAB is receipt by the contractor, employer or the engineer of an allegation of SEA/SH. In this event, the allegation must be promptly notified to the other two parties and the employer must promptly refer the allegation to the DAAB for a decision with respect to non-compliance. Although Sub-Clause 6.27 states that 'the allegation' is to be referred to the DAAB, Sub-Clause 21.9 makes it clear that the DAAB is only to decide whether there has been any non-compliance with the SEA/SH Prevention and Response Obligations and is not to be asked to decide on the allegation itself.

Jurisdiction

The DAAB has jurisdiction to decide upon SEA/SH referrals by virtue of Sub-Clause 21.1 of the General Conditions and Sub-Clause 1.4 of the General Conditions of Dispute Avoidance/Adjudication Agreement, both as modified by the Special Provisions:

> **Special Provisions Sub-Clause 21.1 Constitution of the DAAB**
>
> 'The DAAB shall also review and decide on any SEA Referral submitted to the DAAB pursuant to Sub-Clause 6.27.2 [*Receipt of SEA allegations*] and Sub-Clause 6.27.3 [*Contractor's non-compliance with SEA/SH contractual obligations*], in accordance with Sub-Clause 21.9 [*SEA referrals*]."
>
> **Special Provisions General Conditions of Dispute Avoidance/Adjudication Agreement: Sub-Clause 1.4 'DAAB Activities'.**
>
> 'This also includes handling of SEA Referrals in accordance with Sub-Clause 21.9 of the Conditions of Contract.'

Procedure

The procedure for dealing with such referrals is set out under Special Provisions Sub-Clause 21.9.

On receipt of the referral, the DAAB is to request the contractor in writing (copied to the employer and the engineer) to submit a statement demonstrating its compliance (including the compliance of any subcontractor identified in the SEA/SH referral), with the SEA/SH Prevention and Response Obligations. The statement should include details of actions taken in response to an engineer's Notice to Correct any non-compliance with the SEA/SH contractual obligations and/or in response to an allegation of SEA/SH. The statement must be provided within 28 days from receipt of the DAAB request and must be copied to the employer and the engineer.

In reviewing the contractor's statement, the DAAB must focus exclusively on the contractor's compliance or non-compliance with its SEA/SH Prevention and Response Obligations. The DAAB must not address the underlying allegation, including the factual aspects of the alleged SEA/SH incident:

> 'The DAAB shall not assess the merits of an underlying allegation, including the factual aspects of the alleged SEA and/or SH incident.'

The DAAB must render its decision in writing within 42 days of receiving the SEA/SH referral. The decision must state that it is issued pursuant to PC 21.9 and must be issued to the contractor and the employer and copied to the engineer.

If the referral arose from an allegation of an SEA/SH incident, the DAAB decision must state whether the contractor (and any subcontractor) was compliant with its SEA/SH obligations at the time of the alleged incident.

Recourse available to the contractor

A dissatisfied party has the right to serve a Notice of Dissatisfaction in accordance with Sub-Clause 21.4.4 of the General Conditions in relation to a decision issued under PC 21.9. The Notice of Dissatisfaction must be issued within 28 days after receipt of the DAAB decision and must set out the grounds for the dissatisfaction. If no Notice of Dissatisfaction is issued within such period, the DAAB becomes final and binding.

If a Notice of Dissatisfaction is served within the 28 day-period, the usual requirement to attempt amicable settlement following such a Notice of Dissatisfaction does not apply.[16] Either party may refer the matter to arbitration in accordance with Sub-Clause 21.6 of the General Conditions. In addition, either party may invoke the ICC Rules of Arbitration's Emergency Arbitrator Provisions.

Use of the DAAB decision by the World Bank

Following receipt of the DAAB decision, the employer must immediately notify the World Bank. They must also notify the World Bank of the commencement of any Emergency Arbitration and the Emergency Arbitrator Order.

If the DAAB's decision is that the contractor failed to correct identified non-compliance with its SEA/SH obligations or was non-compliant with such obligations at the time of an alleged incident, and if no Notice of Dissatisfaction was served by either of the Parties, the World Bank will review the DAAB decision for procedural regularity. Following this review, it may disqualify the contractor (as well as any subcontractor determined to be non-compliant), from being awarded a World Bank-financed contract for a two-year period.

If Emergency Arbitration has been commenced, the World Bank will await the outcome and take due account of the Emergency Arbitrator's Order. If the Emergency Arbitrator confirms the non-compliance, the contractor (and any non-compliant subcontractor) may be disqualified.

A contractor/subcontractor's disqualification expires two years after the date of disqualification unless an arbitration award is made in favour of the contractor within that period.

The contractor's disqualification is without prejudice to the Parties' rights and obligations under the contract, notably, the right of the employer to terminate the contract if the contractor's breach of its SEA/SH Prevention and Response Obligations is substantial. If the circumstances do not merit termination, the contractor will be required to complete the works.

On expiry of the disqualification, the contractor may bid for further World Bank-financed projects but must declare the previous disqualification and demonstrate what steps it has taken to ensure future compliance. This requirement applies not only to projects identified as being at high risk of SEA/SH but all World Bank-financed projects.

Furthermore, the contractor will be subject to greater scrutiny on other World Bank-financed projects on which it is working at the time of disqualification.

Notes

1 'World Bank to Introduce Contractor Disqualification to Strengthen Prevention of Gender-Based Violence', press release, World Bank, 24 November 2020, see https://www.worldbank.org/en/news/press-release/2020/11/24/contractor-disqualification-to-strengthen-prevention-of-gender-based-violence, accessed 2 April 2021.
2 *Conditions of Contract for Construction for Building and Engineering Works designed by the Employer*, 1st edn, FIDIC, 1999.
3 Referred to as Dispute Board (DB) in the Pink Book and Dispute Adjudication Board (DAB) in the Red Book, 1999.
4 'World Bank Statement on Cancellation of the Uganda Transport Sector Development Project (TSDP)', press release, World Bank, 21 December 2015, see https://www.worldbank.org/en/news/press-release/2015/12/21/wb-statement-cancellation-uganda-transport-sector-development-project, accessed 2 April 2021.
5 'Statement by World Bank Group President Jim Yong Kim on Inspection Panel Report on Uganda Project')', press release, World Bank, 11 August 2016, see https://www.worldbank.org/en/news/press-release/2016/08/11/statement-world-bank-group-president-jim-yong-kim-inspection-panel-uganda, accessed 2 April 2021.
6 World Bank, Environmental and Social Framework, see https://www.worldbank.org/en/projects-operations/environmental-and-social-framework, accessed 2 April 2021.
7 Via an Environmental and Social Commitment Plan agreed between borrower and the World Bank.
8 World Bank, 'Request for Bids Works (After Prequalification)', Standard Procurement Document, see http://pubdocs.worldbank.org/en/407151609775359280/SPD-RFB-Works-After-PQ-Disq-mechanism-does-not-apply-January-2021.docx, accessed 21 April 2021.
9 Similar SPD were issued in December 2019 for use with FIDIC Yellow Book 2017, see http://pubdocs.worldbank.org/en/472121609778764008/SPD-RFP-Works-DB-SingleStage-without-SEA-SH-disqualification-January-2021.docx, accessed 2 April 2021; and in January 2021, for use with FIDIC Silver Book 2017, see http://pubdocs.worldbank.org/en/713601609779208416/SPD-RFP-Works-EPC-Turnkey-SingleStage-without-SEA-SH-disqualification-January-2021.docx, accessed 2 April 2021.
10 This support includes financing the employer's share of the DAAB costs and imposing the appointment of the DAAB as a condition to be satisfied before fixing of the commencement date.
11 Under FIDIC contracts, the term 'contractor's personnel' includes subcontractors.
12 Special Provisions, Procedural Rule 3.3.
13 Special Provisions, Procedural Rule 3.7.
14 Special Provisions, Procedural Rule 3.10.
15 Special Provisions, Sub-Clause 6.27.
16 Special Provisions Sub-Clause 21.10.

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COUNTRY UPDATE: ENGLAND

Update from the English High Court on preconditions to arbitration: *Republic of Sierra Leone v SL Mining Ltd*

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Multi-tiered dispute resolution clauses are a frequent feature in many contracts and are particularly prevalent in the major projects sector. These clauses set out certain preconditions to be met before a dispute can be escalated to a binding form of dispute resolution, such as arbitration or court litigation. The issue of compliance with tiered dispute resolution clauses arises every so often, and the consequences of failing to comply can differ across jurisdictions. On one end of the spectrum, there are instances where a claim may be dismissed for being pre-emptive, while on the other, failure to comply may be treated as a formality and claims may be permitted to proceed.

The English High Court (the 'Court') recently considered this question in *Republic of Sierra Leone v SL Mining Ltd*[1] (Sierra Leone and SL Mining respectively) by way of a challenge to an arbitral tribunal's partial final award pursuant to section 67 of the English Arbitration Act 1996 (the 'Act'). The Court held that non-compliance was ultimately a question of admissibility of the claim before the arbitral tribunal, and not a question of the tribunal's jurisdiction. As a result, the tribunal's decision was not open to challenge under section 67 of the Act.

Background

The underlying dispute before the arbitrators related to the suspension and subsequent cancellation of a large-scale mining licence, which contained a multi-tiered dispute resolution clause. In sum, the clause required the parties to 'in good faith endeavour to reach an amicable settlement' within a period of three months following the notification of a dispute, following which the dispute could proceed to arbitration in the manner prescribed by the clause.

SL Mining issued a Notice of Dispute on 14 July 2019, followed by an application invoking the Emergency Arbitrator procedure on 20 August 2019. Under the Emergency Arbitration procedure, SL Mining was then required to issue a Request for Arbitration within ten days. Mindful of the multi-tiered dispute resolution clause, SL Mining proposed delaying the issuance of this Request until three months had passed from the Notice of Dispute. However, Sierra Leone refused this proposal. SL Mining issued a Request for Arbitration ten days later on 30 August 2019, approximately six weeks from the date of the Notice of Dispute.

Sierra Leone raised a challenge before the tribunal that arbitration could not be commenced before 14 October 2019 at the earliest, being three months from the issuance of the Notice of Dispute, and as a result, the tribunal had no jurisdiction. A subsidiary argument before the tribunal equally challenged the Emergency Arbitrator procedure.[2] The arbitral tribunal ultimately concluded that it had jurisdiction over the claims brought by SL Mining.

Sierra Leone's challenge before the Court proceeded under section 67 of the Act, which provides that an application may be made to the Court to challenge the 'substantive jurisdiction' of an award. 'Substantive jurisdiction' is in turn defined under section 82(1) of the Act as matters specified in section 30(1) as follows:[3]

> '30 Competence of tribunal to rule on its own jurisdiction.
>
> (1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—
>
> (a) whether there is a valid arbitration agreement,
>
> (b) whether the tribunal is properly constituted, and
>
> *(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.*'

Sierra Leone claimed that pursuant to section 30(1)(c), given arbitral proceedings could not be commenced until the lapse of the prescribed three-month window for negotiations, the dispute had not been submitted to arbitration as contemplated by the parties' arbitration agreement.

Decision

In reaching its decision, the Court considered the following four questions:

1. Was the challenge to the alleged prematurity of the award within section 67 of the Act?
2. Had Sierra Leone waived the condition precedent?
3. What is the proper construction of the multi-tiered dispute resolution clause?
4. Did SL Mining breach the multi-tiered dispute resolution clause?

In line with the Act's stance on limited court intervention, only matters of jurisdiction could be brought before the Court for the purposes of a challenge under section 67.[4] The parties agreed that there is a distinction between challenges where a claim is allegedly not admissible before a tribunal (admissibility) and challenges whereby the tribunal

is said to have no jurisdiction to hear a claim (jurisdiction). This common ground aligned with previous Court jurisprudence.

In finding the distinction between jurisdiction and admissibility, the Court surveyed the views of 'leading academic writers', finding that the overwhelming support in a challenge such as the present, does not go to matters of jurisdiction. Irrespective of those views, however, the matter under English law is whether the question of prematurity falls within section 30(1)(c) of the Act. Although the claimant put forward an argument that the distinction between jurisdiction and admissibility was to be resolved by reference to the precise wording of the dispute resolution clause in question, the Court held there is no difference between a clause that provides: 'No arbitration shall be brought unless X' and 'In the event of X the parties may arbitrate'.

In delineating the difference between jurisdiction and admissibility, the Court cited a passage from the Singapore Court of Appeal in *BBA v BAZ*:

> '*Jurisdiction* [and so susceptibility to a s 67 challenge] *is commonly defined to refer to "the power of the tribunal to hear a case", whereas admissibility refers to "whether it is appropriate for the tribunal to hear it"*'.[5]

The question before the Court, therefore, is not whether the issue is arbitrable, as contemplated by section 30(1)(c), but rather whether the claim has been presented prematurely. Ultimately, section 30(1)(c) was not engaged by the condition precedent which required the provision of a period for amicable settlement. As a matter of admissibility, the question was one for the arbitrators to determine.

The Court in *obiter* discussed whether Sierra Leone had waived any non-compliance with the prescribed three-month period by insisting arbitration be commenced on 30 August 2019, instead of agreeing to the proposal of the emergency arbitrator to defer service to 14 October 2019. The Emergency Arbitrator ordered service of the Request for Arbitration on 30 August 2019, and while it included an expression of willingness for a stay, if so ordered, no such stay was sought. The Court opined that irrespective of a stay, Sierra Leone by insisting on service, consented to service with the effect of waiving the three-month period (if it otherwise applied). Ultimately, the Court's decision did not turn on arguments of waiver.

Had the requirement to amicably attempt settlement not been waived, the Court considered whether non-compliance would bar the pre-emptive issuance of the Request for Arbitration, which was a matter of the proper construction of the clause. The Court held that the three-month period did not act as an absolute bar to proceedings, but rather provided a window to explore settlement, and enable earlier commencement of proceedings if amicable settlement could not be reached. This required an objective consideration as to whether the additional six weeks for settlement discussions would have brought about an amicable settlement. In this respect, the Court held 'there was not a cat's chance in hell of an amicable settlement by 14 October'. On that basis, SL Mining had not breached the clause on its proper construction.

Significance

The Court's decision is not by any means surprising, considering leading commentary and international practice. It is significant however, in that it continues to demonstrate England as an arbitration-friendly jurisdiction, when viewed from the lens of limiting national court intervention in arbitration. In this decision, the Court has signalled it will not entertain jurisdictional challenges pursuant to section 67 on the grounds of non-compliance with a condition precedent, where the question raised is more appropriately categorised as one of admissibility rather than of tribunal jurisdiction. This case has also provided welcome clarity following the widely criticised case of *Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd*,[6] which dealt with a condition precedent in a multi-tier dispute resolution clause as an issue of jurisdiction under section 67 of the Act.

Ultimately, non-compliance with multi-tiered dispute resolution clauses still carries certain risks, and parties should not breach apparent condition precedents without caution. For instance, a party to a dispute may challenge the admissibility of a claim before an arbitral tribunal, who is entitled to rule that the dispute, or indeed certain claims, are premature. In such circumstances, a party risks having to comply with certain preconditions before appointing a new tribunal, and in doing so incurs unnecessary delays and costs.

It does, however, remain to be seen whether a court would differ in its decision where the fulfilment of a condition precedent is also expressed as a condition to consent to arbitration, and so arguably goes to the very jurisdiction of a tribunal.

Notes

1 [2021] EWHC 286 (Comm).
2 This subsidiary argument was swiftly dismissed by the Court, holding that the Claimant, Sierra Leone, had consented to the adoption of the Emergency Arbitration Procedure. See *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm), para 5.
3 English Arbitration Act 1996, s 30(1).
4 English Arbitration Act 1996, s 1(c).
5 *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm), para 18.
6 [2015] 1 WLR 114.

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COUNTRY UPDATE: INDIA

India's parliament introduces Bill to alter Arbitration Law: attempt to put an end to fraudulent practices

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India's laws relating to arbitration are largely based on the English Common Law. The Indian arbitration regime is governed and regulated by the Arbitration and Conciliation Act 1996 (the 'Principal Act'), which derives its basis from the 1985 United Nations Commission on International Trade Law (UNCITRAL) Model on International Commercial Arbitration and the UNCITRAL Arbitration Rules of 1976. The Principal Act was passed to consolidate the laws relating to domestic arbitration, international and commercial arbitration, enforcement of foreign arbitral awards, and the law relating to conciliation.

Since its inception, the Principal Act has been through significant changes under the Arbitration and Conciliation (Amendment) Act, 2015 (the '2015 Act') to make the arbitration process user-friendly, cost-effective and to ensure speedy disposal of disputes and neutrality of arbitrators. Subsequently, to address the practical difficulties arising in implementing the amendments carried out through the 2015 Act, and to promote institutional arbitration in the country, the Principal Act was again amended by the Arbitration and Conciliation (Amendment) Act, 2019 (the '2019 Act').

This brings us to the Arbitration and Conciliation (Amendment) Act, 2021 (the 'New Bill'), which was introduced in the Indian parliament and recently passed by the Lok Sabha (lower house). It seeks to address corrupt practices in securing contracts or arbitral awards. A need was felt to ensure all stakeholders have an equal opportunity to obtain an unconditional stay on arbitral awards where the agreement or the contract is 'induced by fraud or corruption'. The New Bill also seeks to attract eminent arbitrators to the country and omits Schedule 8, concerning the requisite qualifications for arbitrators, which was introduced in the 2019 Act. An ordinance to this effect was promulgated by the President on 4 November 2020 under Article 123(1) of the Constitution of India as the parliament was not in session and immediate steps had to be taken.

The changes suggested by the New Bill

The changes suggested by the New Bill are summarised below.

More power to all stakeholders

The New Bill seeks to amend Section 36 of the Principal Act that envisaged that an arbitral award was enforceable even if an appeal was filed against it in court under Section 34 of the Principal Act. The Court could stay the order only if the conditions are deemed fit by the court. The New Bill adds an extra clause to the section, giving courts the power to grant an unconditional stay on the award pending disposal by a challenge under section 34 if the court is satisfied that a prima facie case is made out that: (1) the arbitration agreement or contract which is the basis of the award; or (2) the making of the award was induced by corruption or fraud. This may apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the 2015 Act.

