CONSTRUCTION LAW INTERNATIONAL

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

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Geotechnical Baseline Reports in the FIDIC Emerald Book – a fair allocation of ground risks?

NEC3 clause 63.1: a tale of necessary assumptions, the principles of sound construction and uncertain equity

Dispute boards and government contracts in Brazil

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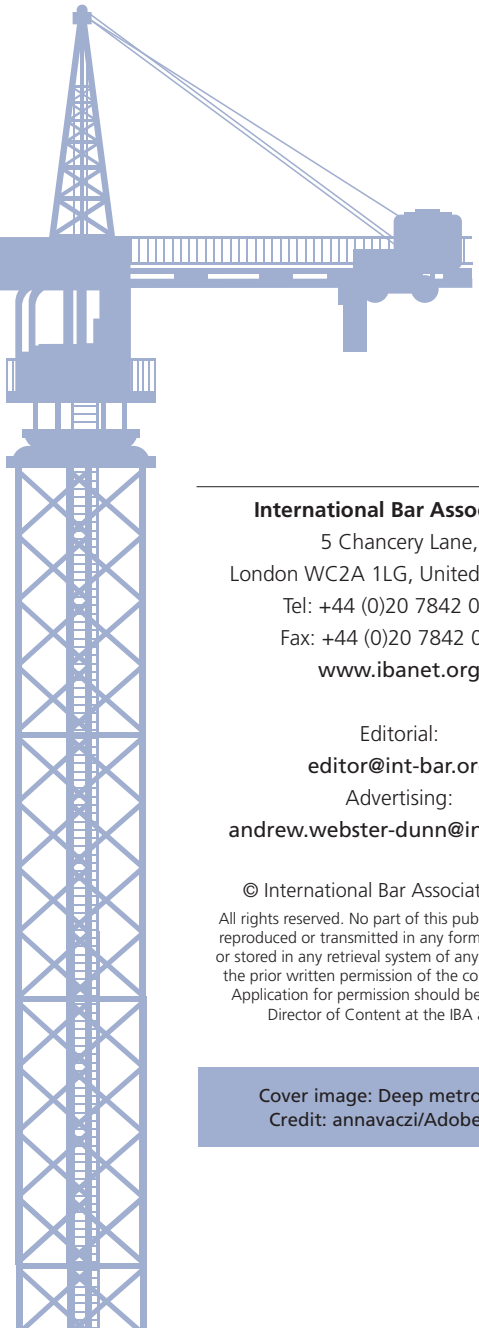

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FROM THE EDITORS

Dear readers,

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

We begin this edition with the first Co-Chairs' column from Jean-Pierre van Eijck and Joe Moore, who took office in January 2022.

In this issue, we continue *CLInt*'s series of diversity and inclusion questionnaires with contributions from Marcel Tan Marquardt, Senior Legal Counsel at Laing O'Rourke, and Iryna Akulenka, Associate Director at HKA Dubai.

We also continue our 'FIDIC Around the World' series with insights on the use of FIDIC contracts in Ireland by Eoin Cassidy and Anne McCarthy; in Pakistan by Khawaja Hamid Mushtaq; and in India by Shri Venkatesh, Ashutosh K Srivastava and Jayant Bajaj. Gagan Anand also explains the key takeaways of new guidelines issued by the Indian Ministry of Finance concerning procurement and project management for public projects.

Next, Ngo Martins Okonmah provides a summary of the ICP-hosted webinar during Milan Arbitration Week 2022 on 'Construction claims when asserted as an investment', providing highlights of the presentations by Professor Pierre Tercier, Professor Troy Harris and Simon Hughes QC. In addition, Andrea Chao and Kiri Parr provide an update on FIDIC's Task Group 17 and its work on a collaborative contract form to complement the existing suite of FIDIC contracts.

Moving to our feature articles, Emilio Linde-Arias, Juan Perri and Osinachi Nwandem take a look at the Geotechnical Baseline Report in the FIDIC Emerald Book, asking the question of whether this allows for a fair allocation of ground risks. Andrew Muttitt considers in detail clause 63.1 of NEC3 contracts, concerning the methodology for assessment of a contractor's monetary compensation. Lastly, Ana Cândida de Mello Carvalho, Vice Chair, IBA Project Execution Subcommittee, Renan Frediani Torres Peres and Mariana Ferrão examine the legal framework for and use of dispute boards under government contracts in Brazil.

Finally, Wayne Jocic provides a review of the new edition of *Contracts for Construction and Engineering Projects* by Donald Charrett.

We thank all our contributors for their informative and thought-provoking articles, and we hope you will enjoy reading this edition.

As always, we invite and encourage all ICP members to share your experiences and insights by submitting your articles to editor@int-bar.org.

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FROM THE CO-CHAIRS

Dear ICP Committee members,

Although we took office in January 2022, as this is our first column as Co-Chairs of the ICP Committee, first and foremost, on behalf of all ICP members, we wish to thank Shona Frame and Ricardo Barreiro-Deymonnaz for their great work for our ICP Committee during their tenure. Although they had the misfortune to take office only a few months before the outbreak of the Covid-19 pandemic, Shona and Ricardo did an excellent job in keeping ICP connected via webinars and Zoom meetings. We are honoured to be your new ICP Co-Chairs and realise that we have big shoes to fill.

We also take this opportunity to welcome again all new ICP officers who took office on 1 January. We are looking forward to working with our team of officers for the next two years.