Norms for accreditation changes

One of the significant changes introduced in the 2019 Act was the specification of the qualifications an arbitrator is required to hold. However, this restricted many good arbitrators from being a part of India's arbitration regime. The earlier section 43J of the Principal Act provided that the qualifications, experience, and norms for accreditation of arbitrators shall be in accordance with Schedule 8 which contained an extensive list of eligibilities. The New Bill introduces a new section 43J which reads 'The qualifications, experience, and norms for accreditation of arbitrators shall be such as may be specified by the regulations.' The Arbitration Council of India may by regulations specify the qualifications, experience, and norms required to be fulfilled by the arbitrator. The matters in respect of which the regulations may be made are matters of procedure and administration and it would be unwise to provide for them in the New Bill itself. The delegation of the legislative can help open avenues for competent arbitrators.

Omission of Schedule 8

As the new Section 43J lays down a different set of rules for qualifications, experience and norms of the arbitrators, the existence of Schedule 8 is redundant and is proposed to be omitted from the Principal Act.

Critical analysis of the New Bill: An Indian perspective

The New Bill seeks to replace the aforementioned Ordinance and bring about changes that can curb corruption and keep a check on fly-by-night operators who take advantage of the law to obtain favourable awards by catering to fraudulent means. However, it is appropriate to look closely at these new provisions and analyse how they shall effect arbitration in India. By introducing an unconditional stay on enforcement of arbitral awards, all stakeholders are brought to parity and are given an equal opportunity. The relaxation of the qualifications of an arbitrator will encourage more international participation and give India's arbitrations global exposure.

If these provisions do see the light of the day, a serious impact on the country's dispute mechanism arena is foreseeable. India is notorious for its lack of agility as it pertains to enforcement of international contracts and agreements. The New Bill may prove to be detrimental: as the stakeholders are given the power to make an unconditional stay, there is scope for misusing the power and prolonging the arbitration without any reasonable concern. Having said that, the object behind the new provisions looks promising and there is no doubt that it will help curb internal corruption and fraud while delivering justice. It can be said that the legislation in this regard is looking to adopt a liberal approach on the subject, although such provisions are long overdue and need to be implemented for the arbitration regime in India to see a better tomorrow.

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The consolidation of India's construction laws: a long overdue reform

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India's construction sector is a manifestation of scattered legislation and uncertainty in interpretation, leading to disputes and lingering litigation. Construction laws in India are governed by various legislation, ranging from the 1872 Contract Act, to extensive statutory provisions in labour laws including a few specific laws, such as the Building and Other Construction Workers Act, 1996 and other state-specific laws and regulations.

The need for amalgamated construction law arises from the lack of a uniform format for construction contracts. This in turn creates problems of its own, resulting in prejudiced contract conditions, delayed payments and drawn out dispute resolution.

The rationale behind Construction Contracts

In India, every contract needs to be in accordance with the Indian Contract Act, 1872, which requires that there be an agreement between two or more parties who are competent to contract and that the parties have entered into the agreement with their free consent, for a lawful consideration and with a lawful object.[1] Like any other contract, construction contracts must also comply with the aforesaid requirements in order to be legally enforceable. The contracts between contractors and employers are mainly governed by the Indian Contract Act, and formats are picked from organisations with an international standing in construction contracts.

FIDIC, the *Fédération Internationale Des Ingénieurs-Conseils*, or the International Federation of Consulting Engineers, was started in 1913 by France, Belgium, and Switzerland.[2] Headquartered in Switzerland, the FIDIC is a proud federation with 60 different countries as members. Digressing from its primary function, FIDIC gained popularity for producing standard forms of contracts for construction and engineering. After the release of its first form contract, titled 'The Form of contract for works of Civil Engineering construction', also known as the *Red Book* due to the colour of the cover, all FIDIC form contracts came to be known by their cover's colour. Given how extensively construction companies and consulting engineers make use of FIDIC's standard form contracts, with time, distorted versions surfaced which do not maintain the integrity of the motives underlying the FIDIC form contracts.

In India, the construction sector does not subscribe to any standard form of contract. However, contracts published by FIDIC, the Institute of Civil Engineers, and the Indian Institute of Architects are often used. Apart from these, many government organisations have their own standard forms of contract, suiting their department's needs. It is therefore safe to conclude that when it comes to construction contracts, there is a lack of uniformity in contract terms and formats.

Disputes in construction contracts and the disparity in interpretation by arbitrators and courts: a global perspective

Construction disputes primarily concern delays in the performance of contracts. It is relevant to note here that the way these disputes are determined by arbitrators or courts of law reveals the practical application of related laws and displays the inevitable disparity in interpretation.

A three-day International Conference on Construction Law and Arbitration was held in New Delhi in December 2019. It was co-hosted by the Society of Construction Law-India and the Chartered Institute of Arbitrators-India. The conference consisted of a panel of renowned judges and speakers from around the world who discussed issues faced by construction contracts and reasons for delays in construction. It is vital to note the trend and approaches followed by the interpreters of law to understand the working of the dispute resolution aspect of construction issues. Some of the issues considered by the panellists are discussed below.

Concurrent delays

There is no single generally accepted definition of concurrent delay. A narrow definition is 'true concurrency', where the employer and contractor delay events occur at the same time and cause a delay to progress for the same period sharing the same start and finish dates, either of which, in the absence of the other, is likely to cause the same delay to the completion of the project.[3]

There are two main approaches followed by arbitrators and courts across different jurisdictions in the world.

The Malmaison approach

This approach is best explained by the UK's Technology and Construction Court (TCC), in the case of *Henry Boot Construction Ltd v Malmaison Hotel*.[4] Essentially, if there are two concurrent causes of delay, one of which is an event that is relevant and beyond the control of the contractor, and the other of which is not beyond the control of the contractor, then in such a case, the contractor is entitled to an extension of time caused by the relevant event. Although this is notwithstanding the concurrent effect of the other event, the contractor shall not have the option of recovering any time-related costs. This approach is well appreciated in Swiss law and is contained in Article 44 of the Code of Obligations of the Swiss Civil Code.

Apportionment approach

Rejecting the Malmaison approach, the Scottish courts in *City Inn v Shepherd Construction Ltd*[5] laid down the apportionment approach. In summary, where there are two competing causes of delay, neither of which is dominant, the delay must be apportioned between the contractor and the employer. This approach was also adapted by the High Court of Hong Kong in *Hing Construction Co Ltd v Boost Investments Ltd*,[6] which was sanctioned and followed by the Scottish courts in the *City Inn Case*. Along similar lines, the United Arab Emirates Civil Code also has similar principles embodied in articles 287, 290, and 291.

Although the Malmaison approach has been consistently upheld by UK courts, there have been a few distinguishing interpretations. In *Saga Cruises v Fincantieri*,[7] the court held that the contractor should not be given the opportunity to take advantage of the employer's delay event if there was already an existing delay, and the employer's delay has no significant impact on the completion.

Therefore, it can be seen how different jurisdictions interpret and rule on concurrent delay in construction contracts, although they are still applying the same settled principles of law.

Exclusionary clauses

Exclusionary clauses refer to clauses in construction contracts which exclude the liability of the employer for delays caused by the employers themselves. It is common knowledge that in India, government contracts are biased towards the government employer and often include terms that give the government an upper hand while dealing with contractors. This has paved the way for exclusionary clauses to be included in contracts, even if there are delays that could be attributable to the employer, no liability for damages could be claimed by the contractor. In *General Manager, Northern Railways v Sarvesh Chopra*,[8] it was laid down that the contractors could only claim damages if they give notice of their intention to claim while accepting the extension of time, although the contractors were the non-defaulting party.

It is relevant to note that India's Contract Act, section 54 provides that when the defaulting party gains any advantage under the contract, such party in breach cannot keep the benefit and will have to compensate the non-defaulting party.

Eventually, such exclusionary clauses were strongly condemned by India's courts. In *Pioneer Urban Land and Infrastructure Ltd v Govindan Raghavan*,[9] the Court reiterated what was said in *Central Inland Water Transport Corporation v Brojo Nath Gangululy*[10] that the courts will not enforce and will strike down an unfair and unreasonable contract or clause entered into between parties who are not equal in bargaining power. In these cases, exclusionary clauses were not binding on the judicial authority and would forbid the employer from entertaining claims made by the contractor.[11] Justice will not be served if the contractor was

provided with an advantage but there was not commensurate compensation for the other for the loss caused by the contractor's delay. Any exclusionary clause itself is contrary to law and the public policy of India, and therefore, any such clause would be void *ab-initio*.[12]

Time being the essence of construction contracts

The Indian Contract Act provides for claims for breach of contract while also envisaging section 55,[13] which sets out how compensation may be available for the delay in the performance of the contract. Different consequences are stipulated based on whether time is of the essence of the contract or not. Where time is not of essence, the provision does not provide any conditions for claiming compensation from the employer. However, it states that notice must be given when accepting a time extension from the employer for the contractor eventually to seek compensation at a later date.

In this regard, it is vital to note the UK practice of using standard contractual terms in construction contracts. The contractor is supposed to carry out the work 'regularly and diligently' and proceed with the resources available keeping in mind time, sequence, and quality of work. If there is any delay in such situations, either of the parties can suspend or terminate the contract. Having said that, some of the formats followed by FIDIC contains a clause which mandates issuance of notice to be a precondition to making claims. This leaves the contractor in difficulty if it fails strictly to obey the terms regarding notice.

It is also to be noted that these principles are not universal and differ from one jurisdiction to another. Therefore, different countries use different approaches to deal with disputes related to construction contracts.

Contractor's ability to anticipate ground conditions

A contractor ought to have enough knowledge about the practical ground conditions of any construction project. Proper due diligence, inspection, and independent assessment must be carried out at the time of the bidding stage in order to assess the nature and scope of work. If the contractor fails to do so, it not be eligible to make claims with respect to ground conditions. To understand the expectations from a contractor, it is useful to take look at the judgment of the TCC in *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* ('*Obrascon*').[14] In *Obrascon*, it was held that an experienced contractor must make its own assessment of all available data and come to its own conclusions, rather than to 'slavishly' accept the information from the employer. Failure to carry out an independent assessment of ground conditions would deprive a contractor from claiming damages and would entitle the employer to terminate the contract for the delay on the part of the contractor attributable to ground conditions.

Consequences of delay

To determine the nature of claims due to any delay, some conditions need to be fulfilled. Damages for extended financing and project administration costs, extended use of facilities by contractors, and loss of profits can be claimed by the employers on the one hand. On the other, any additional cost of labour and field supervision, extended equipment and tool financing costs, extended overheads, lost profits on the contract and on other contracts can be claimed by the contractor. Ultimately, it is both tests of 'beyond the control of the party' and 'unforeseeable' which determine whether damages as a consequence of delay are available under construction contracts.

A brief analysis of the above issues indicates that when it comes to disputes relating to construction contracts, no standardised approach is applied. However, a deeper examination reveals that courts and arbitrators follow rules based on principles universally applied.

Amendments in India's laws

India's government has made efforts to review laws to tackle issues and disparities faced by the construction sector. Amendments have been made to certain laws which have simplified particular provisions or issues.

Specific Relief Act

The Specific Relief Act, 1963 was amended in 2018 by the Specific Relief (Amendment) Act, 2018.[15] Section 20B prohibits any civil court from granting an injunction order for any such infrastructural projects where the injunction can cause impediment or delay the progress or completion of such project.[16] This was an effort towards relaxing the pressure on construction contractors or workers engaged in disputes.

Arbitration and Conciliation Act

On 9 August 2019, the Arbitration and Conciliation Act, 1996 was amended through the Arbitration and Conciliation (Amendment) Act 2019. The changes introduced seek to promote institutional arbitration in India and expedite the resolution of commercial disputes by arbitration with a view to making the country a hub for domestic and international arbitration. The amendments mainly focused on promoting institutional arbitration, graded by a newly established Arbitration Council of India. This was necessary to organise the current arbitration regime, avoiding disorder and confusion. Qualifications for arbitrators were laid down, focusing on confidentiality and time limits in

disposing of any dispute brought before the arbitral tribunal.

Nevertheless, these amendments lack clarity and fail to address current issues faced by construction and infrastructure companies. It must be borne in mind that the construction sector deals with complicated transactions and have adapted their evitable technological advancement. Laws must therefore aid the smooth flow of transactions. The core issue remains whether construction laws will undergo the sort of consolidation or unification required.

Suggestions and recommendations

The need for a unified construction law can be met only by consolidating India's existing laws, taking inspiration, for example, from the Code of Wages, which seeks to consolidate labour laws.

A unified construction law should also borrow from the relevant legislation of other countries, such as the UK Construction Act and the United States False Claims Act (FCA).

The FCA is the US' first whistleblower law and remains one of the strongest whistleblower laws in the country.[17] Since its original signing, the FCA has seen several revisions and become increasingly powerful. One aspect has remained since its conception: the *qui tam*, or whistleblower, provision. Under this, whistleblowers can provide useful information while maintaining anonymity and reveal any fraud or misappropriation that goes against the interest of the people or the government. On successful prosecution, they are awarded a mandatory reward of between 15 and 30 per cent of the collected proceeds. This can help bring to light corruption or fraud in construction transactions, especially where government is a party.

Similarly, the UK's construction laws have themselves gone through significant changes which could inspire revisions to India's construction regime. For example, the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) brought into force the Economic Development and Construction Act 2009 (LDEDCA) in 2011 in order to correct anomalies or close loopholes. Among many changes, the UK Construction Act contains a provision allowing an adjudicator to correct errors in the arbitrator's decision, known as the 'slip rule'. Adjudication can be enhanced by closely studying such provisions that address issues such as delay in arbitration or challenge of the award when it comes to errors made by the adjudicating authority. The US also has a provision in its law relating to 'mistake in bid' which allows a company to withdraw its bid where it has made a genuine mistake during the submission of its bid. In this regard, India could implement such provisions specific to the practical problems relating, for example, to errors in quoting.

Furthermore, the use of quality material in construction is a growing concern and legislation relating to this is ripe for introduction in India. Often, the employer is at the mercy of the terms of agreement with the contractor and the contractor's choice of materials. Although the employer can claim damages, whether substituted materials are considered to be different than what was agreed or deliver the agreed results is subject to interpretation.

In the United Arab Emirates, there is a local practice of imposing a limit of ten per cent of the contract value for any delays on the part of the contractor in failing to complete the work by a stipulated completion date notwithstanding any fixed damages which may have been agreed to by the parties. This local practice was ignored by the UAE Court of Cassation in a case which held that local courts had the authority to fix a level of damages (in order to balance the equities between the contracting parties) should it become evident the damages actually suffered were either higher or lower than the contractual amount originally envisaged and agreed upon.[18] It can guarantee price balancing in construction contracts, allowing parties to be on equal footing regarding claims keeping in mind the integrity of the contract. Therefore, liability clauses must be framed bearing in mind the genuine pre-estimate of losses that a company may incur.

While it is unknown whether the above laws of various jurisdictions will be taken into account in revising India's construction law regime, a few steps can be taken on a micro level to bring about clarity. While drafting tender conditions, balanced conditions should be framed to avoid the project becoming hindered. It is recommended to implement checks and balances so that projects run smoothly with regards to costing and setting timelines.

Consolidated construction law can augment growth and expand the outreach for the industry. India's construction laws, however extensive in provisions, are required to be unified in a way that can deliver the idea behind the legislation in its truest sense.

Notes

1 Section 10, Indian Contract Act, 1872, No 9, Acts of Parliament (India).
2 Koko Udom, 'A brief introduction to FIDIC contracts', NBS, 1 February 2014, see www.thenbs.com/knowledge/a-brief-introduction-to-fidic-contracts, accessed 21 April 2021.
3 'Conquering Concurrency: Part 1 What is concurrent delay?', FTI Consulting, 2018, see, www.fticonsulting-asia.com/~/media/Files/apac-files/insights/articles/conquering-concurrency-part-1-what-concurrent-delay.pdf, accessed 6 April 2021.
4 70 Con LR 32 (1999).
5 [2010] C SIH 68.
6 (2009) BLR 339.
7 (2016) EWHC 1975 (Comm).
8 AIR 2002 SC 1272 (SC of India).
9 Civil Appeal No 12238 of 2018, judgment dated 2 April 2019.
10 AIR 1986 SC 1571.
11 *Asian Techs Ltd v Union of India* (2009) 10 SCC 354(SC).
12 *Simplex Concrete Piles v Union of India*, CS(OS) No 614A/2002, judgment dated 23 February 2010 (Delhi HC).
13 Section 55, Indian Contract Act, 1872, No 9, Acts of Parliament (India).
14 [2014] EWHC 1028 (TCC).

15 Specific Relief (Amendment) Act, 2018, No 18 of 2018, Acts of Parliament (India).
16 Section 20A, Specific Relief Act, 1963, amended in 2018, No 18 of 2018 Acts of Parliament (India).
17 'The False Claims Act' NWC, see, https://www.whistleblowers.org/protect-the-false-claims-act, accessed 6 April 2021.
18 Parveen P Mahtani, 'Reformation of Construction Law in India', *Legal Era*, 21 October 2020, see www.legaleraonline.com/within-the-circle/reformation-of-construction-law-in-india-671465?infinitescroll=1.

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COUNTRY UPDATE: PANAMA

Changes to Panama's public procurement law

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Panama's public procurement law is found in Law 22 of 2006, which regulates how the government and its entities execute their yearly budget regarding the acquisition of goods, services and works, based on strong principles and a variety of procurement processes available for different types and sizes of acquisitions.

Although this Law has undergone many changes, its latest amendment (through Law 153 of 2020) is probably the most significant one in its history. Most of the modifications to this Law respond to the efforts from the government to strengthen the efficiency and transparency principles that govern public contracting in Panama, avoiding project execution blockades by losing bidders, as well as shortening the adjudication process.

Risk factor and reference price

Law 153 eliminated the famous 'risk-factor' from different procurement procedures, promoting competition from the bidders, avoiding common scenarios where all the economic proposals were the same. The risk-factor essentially established a 'floor' or maximum percentage allowed for bidders to make an economic proposal below the reference price in each bid.

The reference price for bids is still determined by the public contracting entity, but under the latest modification to Law 22, the Public Procurement Directorate may request public contracting entities to demonstrate how such a reference price was determined, being able to suspend the bid if such evidence or explanation is insufficient.

Bid bonds

Another change is that bids of less than US$500,000, will not require bid bonds. Also, bid bonds will now be presented to the public contracting entity and verified by such entity electronically, instead of physically.

Evaluation and verification committee reports

The term for the issuance of the public contracting entities' committees report was shortened in some procurement processes, making the adjudication faster and project execution more efficient.

Claim actions

The term for bidders to challenge the reports from the evaluation or verification committees is also reduced. Previously, a bidder could challenge the mentioned reports directly to the Public Procurement Directorate, without presenting its arguments to the public contracting entity. Now, bidders must first share their observations with the public contracting entity and allow such entity to decide whether or not to order the commissions, to change or reconsider their evaluation and/or verification process as per the arguments of the challenger. Only after the observations are shared with the public contracting entity, and if because of such observations the public contracting entity: (1) does not order the according changes or reconsiders the corresponding committee, or (2) remains silent about such observations, the bidder is able to file the legal challenge (better known as 'claim action') before the Public Procurement Directorate.

If, on the other hand, the public contracting entity does order the corresponding committee to change or reconsider its report, such committee shall follow through and issue a new one. This new report may be subject to claim actions, but in most cases will require a claim action bond, guaranteeing that the challenger is not purposely trying to delay the process unjustifiably. This claim action bond is also a new element to the Law.

Another important change to the Law is that claim actions against bid specifications (the bid document itself), are only available to those who participated in the official confirmation meeting and must be filed with a minimum anticipation from the bid proposal presentation date. This varies, depending on the amount of each bid. The confirmation meeting is a publicly accessible meeting between the public contracting

entity and all interested parties, where the bid document/ specifications are discussed, and the concerns of interested parties cleared. It is common for interested parties (possible bidders) to make several public requests to the public contracting entity regarding changes to the bid document at the confirmation meeting. The new criteria is that if an interested party does not participate in the meeting, it should not be able to challenge the bid document at a later date, as the specified time to share comments and make requests for changes directly to the public contracting entity is at the confirmation meeting. It was even included in the latest change to Law 22, that if most of the participants at the confirmation meeting agree with the public contracting entity to a certain change to the bid document, such change must be implemented.

Another change to the Law is that claim actions must contain all the bidder's arguments, and no further claim actions shall be available from the same bidder with new arguments. This measure anticipates avoiding the common practice of bulking bid processes with multiple claim actions by the same bidders.

Claim actions may now not only be filed before the adjudication or the declaration of deserted act (when no proposal complies with the bid requirements), but also against proposal rejections and the cancelation of bid processes.

Appeals and impugnation recourse

Contractors may challenge fines or penalties during the execution phase of contracts, before the Public Procurement Administrative Tribunal, as well as via sanctions which restrict a party from contracting with governmental entities.

Impugnation recourses (a type of second instance claim), should now be resolved within 30 business days as opposed to the 60 business days established in the Law before the latest modification.

Best value bid with separate evaluation

This contractor selection process has been abolished, as it was deeply unpopular, and from a technical standpoint, it did not add any value to government. Under the former process, bidders would present two separate proposals – economic and technical. The economic proposals were kept in sealed envelopes in a vault in Panama's National Bank, where they remained until after the technical proposals were evaluated, supposedly as to not influence the evaluation committees' decisions. The reference prices for bids were also not made public, being kept in the vault. The problem was that public opinion distrusted the alleged secrecy of such a mechanism, and this led to acrimony regarding possible leaks of secret reference prices and economic proposals.

Exceptional process

The general rule regarding acquisitions by government and its entities is that they must take place via a competitive procurement process. These processes are described and regulated in Law 22, where an 'exceptional process' is also available in certain circumstances, which are expressly listed in the Law. Law 153 has reformed the exceptional process, so that it now requires public contracting entities implementing such a process to obtain at least three proposals instead of just one. Alternatively, they must prepare a report explaining the reasons why it was unfeasible, impossible, or inconvenient to obtain three proposals. In this sense, it is fair to say that direct public contracting is now more difficult than before.

Bureaucratic requirements

Law 153 establishes as a new obligation for public contracting entities that general public documents which have been issued by other public entities in Panama (eg, good standing certificates, commercial permit, and similar documents) are not required to be included in the bid documents. Instead, public contracting entities are required to validate the fulfilment of these requirements in public bids electronically. This should ease the process of participating in public procurement processes.

Electronic proposals

All bid proposals shall now be presented electronically, instead of physically. This is a major practical improvement as, in the past, most of the bid proposals were not only presented in-person in big heavy boxes, but included several copies, which were rarely used.

Amendments to the bid document

Law 153 increases the minimum amount of time that shall elapse between a modification to a bid document and the date for proposal submissions. Also, a unified version of the bid documents must be uploaded to the public procurement website (PanamaCompra), including all modifications by amendments before the bid proposal submission date.

Advanced payments and amendments to public contracts

For contracts of more than US$3m that include an advance payment component, such advance payment will now be consigned into a trust to be created by the Ministry of Economy and Finance, rather than being paid directly to the contractor.

Regarding contract amendments, the sum of all amendments to the price of a public contract is now

limited to 25 per cent instead of 40 per cent.

Transparency, level playing fields and professionalisation of public procurement

Law 153 includes the development of a capacity- building programme for public servants in the different public contracting entities, as well as the creation of a Public Procurement Observatory that will allow the public to follow the various stages of ongoing public contracts and file complaints. This is in addition to the existing public procurement website where all public bids are available to view.

The obligation for public contracting entities to include authentic, exact, and precise information in the bid documents has also been included in Law 22, creating a level playing field for all interested parties.

Although there is a long way to go to reach perfect or near-perfect public procurement legislation, several of the latest changes to Law 22 should help the Government of Panama attract new private investment and contribute to the economic reactivation of the country.

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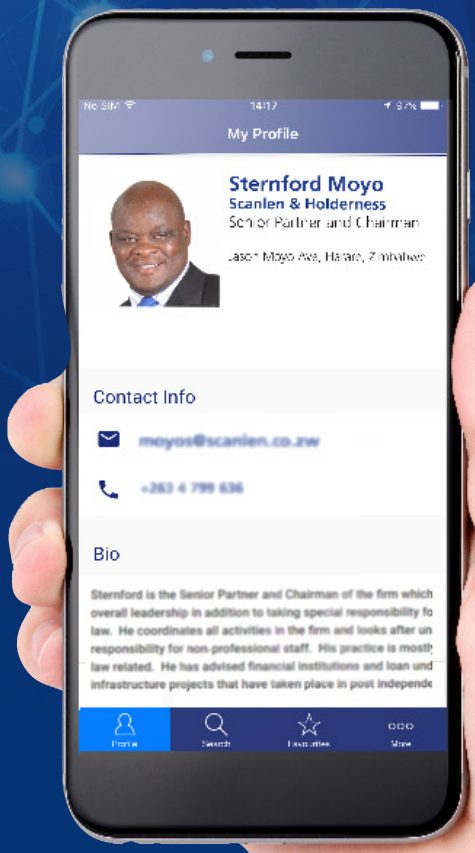

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Contractors' claims for expropriation of contractual rights on the basis of international investment treaties

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This article analyses when claims for expropriation of contractors' contractual rights can be made against states on the basis of international investment treaties. The approaches adopted by arbitral tribunals in expropriation claims are examined in relation to various types of contract and then compared to the approaches followed in relation to construction contracts. This article concludes that construction contract cases do not differ from the cases relating to other contract types when it comes to expropriation of contractual rights. It also proposes some recommendations on the subject to contractors as potential foreign investors.

Introduction on expropriation of contractual rights

The protection of foreign investors from unlawful and uncompensated expropriation of their property by the host state has traditionally been among the fundamental guarantees of international investment treaties. Apart from tangible assets, most investment treaties such as ICSID, ECT, NAFTA and the vast majority of BITs,[1] have recognised that an investor's

contractual rights, as a form of intangible property with an economic value,[2] are qualified 'investments' capable of being expropriated by the host state.[3]

Expropriation of contractual rights may occur in cases where the investor has a contractual relationship with a state body, authority, state-owned entity or even a private entity that under certain circumstances acts as the state's arm in a business transaction. Expropriation may particularly occur when the state-counterparty acts in breach of contract (or even exercises a contractual right) but in a way that deprives the investor substantially and permanently of its right of use and enjoyment of its investment under the contract. That action must be attributable to the state,[4] and must be the result of exercise by the state-party of sovereign authority.

Not every breach or failure of the state-party will therefore amount to an expropriation. Specifically, a contractual breach will not ipso facto also entail a breach of the applicable international investment treaty. The state may well have acted in a mere commercial capacity like any private contracting party. Or perhaps the state's action, albeit in a sovereign capacity, was justified and acceptable within the context of its right and power to legislate its domestic environment. If the state's conduct is found to be only in breach of contract *and not* in breach of the treaty, the investor cannot claim for compensation under investment treaty law.

Not every breach or failure of the state-party will therefore amount to an expropriation

Consequently, the first step (and challenge) in the relevant arbitral case will be to determine whether the conditions are met for the state-counterparty's alleged conduct to constitute in fact an expropriation, and not an action purely contractual in nature. It is only after expropriation is found that the investment tribunal will examine the legality of the relevant state conduct (ie, public purpose, non-discrimination, due process, and compensation).

Why is this subject relevant to contractors?

The risk of expropriation, including that of contractual rights, is a political risk which a contractor should take into consideration in assessing its business risks prior to bidding for and working on a project in a foreign state.[5] However, not many construction professionals are familiar with the concept, and are, therefore, unaware of the protection available to them under the applicable investment treaties.

By way of illustration, a foreign contractor has signed a contract with the Ministry of Infrastructure of foreign State X for the construction of a railway project. The contractor performs and delivers its work as per the contract, but the Ministry refuses to pay. The contractor's right for payment under the contract is infringed, while the Ministry breaches its own obligation to pay. The contractor primarily has a contractual claim against the Ministry, and should adhere to the dispute resolution procedure in the contract. However, if an investment treaty exists between the contractor's home country and State X, according to which the contractor's right to payment under the said contract is a protected investment, the contractor may be able to raise a treaty claim against State X, seeking protection against the expropriation of its right through international arbitration proceedings. The benefits for the contractor in this case include:

- The claim is brought directly against State X; notwithstanding that it was a certain Ministry that did not pay. Therefore, the contractor will be able to enforce against state assets located anywhere in the world, whereas the Ministry's assets may be limited and restricted within the state's territory.
- The contractor can claim directly against the state, even if its contractual counterparty was a private entity, insofar as they can demonstrate that the latter's conduct was attributed to the state (eg, state exercising political pressure).
- Investment arbitration proceedings are certainly a good additional option, when recourse to local courts as per the contract mechanism is not viable or is deemed by the contractor unfavorable, particularly so in consideration of in consideration of the wider benefits of arbitration compared to litigation (speed, expertise, impartiality, independence, etc.).

- The dispute will be resolved on the basis of international public law and principles (eg, equity). By contrast, a pure contractual breach will be inevitably linked to the contract's governing law, which may be restrictive. For example, the damages awarded for a state's international violation will usually amount to the market value of the contractor's investment,[6] which shall not be the case for damages under the contract.

Arbitral approach on expropriation of contractual rights

There are certain principles and conditions to which investment arbitral tribunals have referred to establish an expropriation of a foreign investor's contractual rights in a particular case.

Contract breach versus treaty breach

A state entity may breach the contract without necessarily breaching the applicable investment treaty. It has been held *(Vivendi 2)* that, even though a treaty breach and a contract breach may eventually overlap, they are still distinguished, and whether they have respectively occurred should be examined by reference to international law (for the treaty breach) and the contract's governing law (for the contract breach).[7]

Therefore, under what conditions does a breach of contract also constitute an expropriation of the investor's contractual rights and, thus, a violation of the applicable investment treaty? The primary threshold, and arguably the highest one, is to ascertain the state's sovereign capacity in its breaching conduct.

Sovereign capacity versus commercial capacity

The requirement for the state entity to have acted in a sovereign capacity in its breach of contract *(acta iure imperii)* for a claim of expropriation of contractual rights to be considered has been repeatedly confirmed by arbitral tribunals. Elaborating on this point:

- It is necessary for the state to have acted beyond its role as a simple party to the contract and in exercise of the particular powers of a sovereign (*Azurix*).[8]
- It is required that the state as a contracting party behaves in an out-of-the ordinary manner, and instead acts on its 'superior governmental power' interfering with the execution of the contract. The state's reliance on its own political structure to avoid its contractual obligations; the state asking for amendments in the contract's economic equation upon change of government; and the contract's termination through a decree issued pursuant to an emergency law, are considered examples of exercise by the state of public authority *(Siemens)*.[9]
- When the state party exercises a contractual right and does so in compliance with the contractual framework and governing law, its action will be probably considered as within its mere commercial capacity *(acta iure gestionis)*. For example, the state's termination of the contract and the call of the performance bond are purely contractual actions, that any reasonable private party would take in response to a contractor's deteriorating financial situation and the threats of its shareholders to terminate the agreement *(Suez)*.[10]

Sovereign right to regulate

It is a customary law principle that a state has the sovereign right to regulate its domestic affairs.[11] Although the exercise of this right is not limitless, the state will normally have no responsibility for any deprivation or interference caused to foreign investors due to such actions.[12] Indeed:

- The adoption of general regulations by a state which are ordinarily accepted as within its police powers, will not amount to an expropriation,[13] especially absent any proof of error or impropriety. Whether a state has 'crossed the line' between a regulatory activity and expropriation is up to each tribunal to decide. For instance, a banking regulator's imposition of forced administration did not expropriate the bank's shareholders' rights, but was a permissible and lawful regulatory activity following the affected bank's failure to comply with banking legislation *(Saluka)*.[14]
- The tribunal will also take into account the political, social and economic circumstances surrounding the state's conduct, and the severity thereof. In *Saluka*, discussed above, the tribunal took into account the then prevailing banking crisis. Also, the renegotiation of public contracts; the introduction of new taxes, and the imposition of limitations on bank accounts,

were considered as general measures taken within the police powers of Argentina within the context of and in response to its 1998–2003 financial crisis *(Suez)*.[15]

- The nature of the state's conduct will be determined by the *effect* it has on the investor. According to the sole effects doctrine,[16] the state's disclaimers as to its purpose or intent in good faith when taking a measure will not legitimise its conduct as regulatory *(Vivendi 1)*,[17] unless differently provided in the applicable investment treaty *(Siemens)*.[18]

Tribunals have agreed that the state party's mere non-performance of or non-compliance with its contractual obligations does not amount to expropriation of the investor's respective contractual rights

Typical examples

The typical situations involving a foreign investor's claim for expropriation of its contractual rights are considered below.[19]

Contract termination

Does the unilateral termination of a contract by the state party constitute an expropriation of the investor's contractual rights, or is it simply an exercise by the state of a contractual prerogative? In addition to the *acta iure imperii* condition, tribunals have commented that:

- the exercise by the state of an existing contractual right or remedy cannot in itself exclude the possibility that its action expropriates the investor's rights, especially if such exercise is found to be unlawful *(Suez)*;[20]
- to determine whether termination was legitimate and reasonable, it is necessary to examine the conditions under which the contract was entered into, performed and terminated, including non-contractual motives that might have led to termination *(Vigotop)*;[21]
- if the state terminated the contract for public policy reasons, the state acted in a sovereign capacity, and termination solely for such reasons would constitute expropriation *(Vigotop)*;[22]
- if the state invoked contractual reasons for terminating the contract, it should be examined whether these were sufficiently well-founded. If not, they may be regarded as mere pretexts in the state's attempt to conceal an expropriatory conduct *(Vigotop)*;[23]
- if contractual grounds are in fact established, it should be ascertained whether termination was bona fide. The exercise of this right by the state only to avoid its obligation to compensate the investor under the applicable investment treaty would be abusive and therefore expropriatory *(Vigotop)*.[24] Similarly, termination would be expropriatory, if found disproportionate compared to the contract's overall benefit to the parties, or if established that it was politically motivated *(Ampal)*;[25]
- eventually, the legitimate invocation of contractual grounds for termination by the state would exclude a finding of expropriation, even if public policy reasons were found to coexist *(Vigotop)*;[26]
- it is the *effect* of the termination that will be considered, not the state's *intention* in terminating. For example, a decree that terminates a contract is a permanent measure, which, if not revoked or allowing for an alternative arrangement, will amount to expropriation *(Siemens)*.[27]

Contractual non-performance

A state authority stops payments to a foreign concessionaire; should non-payment be directly treated as breach of international law? Tribunals have agreed that the state party's mere non-performance of or non-compliance with its contractual obligations does not amount to expropriation of the investor's respective contractual rights in and of itself. Tribunals have held:

- The investor should first address the matter using the prescribed contractual remedies; that is, go to the national court or to arbitration to redress the breach.
- However, if such a route is foreclosed to the investor, either practically or legally, the state's conduct might constitute a taking of the investor's contractual right. In the aforementioned example, expropriation may be found if, apart from being refused payment, the concessionaire was also obstructed by the state and denied its legal remedies. Therefore, if recourse to court is still open to the concessionaire to claim payment, an expropriation claim will not normally be upheld, especially if non-payment was the result of money shortage (business risk) and not of some legislative action *(Waste Management)*.[28]
- When the state-party's debt to the investor has not been wiped out by any enacted

decree or law, but still exists, and the investor can still claim interest for its late payment in the available forum, it cannot claim that its payment right has been expropriated. All the more so if there is a dispute pending between the contracting parties regarding the amount due *(SGS)*.[29]

- Therefore, the *effect* of the state's non-performance/non-compliance action should be one that prevents the exercise of the right entirely or to a substantial extent. Non-payment not redressed by any means available to the investor satisfies this condition *(Waste Management)*.[30]

Failure to take action

The state has agreed to take a certain action for the wellbeing of the investment; eg, adjustments to the tariff calculation in a concession contract. Should the state's failure or refusal to take such action amount to the expropriation of the concessionaire's rights, when the latter is deprived of the tariff income from consumer payments? The tribunal determined:

- The wording of the applicable investment treaty will outline the expropriatory conduct. The vast majority of BITs talk about *measures* of expropriation taken by the state. When there is no specific definition in the treaties, a *measure* is an action towards a specific purpose.
- A simple omission on the part of the state to take the previously agreed action will not qualify as a *measure*, unless it can be shown that the state deliberately and carefully decided not to act, and communicated such decision to the affected investor. Only in the latter case, the state's failure (refusal) to adjust the tariff would qualify as a *measure* for the purposes of the expropriation claim *(Suez)*.[31]
- The *effect* of the state's conduct on the investment will also be considered. If, despite the refusal of tariff revision, the investor kept control of the concession and retained its management authority, the expropriation claim will be refused *(Suez)*.[32]

Series of measures taken against the investor/investment

The state takes several actions against the investor which lead to the destruction of the investment's value: adopting an adversarial position against the investor; at the same time, issuing adverse resolutions and fines; then, encouraging the non-payment of the concessionaire's invoices and/or depriving the investor of all legal recourses available. The investor may then reasonably end up with only one remaining option: to rescind the contract and abandon the investment. Can the investor claim that its concession rights were expropriated?

The tribunal will examine the *effect* of the state's *overall* conduct on the economic viability of the investment. The aforementioned state actions gradually rendered the investor's payment rights (ie, the benefit of the concession) neutralised and worthless. Therefore, with a constantly falling recovery rate culminating in the concession's inescapable rescission by the investor, the effect was undoubtedly devastating, completely taking away the economic use and enjoyment of the investment *(Vivendi 1)*.[33]

Construction contracts are qualified investments within the meaning of the ICSID Convention and under the vast majority of BITs.

Expropriation of contractual rights in construction contracts

Construction contracts are qualified *investments*[34] within the meaning of the ICSID Convention[35] and under the vast majority of BITs.[36] Therefore, the rights of contractors arising out of construction contracts and concessions involving infrastructure projects may be expropriated by the host state.

In the following paragraphs, the general principles discussed above are considered by reference to construction cases where the tribunal applied or adopted such principles when determining whether contractual rights have been expropriated.[37]

RFCC v Morocco: concession contract for the construction of a highway in Morocco

The parties disputed the works' final accounts. Eventually, the National Construction Authority imposed a late performance penalty on RFCC and called the performance bond. The Italian contractor raised an expropriation claim, arguing that such actions were abusive, disproportionate and unjustified. Morocco counter-argued that the actions were in exercise of the Authority's contractual rights and justified.

The Tribunal held that, even although a breach of the Italy–Morocco BIT could result from the Authority's breach of contract, a contractual breach does not constitute *ipso jure* and as such a BIT breach *(Vivendi 2)*.[38] The basis of this decision was that a contractual breach constitutes an expropriation, only if it can be established that the Authority went beyond its role as a mere party to the contract, and exercised the specific actions of a sovereign *(Azurix, Siemens, Suez)*.[39] Furthermore, both the penalty and the call should have substantial effects of such intensity, that RFCC's benefits arising from its rights are reduced or eliminated to a point that their possession is rendered useless *(Suez, Siemens, Waste Management, Vivendi 1)*.[40]

The Tribunal found no proof that the Authority acted in sovereign capacity. The parties' differences pertained to contract interpretation and contractual liability, which are disputes that do not go beyond a normal disagreement between private contracting parties; therefore, no expropriation was established.[41]

Impregilo v Pakistan [settled]: two contracts for the construction of hydroelectric facilities in Pakistan

The works suffered several delays, and the Italian contractor filed an ICSID claim accusing the Pakistan Authority of frustrating: (1) its ability to carry out and complete the work in a timely fashion; and (2) the contractual dispute resolution mechanism, by failing to appoint a person to chair the dispute resolution board for more than two years. The contractor argued that the Authority's failure to observe the terms of the contract was tantamount to an expropriation. In its jurisdictional objection, the state argued that the dispute was contractual in nature, denying any expropriation allegations.

The Tribunal held that Pakistan may have breached the contracts without breaching the Italy–Pakistan BIT. The two claims are distinct and should be examined separately, even if they overlap in content *(Vivendi 2)*.[42] The basis of this determination was that only in the exercise of '*puissance publique*' could the actions of the Authority amount to measures having an equivalent effect to expropriation *(Azurix, Siemens, Suez)*.[43] Therefore, if the Authority breached the contract as a result of regular contractual performance and implementation, such breach could not amount to an expropriation. Like in *RFCC*, the *effect* of Pakistan's actions against Impregilo was also highlighted by the Tribunal as a requirement for finding expropriation.

ADC v Hungary: concession contract for the design, construction and operation of the Budapest Airport

Hungary issued a governmental decree for the restructuring of the national airport operations, pursuant to which privatisation of airport operations was prohibited. The contract was consequently terminated; the national airport authority took over the airport operation and ADC had to leave. In its expropriation claim to ICSID, the Cypriot concessionaire argued that its rights under the contract had been rendered worthless and disappeared. Hungary responded that ADC only had contractual claims; that its actions were within its sovereign right to regulate its domestic affairs in view of its impending European Union accession; and that the investor had assumed regulatory risk.

The Tribunal held that the termination of the contract pursuant to the issuance of a government decree is a result of the exercise by the state of its sovereign powers *(Azurix, Siemens)*.[44] Furthermore, it noted that Hungary does have an inherent sovereign right in self-regulation; however, such right is limited by the state's international treaty obligations.[45] The difference between this position and the one adopted in *Saluka*,[46] is that in the latter there was a banking crisis involving a continuously failing bank; the intervention of the banking regulator was deemed necessary for the benefit of the general welfare. In *ADC* it was found that Hungary simply aimed to restructure an otherwise healthy sector, with no obvious benefit to the public.

In any case, foreign investors do not accept any potential risk when making an investment; therefore, they cannot be presumed to have accepted *a priori* every change in the regulatory regime.[47]

The Tribunal held that ADC rightly presented a treaty claim, since termination resulted from exercise by the state of its sovereign powers. The termination could not be justified for regulatory purposes either; so ADC's concession rights were indeed expropriated.[48]

Bayindir v Pakistan: highway construction contract in Pakistan

The work started falling behind schedule, but the parties could not agree who was to blame. Eventually, the Pakistani Highways Authority served a notice of termination to the Turkish investor, Bayindir demanding they vacated the site. Bayindir filed an ICSID claim arguing that Pakistan expropriated its contractual right of payment for the work executed until the termination and expulsion. Pakistan responded that it acted reasonably in exercise of its contractual rights, and that, in any case, Bayindir's claims were limited to the contract itself and could not amount to a breach of the Pakistan–Turkey BIT.

Agreeing with previous tribunals, the Tribunal held that a breach of contract and a breach of treaty are two distinct questions initiating two separate examinations *(Vivendi 2)*.[49] For expropriation to be found, the Authority's conduct should result from exercise of sovereign powers *(Azurix, Siemens, Suez)*.[50] On the other hand, the exercise by Pakistan of a contractual right or remedy could not exclude in and of itself the possibility of the BIT being breached by the state *(Suez, Vigotop)*.[51] Particularly, the Authority could have potentially expropriated Bayindir's contractual rights by exercising its own contractual rights, if: (1) Bayindir's rights were not limited by the state's rights; or (2) such contractual rights were exercised in breach of the contract terms.[52] The existence of legitimate contractual grounds to terminate Bayindir, would invalidate its expropriation claims. To confirm the existence of contractual grounds it would be necessary to examine the conditions linked to the interpretation and performance of the contract *(Vigotop)*.[53]

Disregarding the state's intent, the Tribunal also underlined the importance of the economic *effect* of the state's conduct. It should be of such intensity that the economic value of use, enjoyment or disposition of the investor's rights have been destroyed or neutralised *(Suez, Siemens, Waste Mananagement, Vivendi 1)*.[54]

It was found that Bayindir's expulsion was the consequence of its poor performance, therefore the state's exercise of its termination right was justified and within the contract's ambit.[55]

Parkerings v Lithuania: contract for the design, construction and operation of a public parking in Vilnius municipality

Parkerings' local subsidiary, BP, faced several challenges during project performance (eg, passing of law restricting the municipality's power to contract with private entities; enactment of decree limiting the municipality's authority in enforcing parking violations). The contract was eventually terminated by the municipality only five years after its conclusion. In its ICSID claim against Lithuania, Parkerings argued that the termination was wrongful, destroying the value of BP and, therefore, expropriating Parkerings' ownership interest in its subsidiary. The state responded that the termination was contractually admissible; that Parkerings ignored the jurisdiction of the Lithuanian courts as the contractually chosen dispute resolution forum; and that Parkerings was not deprived of its investment, since BP was still under its ownership and control while still operating in Lithuania.

The Tribunal confirmed that the state's actions should result from the exercise of its sovereign power, going beyond the actions a simple contracting party would have taken *(Azurix, Siemens, Suez)*.[56]

Nevertheless, it agreed that an investor must first address a breach before the contractually chosen forum (here, the Lithuanian courts), before raising an international expropriation claim. If it is demonstrated that the investor was denied, practically or legally, the possibility of seeking remedy, then the Tribunal might decide whether international rights have been violated on the basis of the treaty *(Waste Management)*.[57]

Moreover, the state's conduct should be one that gives rise to substantial decrease of the investment's value *(Suez, Siemens, Waste Management, Vivendi 1)*.[58]

The Tribunal rejected Parkering's claim, as there was no proof that the municipality used its sovereign authority in terminating the contract.[59] Furthermore, the investor had the opportunity to raise its claim to the Lithuanian courts, and there was no proof of any objective reason for not having done so prior to raising a treaty claim.[60]

Saipem v Bangladesh: gas pipeline construction contract in Bangladesh

A contract was signed between Saipem and Bangladesh's Petrobangla. A dispute arose

when Petrobangla failed to pay Saipem some additional costs. Saipem referred the dispute to ICC arbitration as per the contract, which ruled in its favour. Meanwhile, Petrobangla repeatedly attempted to disrupt the ICC process. It then asked the State's Supreme Court to set aside the ICC arbitral award. Indeed, the award was set aside as 'non-existent'.

Saipem filed an expropriation claim to ICSID, accusing both Petrobangla and the Court of having deprived it of its contractual rights to arbitration and to the arbitral award. Bangladesh argued that the Court, as court of the seat of the ICC arbitration, had the power to revoke the ICC tribunal's authority, and that the award was erroneous. Also, that Saipem should have first exhausted the available local remedies before raising the ICSID claim, if it wished to dispute the revocation.

The exercise by the state party of its sovereign powers constitutes a conditio sine qua non *for the tribunal to establish expropriation of contractual rights*

The Tribunal held that according to the wording of the Italy-Bangladesh BIT, Saipem's *residual contractual rights under its investment as crystallised in the ICC award* were the investment capable of being expropriated.[61] Moreover, it reaffirmed that only acts of the government that cannot be performed by private parties can amount to an expropriation.[62] *[Azurix, Siemens, Suez]* Therefore, the interference of *a state's judiciary* with an arbitration agreement could constitute expropriation of the investor's contractual rights (*judicial expropriation*),[63] if it caused the investment's confiscation.[64] However, this particular type of expropriation additionally required the element of *illegality*; otherwise any national court setting aside an arbitral award could be accused of expropriation, even if ordered on legitimate grounds.[65]

In any case, contrasting the principle set in *Waste Management* and *SGS*, an investor does not have to exhaust the legal remedies available to it domestically before raising an international investment claim; *expropriation by a court* does not necessarily presuppose a denial of justice.[66]

The Tribunal eventually held that Petrobangla's collusive actions with regards to the ICC proceedings, whether justified or not, did not constitute an expropriation, as it was not acting in a sovereign capacity. However, by setting aside the arbitral award, the Court, abused its supervisory jurisdiction over the arbitration process, and interfered with it contrary to the NYC article II;[67] a non-existent award cannot be performed anywhere.[68] The Court did expropriate Saipem's contractual rights to payment, as such were crystallised by the ICC arbitral award.

Malicorp v Egypt: concession contract for the construction and operation of an international airport in Egypt

Nearly a year after its signing, Malicorp was notified that the contract was terminated. The British investor filed an ICSID claim, arguing that Egypt had expropriated its rights conferred by the concession to operate the airport, to use allocated lands and to benefit from the transfer of ownership of a land adjacent to the construction site. Egypt claimed it had valid contractual grounds to terminate (lack of progress), but Malicorp contested such grounds as 'merely political pretexts' to conceal an expropriatory conduct amid a change in governmental policy on airport development.

The Tribunal confirmed that in view of a contractual claim the affected party should first try to resolve the matter using the available contractual remedies, before seeking investment treaty protection *(Waste Management, SGS)*.[69] Nevertheless, termination by the state could potentially amount to expropriation, if there is no legitimate supporting contractual basis *(Suez, Vigotop)*,[70] which will be determined based on grounds presented by Egypt pertaining to the conclusion and the performance of the contract by Malicorp *(Vigotop)*.[71]

Malicorp's misrepresentation of its financial stability on the conclusion of the contract[72] and its failure to launch the project[73] were held *'sufficiently plausible'* and not pretextual; so Egypt's conduct was not expropriatory.[74]

Convial v Peru: 30-year concession contract for the construction and operation of an expressway in Callao municipality

Following certain schedule overruns, the contract was unilaterally terminated by the municipality only six years after its conclusion. According to Convial's subsequent ICSID claim the termination was in abuse of its sovereign power, depriving the investor of

all its rights over the concession, including its right to payment for work performed. Peru argued that, due to Convial's failure to complete the project in a timely manner, project continuation was no longer in the public interest. Termination was, therefore, a contractual prerogative, legitimately exercised by the municipality.

According to the Tribunal, in the absence of exercise of sovereign power by the state, no expropriation claim can be upheld *(Azurix, Siemens, Suez)*.[75] However, contrasting the position held in *Vigotop,* contract termination for reasons of public interest is not necessarily indicative of exercise of sovereign powers, especially when such right is agreed by the parties in the contract.[76] Since the municipality's right to unilateral termination for reasons of public interest was specifically agreed in the contract, it merely exercised a contractual prerogative.[77]

Conclusion

The principles and conditions that have been applied by international arbitral tribunals in determining whether contractual rights have been expropriated under various types of contracts, have also largely been applied in cases of rights particularly arising out of construction contracts.

The exercise by the state party of its sovereign powers constitutes a *conditio sine qua non* for the tribunal to establish expropriation of contractual rights, particularly in cases of termination of the construction contracts.

Although the threshold in support of such claims seems to be high, it is reassuring that there is some protection available to contractors under international investment treaties, considering in particular the constantly growing market challenges and project risks affecting the construction industry (eg, increased project value and complexity; demand of greater resources; greater state interaction and interference; increased pricing; and currency volatility). Nevertheless, pure business risks are not protected by international investment treaties.

Having regard to the cases discussed above, contractors should consider the following points:

- Ensure that an investment treaty is applicable to the project; that both the contractor's business activities and in particular, its contractual rights are considered qualified 'investments' under the relevant treaty; and that the same are protected against expropriation.
- Check the treaty provisions regarding the requirements for state conduct to amount to expropriation. Particularly, if the treaty specifically distinguishes the measures amounting to expropriation from the regulatory measures taken within the state's sovereign right to legislate.
- Even if a state's conduct would appear to be within the state's inherent sovereign power of self-regulation, a contractor should not be discouraged from pursuing its claim. Self-regulation is limited by the state's international treaty obligations, and the contractor may still argue its case based on the particular conditions of the breach.
- Check whether the contract specifically allows the host state unilaterally to terminate the contract for public policy reasons.
- Much will depend on the prevailing surrounding circumstances (eg, a prevailing financial crisis) and the state's wider conduct. Tribunals have shown that they will consider whether the state's conduct, despite being legitimate (under law or contract), was abusive or disproportionate.
- Much will depend on the tribunal's school of thought. For example, supporters of the sole effects doctrine will not take into account the state's purpose or intent in taking the allegedly expropriatory measure.
- Similarly, some investment tribunals may reject the contractor's investment claim if the contractor did not first try to address and solve the dispute by exhausting the available contractual remedies.
- Finally, contractors attempting to enter a foreign market are in no way presumed to have accepted *a priori* every change in the regulatory regime of the host state. Some of these changes may be the ground for an expropriation claim based on the applicable investment treaty.

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Bibliography

Y Banifatemi and E Gaillard, 'Introductory Note to ICSID: *Salini Costruttori SPA and Italstrade SPA v Kingdom of Morocco* (Proceeding on Jurisdiction)' (2003) 42 (3) ILM 606.

M Bollini and V Colaiuta, 'Expropriation of Contractual Rights' in Renato Nazzini (ed), *Transnational Construction Arbitration: Key Themes in the Resolution of Construction Disputes* (Informa Law from Routledge 2017).

R Dolzer and C Schreuer, *Principles of International Investment Law* (2nd edn. Oxford University Press 2012).

G Glover, 'International Procurement, Development Bank Procurement and FIDIC' (2008) Fenwick Elliott, www.fenwickelliott.com/sites/default/files/International%20procurement%2C%20development%20bank%20procurement%20and%20FIDIC.pdf accessed 12 July 2020.

Organisation for Economic Co-operation and Development (OECD), ' "Indirect Expropriation" and the "Right to Regulate" in International Investment Law' (2004) OECD Working Papers on International Investment 4/2004, OECD Publishing, https://doi.org/10.1787/780155872321, accessed 28 September 2020.

A Reinisch and C Schreuer, *International Protection of Investments: The Substantive Standards* (Cambridge University Press 2020).

B Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (Oxford University Press 2011).

G Sacerdoti, 'Bilateral Treaties and Multilateral Instruments on Investment Protection' (1997) 269 Collected Courses of the Hague Academy of International Law 381.

Table of cases

ADC Affiliate Ltd and ADC & ADMC Management Ltd v Republic of Hungary, ICSID Case No ARB/03/16), Award (2 Oct 2006).

Ampal-American Israel Corporation and others v Arab Republic of Egypt, ICSID Case No ARB/12/1, Decision on Liability and Heads of Loss (21 Feb 2017).

Azurix Corp v The Argentine Republic, ICSID Case No ARB/01/12, Award (14 Jul 2006).

Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan, ICSID Case No ARB/03/29, Award (27 Aug 2009).

Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic, ICSID Case No ARB/97/3, Award (21 Nov 2000).

Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic, ICSID Case No ARB/97/3, Decision on Annulment (3 Jul 2002).

Consortium RFCC v Royaume du Maroc, ICSID Case No ARB/00/6, Award (22 Dec 2003).

Convial Callao SA and CCI – Compañía de Concesiones de Infraestructura SA v Republic of Peru, ICSID Case No ARB/10/2, Award (21 May 2013).

Impregilo SpA v Islamic Republic of Pakistan, ICSID Case No ARB/03/3, Decision on Jurisdiction (22 Apr 2005).

Malicorp Ltd v The Arab Republic of Egypt, ICSID Case No ARB/08/18, Award (7 Feb 2011).

Parkerings-Compagniet AS v Republic of Lithuania, ICSID Case No ARB/05/8, Award (11 Sept 2007).

Saipem SpA v The People's Republic of Bangladesh, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 Mar 2007).

Saipem SpA v The People's Republic of Bangladesh, ICSID Case No ARB/05/07, Award (30 June 2009).

Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco, ICSID Case No ARB/00/4, Decision on Jurisdiction (31 Jul 2001).

Saluka Investments BV (the Netherlands) v the Czech Republic, UNCITRAL, Partial Award (17 Mar 2006).

SGS Société Générale de Surveillance SA v Republic of the Philippines, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 Jan 2004).

Siemens AG v The Argentine Republic, ICSID Case No ARB/02/8, Award (17 Jan 2007).

Southern Pacific Properties (Middle East) (SPP) Ltd v Arab Republic of Egypt, ICSID Case No ARB/84/3, Award (20 May 1992).

Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentina, ICSID Case No ARB/03/19, Decision on Liability (30 Jul 2010).

Vigotop Ltd v Hungary, ICSID Case No ARB/11/22, Award (1 Oct 2014).

Waste Management, Inc v United Mexican States, ICSID Case No ARB(AF)/00/3, Award (30 Apr 2004).

Table of conventions and treaties

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (The New York Convention).

Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) (ICSID Convention).

International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) (ILC Articles).

Notes

* This article is based on the author's dissertation submitted to the King's College of London as part of her assessment for the Construction Law and Dispute Resolution MSc course.

1 International Centre for Settlement of Investment Disputes (ICSID); Energy Charter Treaty (ECT); North American Free Trade Agreement (NAFTA); Bilateral Investment Treaty(-ies) (BIT(s)).

2 Giorgio Sacerdoti, 'Bilateral Treaties and Multilateral Instruments on Investment Protection' (1997) 269 *Collected Courses of the Hague Academy of International Law* 381.

3 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn. Oxford University Press 2012).

4 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001) UN Doc A/56/10, Arts 4, 7, 31, see https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, accessed 29 June 2020.

5 Jeremy Glover, 'International Procurement, Development Bank Procurement and FIDIC' (2008) Fenwick Elliott, see www.fenwickelliott.com/sites/default/files/International%20procurement%2C%20development%20bank%20procurement%20and%20FIDIC.pdf, accessed 12 July 2020.

6 Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (Oxford University Press 2011).

7 *Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic,* ICSID Case No ARB/97/3, Decision on Annulment (3 Jul 2002) [*Vivendi 2*] paras 95–96.

8 *Azurix Corp v The Argentine Republic,* ICSID Case No. ARB/01/12, Award (14 Jul 2006) para 315.

9 *Siemens AG v The Argentine Republic,* ICSID Case No ARB/02/8, Award (17 Jan 2007) paras 248, 253, 254–260.

10 *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentina,* ICSID Case No ARB/03/19, Decision on Liability (30 Jul 2010) para 154.

11 Marco Bollini and Virginie Colaiuta, 'Expropriation of Contractual Rights' in Renato Nazzini (ed), *Transnational Construction Arbitration: Key Themes in the Resolution of Construction Disputes* (Informa Law from Routledge 2017).

12 OECD, ' "Indirect Expropriation" and the "Right to Regulate" in International Investment Law', (2004) OECD Working Papers on International Investment 4/2004, OECD Publishing, see https://doi.org/10.1787/780155872321 accessed 28 September 2020.

13 *Saluka Investments BV (the Netherlands) v the Czech Republic*, UNCITRAL, Partial Award (17 Mar 2006), para 262.

14 *Saluka* (n 13) paras 264, 269–275.

15 *Suez* (n 10) paras 136, 140.

16 August Reinisch and Christoph Schreuer, *International Protection of Investments: The Substantive Standards* (Cambridge University Press 2020).

17 *Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3, Award (21 Nov 2000) [*Vivendi 1*] para 7.5.20.

18 *Siemens* (n 9) para 270.

19 Bollini & Colaiuta (n 11)

20 *Suez* (n 10) para 155.

21 *Vigotop Ltd v Hungary*, ICSID Case No ARB/11/22, Award (1 Oct 2014) paras 313, 327.

22 *Ibid*, para 328.

23 *Ibid*, para 329.

24 *Ibid*, para 330.

25 *Ampal-American Israel Corporation and others v Arab Republic of Egypt,* ICSID Case No ARB/12/1, Decision on Liability and Heads of Loss (21 Feb 2017) paras 324-333, 344.

26 *Vigotop* (n 21) para 331.

27 *Siemens* (n 9) paras 270, 271.

28 *Waste Management, Inc v United Mexican States*, ICSID Case No ARB(AF)/00/3, Award (30 Apr 2004) paras 174–177.

29 *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 Jan 2004) paras 126–127, 161.

30 *Waste Management* (n 28) para 175.

31 *Suez* (n 10) paras 141, 142.

32 *Ibid*, para 145.

33 *Vivendi 1* (n 17) *paras* 7.5.26, 7.5.31, 7.5.34.

34 *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction (31 Jul 2001) paras 53–57.

35 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 Mar 1965, entered into force 14 Oct 1966) ('ICSID Convention') Art 25(1).

36 Yas Banifatemi and Emmanuel Gaillard, 'Introductory Note to ICSID: *Salini Costruttori SPA and Italstrade SPA v Kingdom of Morocco* (Proceeding on Jurisdiction)' (2003) 42 (3) ILM 606.

37 The general cases reflected each time in the construction cases are marked with square brackets; eg, *[case name]*.

38 *Consortium RFCC v Royaume du Maroc*, ICSID Case No ARB/00/6, Award (22 Dec 2003) para 48.

39 *Ibid*, paras 65, 69.

40 *Ibid*, paras 67–69.

41 *Ibid*, paras 66, 86–87.

42 *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No ARB/03/3, Decision on Jurisdiction (22 Apr 2005) paras 256–259.

43 *Ibid*, paras 260, 278, 281.

44 *ADC Affiliate Ltd and ADC & ADMC Management Ltd v Republic of Hungary*, ICSID Case No ARB/03/16), Award (2 Oct 2006) para 304.

45 *Ibid*, para 423.

46 *Saluka* (n 13).

47 *ADC* (n 44) para 424.

48 *Ibid*, paras 425, 426.

49 *Ibid*, para 137.

50 *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award (27 Aug 2009) paras 444, 461.
51 *Ibid*, para 138.
52 *Ibid*, para 460.
53 *Ibid*, para 458.
54 *Ibid*, paras 443, 459.
55 *Ibid*, paras 458, 460-462.
56 *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No ARB/05/8, Award (11 Sept 2007) paras 443–444.
57 *Ibid*, paras 448–452.
58 *Ibid*, para 455.
59 *Ibid*, paras 445–447.
60 *Ibid*, paras 453–454.
61 *Saipem SpA v The People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 Mar 2007) paras 126–127, 130.
62 *Saipem SpA v The People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Award (30 Jun 2009) para 131.
63 Reinisch & Schreuer (n 16).
64 *Saipem* (n 61) paras 131–132.
65 *Ibid*, para 133.
66 *Ibid*, para 181.
67 NYC: The New York Convention 1958.
68 *Ibid*, paras 159, 163–169, 173.
69 *Malicorp Ltd v The Arab Republic of Egypt*, ICSID Case No ARB/08/18, Award (7 Feb 2011) para 103(c).
70 *Ibid*, para 126.
71 *Ibid*, para 129.
72 *Ibid*, paras 130–137.
73 *Ibid*, paras 138–142
74 *Ibid*, para 143.
75 *Convial Callao SA and CCI – Compañía de Concesiones de Infraestructura SA v Republic of Peru*, ICSID Case No ARB/10/2, Award (21 May 2013) paras 504–508, 511–512.
76 *Ibid*, paras 537–539.
77 *Ibid*, para 534.

FEATURE ARTICLE

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Eastern European workers: exploitation in the construction industry and enforcement by regulatory agencies

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The impact of Brexit will have major implications for workers in the construction industry, because the United Kingdom's exiting of the European Union will end free movement and restrict migration by a point scoring system based on salary and skill level. The workers who benefitted from free movement from Eastern Europe will be restricted by the imposition of the Tier 2 system, which restricts the employment of migrants to either a 'highly skilled' role or 'medium skilled' personnel. This will exclude large numbers of construction workers because they will be unable to score enough points. This article examines the discrimination suffered by workers from Eastern Europe, and in particular from Romania and Bulgaria, in the construction industry.

With the vacancies available in the construction sector, the demand for Eastern European workers will not recede and many of these EU nationals have chosen to remain in the UK under the pre-settled or settled programme. The issue of discrimination against these workers in the construction industry can be addressed by the legal framework and in particular by the Modern Slavery Act 2015 and the Immigration Act 2016 provisions. This article argues that these can be strengthened and that work conditions will be improved if there is greater enforcement of legal mechanisms.

Introduction

The UK has departed from the EU, of which it had been a Member State from 1 January 1973 (when it joined what was the European Economic Community or EEC) to 31 January 2020.[1] The execution of Article 50 Treaty on the European Union and EU (Withdrawal Agreement) Act 2020 has accomplished an objective after which the policy of labour migration will be formulated by legislation.[2] There will be a new points system that will become effective in 2021, which will allow for only skilled-based migration commensurate with the Tier 2 occupations of skilled labour and medium skilled labour, although general labourers will be excluded. There is a transitional period until 30 June 2021, when the EU citizens and their families, already resident in the UK, will be able to apply for 'Settled' or 'Pre-Settled' status, and it is likely that nationals from EU countries such as Romania and Bulgaria who form most of the foreign workers in the construction industry, will remain in the UK.

The UK has also set out plans for a new single skills-based immigration system which will operate from 2021 and which would enable employers to attract the skills needed from around the world, while ensuring net migration is reduced to sustainable levels.[3] The EU (Withdrawal Agreement) Act 2020 will preserve under Section 2(1) the EU-derived domestic legislation, as it has effect in law on and after exit day. The result is that all the Statutory Instruments (secondary law in the UK), such as those which implemented the EU Working Time Directive, will continue to apply in the UK.[4] It will also allow the EU regulations on matters such as cross-border healthcare to have effect in the UK.[5] The intention behind the legislation is that it will ensure a more gradual transition from the previous to new legal framework in the interest of maintaining as much continuity in the legal rules as possible.

The UK and the EU signed the Trade and Cooperation Agreement (TCA) on 24 December 2020. The TCA includes free trade in its framework as one of its three key principles and also ensures labour rights. It states:

> 'Both parties have committed to ensuring a robust level playing field by maintaining high levels of protection in areas such as environmental protection, the fight against climate change and carbon pricing, social and labour rights, tax transparency and State aid, with effective, domestic enforcement, a binding dispute settlement mechanism and the possibility for both parties to take remedial measures'.[6]

Despite the TCA, which has introduced measures that attempt to ease restrictions on the flow of goods between the UK and the EU following Brexit, and the retention of the EU Procurement Directives, it is estimated that the

> 'increased customs checks, double product conformity assessments and restrictions on products, which do not originate from the UK or the EU, are likely to slow the progress of construction projects. Parties operating within the construction industry are also likely to incur additional costs due to delays in relation to goods and materials'. This is because of 'the large quantities of building materials currently imported and exported from the EU'.[7]

The mechanism for Brexit has to be considered in the context of the treatment alleged against the Eastern European workers, who have been discriminated against in the past. Romanian and Bulgarian workers, labelled A2/EU2 migrants since 2007 when Romania and Bulgaria joined the EU, have freely accessed the domestic labour markets from 2013. However, A2/EU2 nationals could only work under certain conditions, which primarily meant either being self-employed or working in specific sectors of the labour market, in agriculture, hospitality and construction. The immigrants from these two countries were consigned to a limited conditional status as 'precarious workers', who are only allowed to work in certain types of roles and are excluded from the workplace rights and benefits available to UK nationals.

This article considers the impact on the EU workers notably from the A2/EU countries who had been the subject of discrimination and exploitation in the construction industry. There is a need to analyse their contribution to the construction industry in terms of the ratio to the population. The determination that the workers from these Eastern European states have been victimised in UK law has to be followed by an assessment of how the regulatory framework can be further developed and this has to be built into the framework of the legal regime that protects against labour exploitation. This requires a detailed evaluation of the provisions of the Modern Slavery Act and the Immigration Act.

Contract work for migrant labourers

The UK construction sector has many strands and provides manpower for an infrastructure that includes mining, forestry, infrastructure, buildings, manufacturing and maintenance. The Home Office briefing paper shows that the construction industry contributes £117bn to the UK economy, six per cent of the total GDP in 2018–2019. In the same period there were 2.4 million jobs in the construction sector, seven per cent of total employment in the UK. The migrant labour force in construction has a similar proportion of non-UK nationals who work in the industry as in the economy as a whole. In London, a significantly higher proportion of migrants work in the construction sector than in the rest of the UK and there is a higher proportion of non-UK nationals in the construction of buildings sub-sector.

Government findings show that around 215,000 building workers employed in the construction industry at the end of 2019 were from non-UK countries. Ten per cent of the total workforce were non-UK nationals, of which 165,000 were from other EU countries and 50,000 were from non-EU countries. In the same period in London, 35 per cent of construction workers were non-UK nationals, of which 27 per cent were other EU nationals and seven per cent were non-EU nationals. In industries other than construction, 23 per cent of workers were non-UK nationals, of which 13 per cent were other EU nationals and ten per cent were non-EU nationals.[8]

The above report comes on the back of another study conducted by the charity Focus on Labour Exploitation (FLEX), which reports that the construction industry is highly vulnerable to economic fluctuations that could lead to demand falling suddenly in recessions, or increasing rapidly during economic upturns as a consequence of government investment. The uncertainty and volatility of the market requires companies to adopt strategies that create the imperative for a highly adaptable workforce, often dependant on migrant workers. FLEX's findings show that in London half of workers do not have a contract, a third report not getting paid, half have worked in dangerous conditions and a third have experienced abuse.[9]

The FLEX survey also showed that the majority of migrant workers occupy lower-paid sections of the construction industry, making up 44 per cent of the low-wage 'building' workforce, suggesting an over-representation of migrant workers in low-paid work and a significant under-representation in higher paid positions. The main element of this low wage workforce is flexibility, as fluctuating demand across different geographical areas, both within London and nationwide, require unskilled labour and, to a lesser extent, skilled labour to be both mobile and available at short notice. The mobile workforce must also be willing and able to work with varying degrees of uncertainty, as the fluctuating demand that drives their employment can quickly make them expendable.

The inability of building companies to provide appropriate safeguards leads to much higher incidents of exploitative practices against migrant and informal workers

The findings confirm that the daily rate for work on building sites depreciates below the minimum wage for those aged 25 and over at £8.21 (April 2019–2020 figures) an hour, and half of workers do not have a written contract. Wages are paid in cash. There is also evidence of random discrimination against the construction workers leading to termination of jobs and lack of support such as transport to and from work. The inability of building companies to provide appropriate safeguards leads to much higher incidents of exploitative practices against migrant and informal workers, with higher risks of workplace accidents, sometimes resulting in death.

In the UK, migrant labour in the construction industry requires a worker's card, which is contingent on reaching a certain standard of English and obtaining a bank account, a National Insurance number and an address. The free movement of workers under the Treaty of Accession of the Republic of Bulgaria and Romania (2005) contributed to these workers working under a framework that provided them legal rights along with the right of residence guaranteeing them 'legal' employment and 'proper' treatment. However, in construction work, labour exploitation is more prevalent as

the data shows the UK's construction sector has always been high risk due to its low profit margins, fragmentation, long supply chains and the consequential need for cheap labour.

In 2006, when the EU Council confirmed the accession of Romania and Bulgaria to membership in the EU, the UK

> 'imposed transitional migration limits aimed at preventing Romanian and Bulgarian nationals from freely accessing domestic labour markets for a period of seven years. EU2 nationals could only work under conditions, which primarily meant either being self-employed or working in specific sectors of the labour market, agriculture and hospitality. As a result, A2 immigrants were consigned to a limited conditional status as precarious workers, allowed to work in certain kinds of roles and excluded from the workplace rights and benefits available to British and other EU citizens'.[10]

The disadvantage that migrant workers from Eastern European countries suffer is that while the citizens of most EU countries are given 'a £55 reduction, Bulgarians, Estonians, Lithuanians, Romanians and Slovenians are not' and the reason proffered was that these countries had not ratified the Council of Europe's Social Charter (CESC) of 1961.[11] However, that does not prohibit the UK from unilaterally applying the waiver of the full charge to all EU countries; rather, the UK has decided not to.[12] EU workers will be prevented from entering the UK without identity cards after the transition period from 1 January 2021 to EU, EEA, and Swiss national identity cards, until 1 October 2021. These identity cards with biometric chips will not be acceptable for travel to the UK by sea, land or air after the deadline, according to an updated GB–EU Border Operating Model. After that, the UK will operate a full, external border as a sovereign nation, and passports will be required for crossing the border into the UK.[13]

The issue is how to draw minimum standards for a regulatory framework to allow vulnerable EU workers in the construction sector to avail themselves of legal remedies.

Regulatory sector improvements

The issue is how to draw minimum standards for a regulatory framework to allow vulnerable EU workers in the construction sector to avail themselves of legal remedies. This requires consideration of the schemes in place that regulate the construction industry and provide the workforce with quantifiable skills which could then lead to the licensing of the industry by providing employers with quality certification.

There is an upward graph for the UK's construction industry, over a ten-year period beginning in 2013. The Home Builders Association estimates that the housing supply in the UK has increased by 74 per cent during 2013–2017 and is expected to expand further over the next few years.[14]

This is also supported by the Construction Skills Network, which has predicted a further 168,500 new jobs will be created in the industry during 2019–2023.[15] However, there are a number of indictors that labour shortages will be caused by Brexit and the improved economy and higher demand for construction in Romania and Bulgaria, which were enjoying a construction boom just before the Covid-19 crisis slowed down this sector of the economy, consequently reducing the number of A2/EU construction workers seeking employment in the UK.

In order to maintain the supply for construction projects in the UK, the leading employers in the industry have had to improve the industry's vocational education and training facilities. Organisations such as the Construction Industry Training Board have developed strategies through Covid-19 and post-Brexit challenges and created training programmes to attract the necessary workforce. The Skills Stability Plan is their latest initiative to attract labour into the construction industry through apprenticeships.[16]

However, it is argued that:

> '[…] the training programmes are long-term solutions to labour shortages and thus require futuristic commitments of the government, employers and employees. This is difficult to achieve for the construction industry as their work is project-based, geographically mobile and jobs in this sector are casual. These result in short-term relationships between employers and employees, and reduce employers' incentives for and workers' commitment to training. It is accepted that the UK construction industry has

> adopted a "low-skills-low-wages" route, which has made the profit margin in this industry low and dependent on cheap labour; which is similar to the UK agricultural sector. The dependency on cheap labour discourages employer's investment in worker's skills or employer's willingness to pay higher wages for skilled workers.'[17]

The UK construction industry is dominated by small subcontracting firms, which have limited capacity to organise and provide firm-level training 'with 86 % employing fewer than 10 staff at site'.[18] The possibility of these firms to establish training programmes is arduous in the absence of a corporate structure and a dual training system, where there is a theoretical and a 'hands-on' training component. This is manifest in the UK in the low unionisation levels in this sector, especially after the amalgamation of the Union of Construction, Allied Trades and Technicians merged into the trade union Unite on 1 January 2017. Union membership in the construction sector fell from 56 per cent in 1995 to ten per cent in 2018.[19]

The consequence of this structural change is that as the longer-term solution of training the local workforce appears unattainable, and employers in the UK construction sector are more likely to continue hiring immigrant workers at least in the short-term. There are also at present no seasonal visa arrangements for the construction industry on par with the agricultural sector, despite the construction industry's advocacy of such short-term solutions. The UK government has made clear that there will be no 'carve-outs' under the points-based system granting extended stay for lower skilled workers. [20]

The Building Research Establishment (BRE) which is a 150-strong stakeholder group including clients, manufacturers, non-governmental organisations and contractors with complex international supply chains, works to drive positive change within industry. Their verification approach allows organisations to develop their ethical labour sourcing practices in a manner that is pertinent to them by enabling them to demonstrate continual improvement against a set of benchmarks. The BRE has developed BRE Global Certification, an Ethical Labour Sourcing Standard BES 6002 issued in February 2017 to uphold verifiable standards in sourcing labour and materials within a supply chain. The organisations that undergo the certification are verified annually by BRE assessors and the assessment covers 12 areas: organisational and management structure; HR; procurement; bribery and corruption; forums; management policies; immigration; supply chain management; learning and development; reporting; assurance and compliance with the Modern Slavery Act and improving their ethical labour sourcing practices. [21]

There has been some notable successes in verifying standards and granting companies with verification of standardisation. The landscaping products supplier Marshalls has become the first company verified as meeting a new ethical sourcing standard. Sir Robert McAlpine was the first labour contractor in the building trade to receive the award, and the construction labour supplier VGC also achieved verification in early 2018.[22]

There is an awareness in the industry that a compulsory licensing scheme is needed. The Federation of Master Builders (FMB) has reached a consensus for there to be a mandatory licensing scheme for all UK construction companies to transform the sector into a 'high quality and professional industry'. Currently, builders and contractors – unlike gas and electrical engineers – can set up their firms without a licence. This makes compliance with a uniform industry standard difficult to enforce across all the trades in the building industry. The licensing scheme is supported by the National Federation of Roofing Contractors (NFRC), Safe Contractor and CHAS, which all want compulsory licensing within the industry. There are

> 'more than three-quarters (77%) of small and medium-sized (SME) construction firms which support the introduction of licensing to professionalise the industry, protect consumers and side-line unprofessional and incompetent building firms'.[23]

Enshrining legal rights for expatriate workers

There is a legislative framework in the UK which provides statutory protection to migrant workers. This regime offers employees with the basic rights of not being exploited or being abused in the market. These are in the form of the Modern Slavery Act and the Immigration Act. These statutes have protection mechanisms that proactively assess and if necessary penalise businesses that are found to be exploiting their workforce.

The enactment of the Modern Slavery Act 2015 is intended to prohibit trafficking and conditions of employment that amount to modern slavery.[24] Section 1 states that:

> '(1) A person commits an offence if –
>
> (a) the person holds another person in slavery or servitude and the circumstances are such that the person knows or ought to know that the other person is held in slavery or servitude, or
>
> (b) the person requires another person to perform forced or compulsory labour and the circumstances are such that the person knows or ought to know that the other person is being required to perform forced or compulsory labour.
>
> (2) In subsection (1) the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the Human Rights Convention.'

'workers in the construction sector are at risk of abuse and exploitation of traffickers and slave masters that target the vulnerable'.

Section 3 of the Act sets out the meaning of exploitation as follows:

> '(1) For the purposes of section 2 a person is exploited only if one or more of the following subsections apply in relation to the person.
>
> Slavery, servitude and forced or compulsory labour
>
> (2) The person is the victim of behaviour –
>
> (a) which involves the commission of an offence under section 1, or
>
> (b) which would involve the commission of an offence under that section if it took place in England and Wales.'

Gangmasters from Romania who have trafficked and exploited construction workers and been found to have imposed oppressive conditions in order to reap financial rewards have been prosecuted under the Modern Slavery Act. In *R v David Lugar*,[25] the defendant was convicted at the Inner London Crown Court on seven counts of holding another person in slavery or servitude or requiring them to perform fraud and compulsory labour. The accused had worked with other gang members to force trafficking victims to forfeit their identity cards, stay in overcrowded accommodation and to compel them to work on sites across London and in the surrounding counties using forged documents. The Court ordered the defendants to be served with a Slavery and Trafficking Order and to pay compensation under the Proceeds of Crime Act 2002.

The Anti-Slave Commissioner, Kevin Hyland has warned in the Chartered Institute of Builders (CIOB) report that 'modern day slavery is hidden on construction sites across the UK today' and that 'workers in the construction sector are at risk of abuse and exploitation of traffickers and slave masters that target the vulnerable'. The CIOB has collaborated with Stronger Together, an industry alliance, to provide a tool kit to help construction businesses formulate their response in dealing with modern slavery. The tool kit provides construction companies and clients with practical resources and training based on the United Nations Guiding Principles on Business and Human Rights framework and in compliance with the Modern Slavery Act requirements. The CIOB published the report *Contactors and the Modern Slavery Act*, which

> 'highlighted aggressive business models that create an environment for un-ethical procurement and recruitment practices and systematic auditing failures that allow criminals to infiltrate major projects undetected'.[26]

The Immigration Act 2015 Part 1 has created the position of Director of Labour Market Enforcement. This person will provide strategic direction for those organisations 'policing' and regulating the UK labour market: Gangmasters and Labour Abuse Authority (GLAA); National Minimum Wage Unit; and the Employment Agency Standards Inspectorate. The GLAA has a broad remit to tackle exploitative practices across the industry spectrum. The GLAA has been involved in the litigation as *amicus curiae* when there has been abuse in recruitment of workers and when there is trafficking and exploitation of migrant labour.

The government has vested the GLAA and the Labour Market Enforcement Unit with powers to take remedial action against the exploitation of workers by identifying and punishing the offenders. The agency under the Director of Labour Market Enforcement also coordinates its work with the Modern Slavery Commissioner in order to identify and penalise those employers who are found to be in breach of the law.

In *Antantos Galdikas and Others v DJ Houghton Catching Services Ltd (QB)*,[27] six Lithuanian nationals, who were agricultural workers, filed a lawsuit in the UK against DJ Hougton Chicken Catching Services, accusing the company of human trafficking. The claimants alleged that they were trafficked to the UK with the involvement of a Lithuanian national who was paid for this service by the defendants. On arrival in the UK, the claimants say they were severely exploited by the company, based in Kent, which ran a business providing labour to poultry farms across the UK, including farms that supply chickens and free-range eggs for major brands, available in supermarkets across Britain.

The defendants paid the men for the number of chickens caught on farms, rather than paying for time worked at minimum rates including night rates and for time spent travelling. The claimants also alleged that they were not paid according to minimum wage requirements for agricultural workers, charged exorbitant fees, their wages were unlawfully withheld, and they were denied adequate facilities to wash, rest, eat and drink. The High Court found the company liable for labour exploitation and the defendants agreed to a settlement of £1m in compensation and legal costs for the Lithuanian victims. DJ Houghton was condemned as 'the worst UK gangmaster ever' by the GLAA. Their licence was revoked by the GLAA and 38 workers were referred to the UK Human Trafficking Centre, which confirmed that all the men were victims of trafficking.

The GLAA has developed an industry protocol and published a document called 'Construction Industry Headline Trends', which explains how expatriate construction workers become embedded in the domestic environment:

> '(i) Arrival "Workers commonly arrive by minibus, coach or van, with regular services from Romania particularly. Some potential exploiters will travel overseas to collect workers." (ii) Accommodation "Regularly organised in residential properties, often with the potential exploiter and/or other employees. This may be in outbuildings. Some potential victims live onsite without access to basic facilities."'[28]

The protocol implements a framework to work with employers, agencies, trade and professional bodies to raise employment standards in the construction sector. The employer has to progress beyond box-ticking and conduct worker interviews on-site with the aim of identifying any deprivation of employee rights and failure to pay wages, paying below the minimum wage, withholding holiday pay and unlawful deductions for clothing or safety equipment. This protocol also requires personal protection equipment (PPE) for workers to prevent on-site injuries, and a complaints procedure that can be escalated to the management level.

There is also an incentive to consider reporting intelligence, such as on recruitment by labour users or labour providers. An example provided is of a construction company hiring workers from Eastern Europe and paying them below minimum wages in cash. The information provided in the form of any additional details will assist the GLAA in identifying the personnel and locations involved to improve their investigation of the employers who breach the protocol.[29]

The employer has to progress beyond box-ticking and conduct worker interviews on-site with the aim of identifying any deprivation of employee rights

The GLAA has published the referrals that it has received for exploitation and modern slavery in a 12-month period ending in June 2020. The findings show that that for 'car washing sector' there were 349 referrals; for agriculture 250 referrals; for food packaging and post 246 referrals; for construction 175 referrals; for hotels and restaurants 150 referrals; for food service 113 referrals; and for cleaning 72 referrals.[30] There is quite a high proportion for the building and construction sector, which reflects other studies that have revealed that exploitation is common place in this environment.

The GLAA has also given a robust definition of slavery in its guidelines and identified what may be visible indicators of slavery in a given set of circumstances:

> 'workers being controlled by someone else, workers may be distrustful and reluctant to interact with people, a lack of belongings can indicate exploitation, evidence of injury, abuse or malnourishment; and victims of forced labour will often work excessively long hours'.

In construction, improvement can be made through achieving 'transparency throughout the supply chain'.[31]

Conclusion

The impact of Brexit will not affect the demand for construction workers because, like agricultural workers, they are needed for labour-intensive work. The freedom of movement for foreign labour has been terminated, but the provision for EU residents to apply for Settled or Pre-Settled status until mid-2021 has generated a huge demand for applicants. This implies that there will be workers on building sites from the A2/EU2 countries. Migrants from Romania and Bulgaria have claimed discrimination in the past from the employers in the UK. This discrimination is structural, as workers from these two countries, as well as three other Eastern European countries, have not been given the benefit of the European Social Charter by the UK.

The manner in which the discrimination from the contractors that employ labour from the A2/EU countries can be terminated is by a regulatory sector establishing standards that are uniform, verifiable and quality controlled. This can only apply if there is a benchmark for the whole sector in the building trade and which will include gas and electrical engineers, plumbers, masons and locksmiths and so on. There is still no compulsory licensing and it is still voluntary because the UK government considers this to be unmanageable and bureaucratic in application.

There is a legal mechanism available in the form of the Modern Slavery Act and the Immigration Act, the purpose of which is to end discriminatory practices in employment and contract work. These provide a statutory plank for the rights of migrant or settled workers to be protected. The drive towards enforcement has begun by the gathering of statistics, issuing of guidelines and checks on the employers. It is by recourse to litigation in case of breach of the laws that the protection can be achieved which will prevent the exploitation of labour.

Notes

1 The European Union (Withdrawal) Act 2018 which repealed the European Communities Act (ECA) 1972 secured direct effect of the Withdrawal Agreement after transition under Sections 7C and 7A.
2 The Immigration and Social Security Coordination (EU Withdrawal) Act 2020 Part 1 states Repeal of the main retained EU law relating to free movement etc. Schedule 1 makes provision to: (a) end rights to free movement of persons under retained EU law, including by repealing the main provisions of retained EU law relating to free movement; and (b) end other EU-derived rights, and repeal other retained EU law, relating to immigration.
3 The government has introduced a White Paper the UK Skills based Immigration System and ending free movement, 19 December 2019, see www.gov.uk/government/publications/the-uks-future-skills-based-immigration-system, accessed 19 April 2021.
4 Section 2 of EU(W)A 2018.
5 Section 3 of EU(W)A 2018.
6 The EU–UK Free Trade and Cooperation Agreement: Protecting European interests, ensuring fair competition, and continued cooperation in areas of mutual interests, 24 December 2020 see https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2531, accessed 19 April 2021.
7 'The Impact of Brexit on the Construction Industry – an overview Clyde & Co', 14 January 2021, see www.clydeco.com/en/insights/2021/01/the-impact-of-brexit-on-the-construction-industry, accessed 19 April 2021.
8 Home Office briefing paper Construction Industry: Statistics and Policy, 16 December 2019, see https://commonslibrary.parliament.uk/research-briefings/sn01432, accessed 19 April 2021.
9 'Shaky Foundations: Labour Exploitation in London's Construction Sector' Focus on Labour Exploitation, April 2018, see https://www.labourexploitation.org/publications/shaky-foundations-labour-exploitation-londons-construction-sector, accessed 19 April 2021.
10 Raluca Bejan, Guest Blog: 'Latest Withdrawal Agreement Fails Romanian and Bulgarian', Centre of Migration, Policy and Society, 2019, see www.compas.ox.ac.uk/2019/latest-withdrawal-agreement-fails-romanian-and-bulgarian-workers, accessed 19 April 2021.
11 *Ibid.*
12 The CESC provides EU member states facility to make it easier for citizens to move to other countries for work. Article 12 provides a right to social security as follows: (a) equal treatment with their own nationals of the nationals of other Contracting Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Contracting Parties; (b) the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Contracting Parties. European Social Charter 1961. Council of Europe. Details of Treaty No.035, see https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168006b642, accessed 19 April 2021.

13 'Government publishes updated GB-EU Business Operating Model', Cabinet Office, 8 October 2020, see www.gov.uk/government/news/government-publishes-updated-gb-eu-border-operating-model, accessed 19 April 2021.
14 House Building Workforce Census, Home Builders Federation Ltd, 2017, see www.hbf.co.uk/documents/7305/HBF_Workforce_Census_web.pdf, accessed 19 April 2021.
15 Ryan Tute, 'Forecast predicts 168,000 construction jobs to be created over next five years', *Infrastructure Intelligence*, 25 February 2019, see www.infrastructure-intelligence.com/article/feb-2019/forecast-predicts-168000-construction-jobs-be-created-over-next-five-years, accessed 19 April 2021.
16 CITB Skills Stability Plan 2020-21, CITB, June 2020 see www.citb.co.uk/documents/about-us/missions_plans/skills_stability_plan.pdf, accessed 19 April 2021.
17 Merve Sancak, 'Restrictions to immigration and work in the UK construction industry', Sheffield Political Economy Research Institute, 19 February 2020, see http://speri.dept.shef.ac.uk/2020/02/19/restrictions-to-immigration-and-work-in-the-uk-construction-industry, accessed 19 April 2021.
18 'Skills and Training in the Construction Industry', CITB, Final Report – August 2016, see www.citb.co.uk/documents/research/citb%20skills%20and%20training%20in%20the%20construction%20industry_2016%20final%20report.pdf, accessed 19 April 2021.
19 'Trade union statistics 2018', National Statistics, 30 May 2019, see www.gov.uk/government/statistics/trade-union-statistics-2018, accessed 19 April 2021.
20 Steven Swinford, 'Priti Patel: Low skill immigrants migrants won't be spared new visa curbs', *The Times*, 23 January 2020, see www.thetimes.co.uk/article/priti-patel-low-skill-migrants-wont-be-spared-new-visa-curbs-pwrz36z25, accessed 19 April 2021.
21 'BRE Global presents its first ethical labour sourcing verification certificate', BRE Group, 22 March 2017, see www.bregroup.com/press-releases/bre-global-presents-its-first-els-verification-certificate, accessed 19 April 2021.
22 'Sir Robert McAlpine announced as first contractor verified under BRE's Ethical Labour Sourcing standard', BRE Group, 24 October 2017, see www.bregroup.com/press-releases/sir-robert-mcalpine-announced-as-first-contractor-verified-under-bres-ethical-labour-sourcing-standard, accessed 19 April 2021.
23 'Construction Industry launches industry taskforce' Federation of Master Builders press release, 12 June 2019, see www.fmb.org.uk/resource/construction-industry-launches-licensing-task-force.html, accessed 19 April 2021.
24 Modern Slavery Act 2015, see www.legislation.gov.uk/ukpga/2015/30/section/1/enacted#section-1-1, accessed 19 April 2021.
25 T 20177417 (23 March 2018).
26 'Tackling Modern Slavery and Construction', CIOB, May 2018, see www.ciob.org/sites/default/files/Construction%20and%20the%20Modern%20Slavery%20Act_0.pdf, accessed 19 April 2021.
27 (2016) EWHC 1376 (QB)
28 GLAA, www.gla.gov.uk/media/5073/industry-profile-construction.pdf, accessed 19 April 2021.
29 GLAA, Construction Protocol, see www.gla.gov.uk/i-am-a/i-use-workers/construction-protocol, accessed 19 April 2021.
30 Spotting and Stopping Modern Slavery in Construction, CHAS, 2020, see www.chas.co.uk/help-advice/risk-management-compliance/csr-in-construction/spot-stop-modern-slavery-construction, accessed 19 April 2021.
31 *Ibid.*

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Recovery of additional time and money arising from Covid-19 by way of variation clauses: a contractor's perspective

International construction projects were hit hard by the Covid-19 pandemic in 2020, which caused, and continues to cause, disruption to global supply chains, restriction of movement of personnel and goods, and an increase in cash-flow constraints. Consequently, contractors have been forced to change their work procedures, often leading to significant extra costs.

Substantial discussions through webinars and publications have taken place regarding the applicability of *force majeure*, hardship, and change in law clauses. Under many standard form contracts, including the FIDIC conditions, a contractor may be entitled to an extension of time if Covid-19 is deemed a *force majeure* event.[1] However, this would not

allow the contractor to recover additional costs incurred as a result of the pandemic. Nor would the jurisprudence of hardship (at least under English law) entitle a contractor to seek payment of additional costs from the employer. Alternatively, a contractor could frame its additional cost claim as a change in law claim, which however is problematic, absent any mandatory governmental acts or measures.[2]

This prompted the authors to raise the following question: Would a contractor be entitled to recover additional costs resulting from the Covid-19 pandemic by invoking a variation clause in a construction contract? If yes, this would generally provide the contractor with a broader scope of recovery, because the valuation of a variation is commonly agreed to be on the basis of unit rates and prices stated in the contract which is usually more convenient to quantify than the actual costs incurred.

To answer this question, this article will address the following three sub-topics: (1) the typical elements of a variation claim and the possibility of pursuing a variation claim with regard to the Covid-19 pandemic; (2) the benefits of relying on a variation claim as compared to a *force majeure* or a change in legislation claim under the FIDIC conditions; and (3) common formality requirements that a contractor should be aware of in preparing a variation claim. The discussion will principally focus on the relevant provisions of the FIDIC Yellow Book 1999 and the FIDIC Red Book 1999 and the Joint Contracts Tribunal (JCT) conditions.

Covid-19-related monetary claims: can it be packaged as a variation claim?

What constitutes a variation? Variation is defined in sub-clause 1.1.6.9 of the FIDIC Red Book: 'Variation means any change to the Works, which is instructed or approved as a variation under Clause 13 [Variations and Adjustments].' A slightly different definition of variation is provided in sub-clause 1.1.6.9 of FIDIC Yellow Book as: 'Variation means any change to the Employer's Requirements or the Works, which is instructed or approved as a variation under Clause 13 [Variations and Adjustments].'

The above definitions of a variation are consistent with that under common law (eg, English law) where the following elements are generally required to be considered a variation under a construction contract: (1) extra work falling outside the scope of the contract; (2) a specific or implied promise to pay for the work;[3] (3) formal requirements. Requirement (1) will be reviewed in more detail in this section, and requirements (2) and (3) will be addressed later in the article.

Only extra work that exceeds the contractor's obligations under the contract can constitute a variation.

Works that are outside the scope of the contract

An employer's instruction for works already included in the original work scope does not constitute a variation order. Only extra work that exceeds the contractor's obligations under the contract can constitute a variation.

What is part of the contractor's original work scope is not always clear cut. Clause 4.11 of the FIDIC Red Book and Yellow Book, respectively, state on the contractor's obligations that:

> '[…] the Accepted Contract Amount covers all the Contractor's obligations under the Contract […] and all things necessary for the proper design, execution and completion of the Works and remedying of any defects.'

Similarly, under English law, where the contractor completes a set job for a lump sum, the courts infer a promise on its part to provide everything 'indispensably necessary' to complete the project.[4]

It follows that where required work is not specified and that work is indispensably necessary to complete the project, an instruction to carry out these works would not constitute a variation order. In *Williams v Fitzmaurice*,[5] the contract required the contractor to build a house 'to be completed and dry and fit for occupation'. The specification required the contractor to provide all the required materials, but the floorboards had been omitted from the specifications. When the contractor was instructed to install the floorboards, the contractor refused to do so, unless he would receive extra payment. To this, Pollock CB said:

> 'It is clearly to be inferred from the language of the specification that the plaintiff was to do the flooring, for he was to provide the whole of the material necessary for the

completion of the work; and unless it can be supposed that a house is habitable without any flooring, it must be inferred that the flooring was to be supplied by him. In my opinion, the flooring of a house cannot be considered an extra any more than doors or windows.'

If a contractor is provided with inaccurate quantities or drawings, would that automatically allow the contractor to pursue a variation claim? Keating states the English law position on this point to be that:

'a contractor who has been put to unexpected expense because of inaccurate quantities or drawings or impracticable plans cannot usually recover the expense by bringing an action for breach of an implied warranty that the plans, drawings or bills of quantities are accurate or practicable. Such warranties are not implied merely from the fact that these documents are submitted to the contractor for tender.'[6]

Comparably, in the US, there is an implied warranty obligation acknowledged under the *Spearin* doctrine relating to the plans and specifications provided by the employer.[7] The employer's responsibility to provide accurate plans and specifications is not overcome by general clauses in the contract requiring the contractor to visit the site, check the plans and inform themselves of the requirements of the work.[8]

standard forms of contract frequently stipulate that the restriction of the contractor's execution or completion of the work in any specific order will be dealt with under the variation clause.

Can the employer demand from the contractor to carry out extra work that is outside the scope of the contract in a limitless fashion? Construction contracts do not generally set a limit on the permissible extent of variations.[9] However, Professor Uff suggests that 'there must be some limit to what may be varied to a contract.'[10] In other words, an employer may not utilise the variation mechanism under the contract if they have decided to change the nature of the work that was originally set out and agreed upon. In *Blue Circle* v *Holland Dredging*,[11] it was held that the construction of an artificial island could not be the subject of a variation order in a contract for dredging.

The term 'cardinal change', more often used in the US, refers to one or more changes ordered by the employer that are beyond the scope of the contract and constitute a 'drastic modification' in the performance required by the contract.[12] The issue whether one or more changes are sufficient to constitute a cardinal change must be analysed on its own facts and in light of its own circumstances, with considerations to the magnitude and quality of the changes ordered.[13]

Is the change to work procedures or methods due to Covid-19 a variation?

It is worth noting that the FIDIC Red Book sub-clause 13.1 provides a non-exhaustive list of variations, which includes 'changes to the sequence or timing of the execution of the Works'. Similarly, other standard forms of contract frequently stipulate that the restriction of the contractor's execution or completion of the work in any specific order will be dealt with under the variation clause.[14] For example, the JCT DB 2016 clause 5.1.2 states that a variation means:

'[…] the imposition by the Employer of any obligations or restrictions in regard to the following matters or any addition to or omission of any such obligations or restrictions that are so imposed or are imposed by the Contract Bills or the Employer's Requirements in regard to:

1. access to the site or use of any specific parts of the site;
2. limitations of working space;
3. limitations of working hours; or
4. *the execution or completion of the work in any specific order.*'

(emphasis added)

On this issue, two UK court cases provide further guidance on whether a change to work procedures or methods arising from Covid-19 may constitute a variation.[15]

First, in *English Industrial Estates Corporation v Kier Construction Ltd*,[16] an engineering contract entitled the contractor to either: (1) crush and use hard materials arising from the excavation and demolition works for filling purposes; or (2) import suitable material. However, the engineer instructed the contractor to crush all hard materials arising from the excavation and demolition works and only use that as the fill materials. Consequently, the instruction was held to be a variation as it involved a change to the method by which the works were undertaken in the sense that it restricted the contractor's legitimate choice.

Second, in *Strachan & Henshaw Ltd v Stein Industrie (UK) Ltd and GEC Alstom Ltd,*[17] the project was for the construction of a power station, and the subcontractors, Stein Industrie and GEC Alstom, were required to install the generators. They employed Strachan & Henshaw Ltd as sub-subcontractors, who provided approximately 150 workers, the clocking-in and out facilities and the welfare facilities. These facilities were initially adjacent to the generators that were to be installed. However, Stein Industrie and GEC Alstom instructed Strachan & Henshaw to relocate them half a mile away, resulting in increased walking time and reduced productivity.

In this case, clause 27.1 of the relevant conditions of contract stated: 'In these Conditions the term "variation" means any alteration of the Works whether by way of addition, modification or omission'. The term 'Works' was defined in clause 1.1 as 'all plant to be provided and work to be done by the Contractor under the Contract'. 'Plant' is defined in condition 1.1(g) as: '[...] machinery, computer hardware and software, apparatus, materials, articles and things of all kinds to be provided under the Contract other than Contractor's Equipment.'

The Court of Appeal held that the instruction to move the facilities was not a variation by adopting a narrow interpretation of the variation clause. It held that:

> 'In my view the "work to be done by the Contractor under the Contract" means simply what it says and should not be distorted so as to encompass the arrangements made by the contractor to bring its workforce to the workplace (see *Photo Production Limited v Securicor Transport Limited* (1980) AC 827 per Lord Diplock at pages 850 and 851).'

In short, under UK law, it will ultimately depend on the language of the contract and its construction whether or not a change to work procedures or methods (due to Covid-19 or otherwise) may constitute a variation.

Many design-and-build contracts require the contractor to submit to the employer or the engineer either all or specified parts of their design for review and approval. [18] In some contracts, approval by the engineer on behalf of the employer must be obtained before the relevant part of the work commences.[19] One advantage of this approach is that risks regarding inadequate design by the contractor that may result in defects and safety issues can be avoided or mitigated. However, it may also limit the contractor's options in achieving an optimal and economical design. If the contractor proposed an optimised design at a later stage, this could constitute a variation.[20] It is not always easy to draw a clear line between design development that was contemplated when each party entered into the contract, and any additional requirements by the employer after the contract was executed.[21]

On this issue, the recently published *FIDIC Guidance Memorandum on COVID-19* sets out a relevant question:[22]

> 'The local authorities or government have promulgated changes to the Laws restricting construction activities and works on the Site. We are still able to proceed with the Works, however the Contractor is suffering delay and/or incurring additional Cost as a result of those changes. How to handle this situation?'

One of the possible solutions is stated as follows: [23]

> 'Such changes in Laws may impose specific COVID-19 health and safety measures on construction activities (ongoing or on resumption) such as social distancing, supply of face masks and sanitisers, alternative arrangements for transportation, facilities, working hours for staff and labour, etc. *Those changes may well be treated as a Variation* owing to the "adjustment to the execution of the Works" that they may cause, or to the "changed or new applicable standards" that they may constitute. In the alternative, they may be treated as a claim event.'
>
> (emphasis added)

It is not always easy to draw a clear line between design development that was contemplated when each party entered into the contract, and any additional requirements by the employer after the contract was executed.

For reference, the New Zealand government has recently provided guidance for the construction sector on variations in contracts to encourage employers and contractors to agree on a fair value for any variations due to the Covid-19 lockdown in relation to *NZS 3910:2013* contracts.[24] In most cases, these guidelines provide that, contractors would be entitled to recover costs as a variation to the contract. The guidance includes a set of

principles for parties to follow when negotiating the cost of the variation and outlines the factors that need to be taken into account.[25] It lists the types of costs that contractors can claim and also states it must be demonstrated that they have incurred these costs and tried to mitigate them where possible.

In light of the above, it is submitted that changes to both permanent and temporary works due to the Covid-19 pandemic may entitle a contractor to pursue a variation claim against the employer, which would then entitle the contractor to recover not only time but also cost.

The benefit of framing a contractor's Covid-19-related claims as a variation instead of a *force majeure* or a change in law claim

Force majeure: time only

Provided it could be deemed that Covid-19 constitutes a *force majeure* event under the FIDIC conditions, contractors may be entitled to an extension of time,[26] subject to the fulfilment of any relevant notice requirements.

However, the FIDIC conditions, similar to other widely used standard form contracts, do not provide for monetary compensation as a remedy for a Covid-19 type of *force majeure* event. The FIDIC Yellow Book 1999 sub-clause 19.4 (b) states:

> 'if the event or circumstance is of the kind described in sub-paragraphs (i) to (iv) of Sub-Clause 19.1 [definition of *force majeure*] and, in the case of sub-paragraphs (ii) to (iv), occurs in the Country, payment of any such Cost.'

Sub-paragraphs (ii) to (iv) of sub-clause 19.1 do not refer to anything like Covid-19 as a *force majeure* event. Therefore, it is unlikely that the contractor will secure monetary compensation based on Covid-19 relying on *force majeure*, even if Covid-19 would constitute a *force majeure* event.

Changes in law: time and money as 'cost'

The contractor may be entitled to an extension of time and payment of costs under the FIDIC standard forms if Covid-19 constituted a change in legislation under sub-clause 13.7 'Adjustments for Changes in Legislation', subject to notice requirements under sub-clause 20.1 being met.

In such case, however (and putting aside for a moment the additional hurdle that a 'change in law' as defined in the contract must exist), monetary compensation is based on *Cost* which is defined in sub-clause 1.1.4.3 as follows: '"Cost" means all expenditure reasonably incurred (or to be incurred) by the Contractor, whether on or off the Site, including overhead and similar charges, but does not include profit'.

In contrast, under the FIDIC and JCT conditions, the valuation of a variation is generally based on the rates and prices contained in the contract rather than by reference to reasonably incurred cost.[27] Calculation based on agreed rates and prices is generally thought to be simpler to prove quantum. For example, proving the value of additional staff or labour costs resulting from a variation may not require actual wage or salary-related information. This may (or may not) include and consider elements such as base salaries, bonuses, overtime fees, pensions, benefits, insurances, allowances, expenses and so on – but none of that requires actual proof. Alternatively, these elements may be set out as a combined rate termed as 'day work rate'[28] or 'defined Cost.'[29] Therefore these contract rates, stipulated in the contract, can be used for the valuation of variations, but not for any other claims. There is consequently a significant practical advantage in framing a claim as a variation claim as opposed to a change in law claim.

Availability of statutory remedies – the right to adjudicate under the Security of Payment Act (SOPA) in Singapore

A variation claim, unlike a *force majeure* or change in law claim, may grant the contractor additional statutory remedies – for instance, the right to adjudicate under the SOPA in Singapore.

Section 5 of the SOPA in Singapore, amended in 2018, provides that: 'Any person who has carried out any construction work, or supplied any goods or services, under a contract is entitled to a progress payment.' It is submitted that payments on account[30] for any construction or supply work carried out (including such work pursuant to a variation) is within the scope of the SOPA and, therefore, the contractor can benefit from Singapore's speedy adjudication process.[31] The adjudicator has to determine an adjudication application

within 14 days of the commencement of the process or within such longer period as may have been requested by the adjudicator and agreed to by the claimant and the respondent.[32]

There are, however, some hurdles to pursue damages claims for loss and expense under the SOPA.[33] The new section 17(2A) of the SOPA clarifies that adjudicators are to consider claims for damages, losses and expenses only when the quantum of such claims can be supported by documents:[34]

> 'In determining an adjudication application, an adjudicator must disregard any part of a payment claim or a payment response related to damage, loss or expense that is not supported by –
>
> a) any document showing agreement between the claimant and the respondent on the quantum of that part of the payment claim or the payment response; or
>
> b) any certificate or other document that is required to be issued under the contract.'

Singapore's Parliament clarified the intent behind the limitations imposed, citing a previous adjudication which lasted for 129 days because a large portion of the amount claimed was prolongation costs.[35] The Minister of State for National Development, Zaqy Mohamad, explained that the new provision was intended to avoid an adjudicator delaying the process and ensuring that it served its intended purpose, which is to resolve payment disputes quickly and cost effectively.[36]

The procedural formalities of a variation claim

The potential benefits of the use of variations borne in mind, the contractor should also be aware of the procedural requirements for the use of a variation clause.

The importance of the engineer's instruction

The employer or the engineer have no implied power to vary the terms of the contract or the agreed contract works.[37] Instead, construction contracts generally give the engineer a specified power to instruct a variation.[38] Consequently, the starting point for a contractor to implement a variation is generally an instruction from the engineer.[39]

Not all instructions from the engineer constitute a variation; sub-clause 3.3 of the FIDIC Yellow Book 1999 stipulates: 'If an instruction constitutes a Variation, Clause 13 [*Variations and Adjustments*] shall apply.' Put differently, a variation instruction or approval from the employer or engineer has to result in a change of the work method for permanent or temporary works, as specified in the contract in the section 'contractor's risks', if implemented by the contractor.

It must be noted that a change of work method due to an error in the drawings and specifications from the outset is unlikely to be deemed a variation. In the leading case *Thorn v London Corporation*,[40] the employer's engineer had specified caissons on which the foundations were to be built, which later turned out to be unbuildable. Consequently, the bridge had to be built in an entirely different way. The contractor obtained the engineer's instruction to change the work method in place of using caissons as per the contract and the specification drawn up by the engineer. It was however held by the court that: (1) there is no implied warranty by the employer that a project could be built in accordance with the drawings and specifications produced on the employer's behalf; and (2) the contractor 'ought to have informed himself of all particulars connected with the work and especially as to the practicability of executing every part of the work contained in the specification'.

Under the FIDIC conditions, a variation cannot generally be obtained in the absence of written instructions – such written instruction would be a condition precedent to a variation. Sub-clause 3.3 of the FIDIC Yellow Book 1999 states: 'The Contractor shall comply with the instructions given by the Engineer or delegated assistant, on any matter related to the Contract. These instructions shall be given in writing.'

Undertaking a variation without an instruction may result in the finished project being non-compliant with the contract, thereby constituting a breach of contract by the contractor. The contractor is therefore taking a significant risk if it proceeds with changes to the work without a prior written instruction.

Project impasse

In construction projects, it is quite common that a contractor and an employer would disagree on whether certain works fall within the originally agreed contract scope or constitute a variation.[41] This is often a difficult question to answer given the complexity of

the construction process and the extensive technical documentation available to describe these works.[42] The contractor may need to carry out work that is not specifically referred to in the technical documents but still falls under 'indispensably necessary' works to complete the project and that would not result in a variation under the contract.[43]

These disagreements are common in construction disputes and may lead to a further delay of a project. In some cases, this may even result in the termination of the contract should the employer and the contractor continue to argue whether certain instructed works are a variation of the contractor's original work scope.

It was held in *Brodie v Corporation of Cardiff* that the decision to refuse an instruction by the engineer could be reopened and amended by an arbitral tribunal.[44] In this case, the engineer had asked the contractor to use 'Cyfartha clay'. The contractor argued that this was a variation since the contract allowed for the use of a cheaper material 'Neath clay'. There was a disagreement and the engineer refused to issue a formal variation instruction, although a written instruction was a condition precedent to trigger payment for varied works.

In the case of a variation claim based on Covid-19, it may not be clear when the works have been varied or when the implementation of a variation resulted in additional time and cost.

Nevertheless, the contractor carried out works using 'Cyfartha clay' without a formal variation instruction and later commenced an arbitration seeking additional payment. The legal issue put to the arbitrator was whether the contractor was entitled to be paid for the alleged variation works without a written instruction, a condition precedent, being issued.

The House of Lords held that a formal instruction was indeed a condition precedent to the right for payment of variation works. However, it also stated that the arbitral tribunal has the power to award the payment for the extra works by way of reviewing the engineer's refusal to issue an instruction:

> 'These are some of the consequences which might ensue if as between the engineer and the contractor each resolutely stuck to, and acted upon, his own opinion as to the nature of the work required to be done […] natural to expect that where the parties by their contract provided an alternative mode of avoiding these embarrassing contingencies, and escaping from such an impasse – namely, arbitration – they intended that that arbitration should have a reach and operation adequate to solve the matters in dispute, and not an arbitration so restricted in its scope as to be absolutely abortive, leaving the parties to it in a position, for all practical purposes, the same as that which they occupied before it had been held.'

In light of the above, probably the only practical way to escape the project impasse problem may be for the contractor to perform the works in the first instance with no agreement as to whether such works constitute a variation and reserve its rights to later seek payment for the disputed variation.

Notice: time bar

Many variation clauses provide for a notice requirement as a condition precedent to a variation claim, failure of which may lead to a complete deprivation of the entitlement of the claim. The purpose of such notice requirement is explained in *Multiplex v Honeywell*,[45] where Jackson J held:

> 'Contractual terms requiring a Contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the Employer the opportunity to withdraw instructions when the financial consequences become apparent.'

The notice period for a variation claim is subject to party agreement – the FIDIC Red Book 1999 provides for 28 days from either: (1) the day on which the variation has arisen; or (2) the day on which the variation has taken effect. In the case of a variation claim based on Covid-19, it may not be clear when the works have been varied or when the implementation of a variation (ie, works requiring a new work method or sequence) resulted in additional time and cost. That is particularly so because, unlike typical variations, it may not be clear to a contractor when a work instruction by the employer or engineer has been made to proceed with the works under the contract by applying a new work method or sequence to it.

It is therefore advisable that a contractor proactively seeks a written variation instruction from the employer or engineer

in a timely fashion. Should the employer or engineer refuse to issue an instruction, it would be prudent for the contractor to keep contemporaneous records as to when the works that require a new work method or sequence (due to Covid-19) were started. The contractor is also better protected if it sends notices to the employer or engineer within the notice period agreed in the contract counting from the day it internally considered the works as a variation. Such internal records may be subject to document production at a later stage should the parties end up in an arbitration.

Conclusion

It is submitted that contracts based on the FIDIC conditions may allow contractors to recover, as a variation claim, additional time and cost resulting from new work procedures, methods and sequences due to Covid-19. The benefits are clear: a variation claim enables the contractor to recover additional cost (hence provides a more complete remedy than *force majeure*), and the valuation of a variation is based on contractually agreed rates and prices which makes the quantification of it much easier, as compared to a change in law claim.

The difficulty with a variation claim is likely to be that the employer or engineer is reluctant to issue a formal written variation instruction, or even any specified work instruction that could be relied on by the contractor as an implicit variation instruction. It is advisable therefore that in such case, the contractor: (1) requests from the employer or engineer a formal written variation instruction, and if that is not provided; (2) leaves as many contemporaneous records as possible demonstrating an instruction to carry out works requiring new methods or sequences, in order to rely on such documentary evidence at a later stage if it needs to establish a variation claim by way of formal dispute procedures.

Notes

1 See, FIDIC YB 1999, sub-clause 19.4.
2 See, FIDIC YB 1999, sub-clause 13.7.
3 It is submitted that as long as the employer insists, explicitly or impliedly, that the contractor should proceed with the works under the contract, this may be construed as a variation instruction which forms the basis of a specified or implied promise by the employer to pay for the extra work ordered.
4 *Sharpe v San Paulo Railway* (1873) L R 8 Ch App 597; *Williams v Fitzmaurice* (1858) 3 H.
5 *Williams v Fitzmaurice* (1858) 3 H.
6 Stephen Furst, Vivian Ramsey, and Donald Keating, *Keating on construction contracts* (10th edn, Sweet & Maxwell 2017), para 4-046; *Thorn v London Corporation* (1876) 1 App Cas 120.
7 *United States v Spearin*, 248 US 132 (1918).
8 M Beutler, E Gentilcore, *Model Jury Instructions: Construction Litigation*, (2nd edn, ABA, 2015), para 4.06.
9 J Uff, *Construction law: Law and practice relating to the construction industry* (12th edn, Sweet & Maxwell, 2017), p 290.
10 *Ibid.*
11 *Blue Circle v Holland Dredging* 1987 BLR 40.
12 T J Kelleher and G Walters, *Common sense Construction law Smith* (4th edn, John Wiley & Sons, 2009; *Becho v United States* 47 Fed Cl 595,600 (2000).
13 *Becho v United States* 47 Fed Cl 595,600 (2000).
14 *See* JCT DB and SBC/Q 2016 cl 5.1.2; FIDIC Red Book 1999 cl 13.1 (f); NEC4 cl. 60.1.
15 *Keating* (n 6) para 4-034.
16 *English Industrial Estates Corporation v Kier Construction Ltd* (1991) 56 BLR 98.
17 *Strachan & Henshaw Ltd v Stein Industrie (UK) Ltd and GEC Alstom Ltd* [1997] EWCA Civ 2940.
18 Nicholas Dennys, Robert Clay, Alfred A Hudson, and Atkin Chambers, *Hudson's building and engineering contracts* (13th edn, Sweet & Maxwell, 2015), para 3-115.
19 *Ibid.*
20 *Crosby (J) & Sons Ltd v Portland Urban District Council* (1967) 5 BLR 121; *English Industrial Estates Corporation v Kier Construction Ltd* (1991) 56 BLR 98.
21 Hudson (n 18) para 3-115.
22 FIDIC Guidance Memorandum to Users of FIDIC Standard Forms of Works Contract, April 2020, pp 7–8.
23 FIDIC Guidance Memorandum to Users of FIDIC Standard Forms of Works Contract, April 2020, p 7.
24 'New guidance on contract variations', NZ Construction Sector Accord, 11 May 2020, see www.constructionaccord.nz/covid-19/covid-19-updates/new-guidance-on-contract-variations, accessed 22 April 2021.
25 *Ibid.*
26 *See* Sub-clause 19.4 (a) of the FIDIC YB 1999.
27 In the second edition of the SCL, sub-clause 19.3 provides that: 'Typically, variation clauses provide that where the varied work is of a similar character and executed under similar conditions to the original work, the tendered contract rates should be used. Where the work is either not of a similar character or not executed under similar conditions, the tendered contract rates can be used, but adjusted to take account of the different circumstances. If the work is quite dissimilar, reasonable or fair rates and prices are to be determined. Fair or reasonable rates will generally be reasonable direct costs plus a reasonable allowance for overheads (on and offsite) and profit.'
28 *See*, FIDIC form contract.
29 *See*, NEC form contract.
30 *See also* the RICS guidance on 'account payments' which states: 'The term on account payment means a payment for an item of work or materials or goods for which no instruction has been issued by the contact administrator to date but is anticipated.' It is submitted that payments on account are used for any item in a valuation that cannot be agreed, but both parties do agree that some payment is due.
31 Building and Construction Industry Security of Payment Act (amended in 2018) Sections 12 and 13.

32 Building and Construction Industry Security of Payment Act (amended in 2018), Section 17(1)(b).
33 Building and Construction Industry Security of Payment Act (amended in 2018), Section 17(2A).
34 *Ibid.*
35 'Significant changes to security of payment regime in Singapore', Pinsent Masons, 18 July 2019, see www.pinsentmasons.com/out-law/analysis/significant-changes-to-security-of-payment-regime-in-singapore, accessed 22 April 2021.
36 *Ibid.*
37 *Keating* (n 6) para 4-061.
38 *Keating* (n 6) para 4-062.
39 See sub-clause 3.3 of FIDIC YB 1999.
40 *Thorn v London Corporation* (1876) 1 App Cas 120.
41 M Sergeant, *Construction contract variations*, (Informa Law, 2014), para1.52.
42 *Ibid.*
43 *Sharpe v San Paulo Railway Co* (1872-73) LR 8 Ch App 597.
44 *Brodie v Corporation of Cardiff* [1919] A C 337.
45 *Multiplex v Honeywell* [2007] EWHC 447 (TCC).

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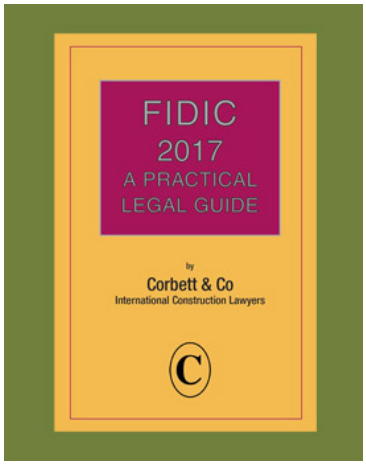
FIDIC 2017 – A Practical Legal Guide

by Corbett & Co

Published by: Corbett & Co
ISBN: 978-1-5272-7255-5
719 pages, £175
Publication Date: 30 November 2020
Reviewed by Dr Donald Charrett



This comprehensive 807-page work was written by Corbett & Co directors, consultants and staff, and published by Corbett & Co in 2020. As the title indicates, the book is (generally) confined to the clauses in the 2017 rainbow suite: the Red Book, the Yellow Book and the Silver Book. It contains sections: Introduction, Table of Cases, Yellow Book, Red Book, three appendices on draft notices, flow charts of principal events and tables of sub-clauses, and an index. The book is currently available in hardback, although Corbett & Co advise that an e-book and Kindle version will also be available soon.

The short introduction by Edward Corbett highlights the best features of the 2017 editions that resolved issues with the 1999 forms, as well as other features of interest. Corbett pulls no punches in highlighting those features he believes are ill-considered or poorly drafted. In particular, he sees the length of about 50,000 words as far too long and 'the draft needed vigorous editing'.

The main section of book (comprising 577 pages) is headed 'Yellow Book' and has the simple and logical structure of each clause covered in a chapter written by one or more of the 12 different authors. Each chapter provides primary commentary on the clauses in the Yellow Book, with supplementary commentary in respect of the Red Book and the Silver Book where necessary. In the majority of chapters, the Red Book and Silver Book commentary is located after the description of the Yellow Book provisions. In the chapters for clauses 4 and 12, the Red Book and Silver Book commentary is included within the discussion of the Yellow Book sub-clauses, albeit under clearly identified sub-headings. There are references to the provisions of the 2019 Emerald Book (incorrectly referred to as the 2017 Emerald Book) in only four chapters – those written by Victoria Tyson. The short separate section on the Red Book (17 pages) provides chapters on clause 5 (Subcontracting) and clause 12 (Measurement and Valuation).

Each clause chapter commences with a summary, generally followed by a discussion of the origin of the clause, highlighting new features or changes from the 1999 Yellow Book, with references to relevant predecessors such as the 4th edition Red Book or the 1995 Orange Book. In the chapter on clause 6 (Staff and Labour), this section details the changes from the 1999 Yellow Book for each sub-clause. The chapters treat each sub-clause in detail, with subheadings and sub-subheadings appropriate to the different issues involved. Given the detail with which each sub-clause is treated, the use of subheadings and sub-subheadings ensures that the reader can readily find the appropriate text on any relevant issue without having to wade through pages of information on peripheral issues. Where FIDIC have issued an erratum to the wording of a sub-clause, this is helpfully identified in the book.

The wealth of detail in respect of each of the sub-clauses provides some invaluable information in summary form. For example, under the subheading 1.1.19 'Cost', there is a list of the sub-clauses under which the Contractor may be entitled to Cost. Similarly for the subheadings 1.1.20 'Cost Plus Profit' and 1.1.38 'Extension of Time' there are lists of the sub-clauses that may give the Contractor an entitlement. Highlighting the importance of the Employer's requirements,

under subheading 1.1.33 there is a detailed list of things that may be included, each item cross-referenced to a sub-clause or the Guidance. Other valuable cross-reference lists of relevant sub-clauses occur at various other locations of the book.

The case law referred to in the clause chapters is predominantly English, but also includes cases from other common law and civil law jurisdictions, as well as arbitration awards. There are many references to the common law position or meaning of words or phrases under English law, indicative of the common law position elsewhere. FIDIC emphasises that the rainbow suite is intended for international contracts in any jurisdiction, civil law and common law. Highlighting the few differences in the application of FIDIC contracts between civil law and common law jurisdictions, this comprehensive and detailed book has only eight references to specific areas of civil law that differ from common law: delay damages, good faith, gross negligence, decennial liability, *force majeure*, *imprévision* and direct loss.

There are inevitable differences in style and treatment arising from the different chapter authors, such as the extent of the summary, the origin of each clause at the start of each chapter, the use of figures and the level of detail of the explanatory material. However, every chapter treats the subject matter of the relevant clause in considerable detail. Not surprisingly, the chapters on clause 20 [Employer's and Contractor's Claims] and clause 21 [Disputes and Arbitration] are appropriately lengthy (56 and 64 pages respectively), given the extent to which these clauses prescribe the detailed procedures and time bars in the 2017 rainbow suite.

Appendix 1 contains draft Notices for use by the contractor, employer or engineer to comply with the notification requirements of the rainbow suite. The formal and prescriptive requirements of the 2017 forms is highlighted by the 135 Notices detailed in Appendix 1. The table of contents preceding the text of the draft Notices identifies each of these Notices by sub-clause number, as well as a description of the Notice. The format of each Notice follows the same format. The heading identifies the sub-clause number, title, description and which entity issues the Notice: contractor, employer or engineer. The body of each Notice specifies to whom it is to be sent and the entities to receive copies, defines when it is required to be issued and details what must be included in it. In addition to the Notices required for the General Conditions in the Yellow Book, Appendix 1 contains eight draft Notices for optional conditions from the Special Provision section of the Yellow Book.

For anyone involved in administering a 2017 FIDIC contract, Appendix 1 alone justifies the cost of this book. It will save many hours of scrutiny of the requirements of the General Conditions and for the necessary drafting to comply with those requirements. The meticulous preparation of these draft Notices is a substantial contribution to the proper administration of 2017 rainbow suite contracts, by providing a comprehensive collection that identifies the issues that need to be formally communicated. The Contractor, Employer or Engineer who issues all the relevant Notices identified in Appendix 1 will undoubtedly minimise the chances of ending up in dispute, or the costs of an unavoidable dispute, by having the contractually required and appropriate paper trail comprehensively documented.

Appendix 2 contains five flowcharts for the Yellow Book: sequence of principal events, payment, referral of a Dispute under clause 21, agreement or determination under sub-clause 3.7 which includes an error, and agreement or determination under sub-clause 3.7 where no agreement is reached. These flowcharts are similar to those included in the 2017 Yellow Book, although formatted differently and with additional explanatory information. As with the diagrams included in various clause chapters, the flow charts are very clear and useful visual representations of the necessary events and procedures that inform the navigation of the relevant sub-clauses for significant issues.

Appendix 3 contains a table of sub-clauses and the sub-clauses referred to therein. The length of this table (20 pages) highlights the interconnected nature of the contractual provisions, and the importance of being familiar with all of the clauses. It is a useful aide-memoire of the other issues that need to be borne in mind when addressing a particular sub-clause.

The index is very comprehensive, occupying 87 pages. It provides information relating to clauses and sub-clauses of the 2017 rainbow suite under either the name, or number, or subject matter of the clause or

sub-clause. The index also includes legislation and bibliographical references. The index is a very important component of the book as it identifies the various routes available to any desired destination. Because it is so comprehensive some of the index entries have an extensive list of sub-entries extending over a page or more; this requires care in using the index to locate the relevant main index entry. This is a small (and inevitable) price to pay for such a comprehensive cross-referenced index.

In addition to a hard copy, this reviewer had the benefit of a soft copy. Quite apart from the convenience of having the book available on an electronic device, a soft copy enables keyword searches that can find the proverbial 'needle in a haystack'. The Covid-19 pandemic has emphasised the importance of electronic communications, and highlighted the constraints of traditional technologies, such as the interruptions to supply chains and delays in deliveries. The availability of this book in soft copy will avoid these supply chain issues and provide additional functionality. Many libraries and practitioners will no doubt obtain the book in electronic form for these advantages when it is available.

In this reviewer's view, *FIDIC 2017 – A Practical Legal Guide* is an essential addition to the library of every practitioner who is involved with the FIDIC 2017 rainbow suite, whether as front end or back end lawyer, employer, contractor, engineer, claims consultant, Dispute Avoidance/Adjudication Board member or arbitrator. It will be an important resource for students of construction law. They will all value it for its completeness, its depth and clarity in explaining how the sub-clauses function, for highlighting the changes from the 1999 rainbow suite and for providing a road map of the interconnection between sub-clauses. The draft Notices will no doubt form part of contract administration manuals that will ensure Notices are submitted correctly and timeously, claims can be assessed expeditiously, and dispute avoidance enhanced. As many writers have observed, good communication is at the heart of dispute avoidance. The team at Corbett & Co are to be congratulated on their magnum opus that will facilitate a better understanding of FIDIC contracts and encourage the detailed communication that is an integral feature of the 2017 rainbow suite, and essential for dispute avoidance.

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Printed by Pensord, Wales

Construction Law International

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

JUNE 2021 Vol 16 Issue 2
ISSN 1819-1371
Citation (2021) 16(2) *CLInt*

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