At the time of writing this column, we see promising signs that the world is opening up after the pandemic, allowing again for in-person meetings. The first one was the much-anticipated ICP Working Weekend in Vevey, Switzerland, in May – which was originally scheduled for May 2020.

We would like to thank Sam Moss and his colleagues at Lalive for their patience and all the hard work to make this Working Weekend happen. It provided a great opportunity to make new friends and to reconfirm old friendships.

During the Working Weekend, each of our three subcommittees – Project Establishment, Project Execution and Dispute Resolution – organised an informative session. Papers or slides prepared for these sessions have been made available on the IBA website. We are looking forward to announcing the venue of the 2023 Working Weekend at our business meeting during the IBA Annual Conference in Miami.

The Working Weekend was followed immediately by the SEERIL Biennial Conference in Milan, Italy, from 16–18 May. Virginie Colaiuta, Vice-Chair of ICP, represented the ICP during this conference and moderated a session titled 'The Future of Infrastructure Delivery'. This session considered the future of infrastructure delivery funding models, the investment environment and the impact of net zero commitments and the increased focus on ESG.

Given the improving Covid situation, it looks as though we will have an in-person Annual Conference again later this year. As you know, it will be held in Miami, United States, from 30 October to 4 November. Preparations for this conference are under way. ICP will present the following five sessions:

- Infrastructure projects in developing countries: challenges, opportunities and the role of multilateral agencies and their model contract forms
- A new era of collaboration? The rise of multiparty and alliancing contracting
- Sustainable project decommissioning – reality or utopia?
- Ridding a slippery slope: the balancing act of risk allocation in major construction and infrastructure projects
- Impact of ESG in construction and infrastructure projects – implications for financing, procurement strategies and delivery

On Wednesday 2 November, we will have our traditional ICP dinner, followed by the ICP excursion on Friday 4 November. We hope to welcome many ICP members at the Annual Conference.

As previously mentioned by Shona and Ricardo, the IBA has offered our Committee the opportunity to participate in a LinkedIn trial. We encourage all ICP members to join this group and to share their thoughts and ideas via this channel.

Finally, at the time of writing this column, joy about easing Covid-19 restrictions is overshadowed by the military conflict in Ukraine. In line with earlier statements by the IBA, ICP also condemns Russia's war in Ukraine. We firmly believe that the rule of law should always be adhered to. This conflict, first of all, is taking a great toll on the brave people of Ukraine, but it has also caused a severe geopolitical and economic crisis.

Sadly, there is no saying how this crisis will unwind. Our hearts go out to all those innocent people who became entangled in this conflict.

Former Co-Chairs Shona Frame and Ricardo Barreiro-Deymonnaz pass the ICP hard hats to new Co-Chairs Joe Moore and Jean-Pierre van Eijck.

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DIVERSITY QUESTIONNAIRE

Marcel Tan Marquardt
Senior Legal Counsel
Laing O'Rourke

1. What is your name and current job, role or title?
My name is Marcel Tan Marquardt and I am Senior Legal Counsel at Laing O'Rourke with a focus on infrastructure, sustainability, and research and development. I am also a Co-Chair of the LGBT Committee.

2. When starting out in your career, did you have any role models?
My two key role models at the beginning of my career were Sandra Steele and Nicole Green.

Sandra Steele was the first partner I worked for as a newly qualified lawyer. She had just moved from an in-house role at Lendlease to head up the construction team at K&L Gates and was, at the same time, having her third child. Working for Sandra instilled in me right from the beginning of my career that there were different paths to partnership. Further, watching her very successfully manage being a new mum and being a new partner was very inspiring.

Nicole Green was head of the Sydney office for MinterEllison and someone I worked closely with as a junior lawyer. Nicole is the most efficient and effective lawyer I have ever met. Growing up with a Chinese mother and a German father, efficiency and being meticulous are very much part of who I am as a person. Learning from someone who had perfected the process influenced how I wanted to be as a lawyer. Nicole also has such warmth and respect for people that it really dispelled the part of me that believed that you had to be arrogant and intimidating to become a senior partner.

3. What advice have you received which helped you progress in your career?
I can't think of any advice that has helped my career. I'm sure that I have received some, but for me it is all about what people do, not what people say. I learn by observing and absorbing. Being an out gay lawyer, I had never met another out gay lawyer until five years into my career at Addleshaw Goddard. Observing the way Marnix Elesnaar, Head of Planning, interacted with his team and the business was really important to me in finding my voice as a gay lawyer. I had also never met an Asian partner until I met Leona Ahmed, and this relationship was very important to me for growing into my role as a senior Asian lawyer in London. Leona and Marnix continue to be my mentors.

4. Do you think that diversity is improving in your particular professional area?
I believe that diversity is definitely getting more airtime and that firms are now being forced to confront the under-representation of different groups of people in the industry. But I'm still unsure whether any of this translates to improvements in diversity. I will remain unsure until I see proper representation across the board in organisations (particularly at board level). Seeing a woman of colour (Hayaatun Sillem, chief executive of the Royal Academy of Engineering) being appointed to the board of Laing O'Rourke gives me a lot of hope that things are changing in some industries.

5. What positive steps have you seen organisations take to progress diversity and inclusion?
The most positive steps that I have seen involve investment into and accountability for diversity and inclusion. It is not just about thinking about inherent biases, ensuring that promotions and recruitment are more equal, and hoping that you can attract diverse talent. Rather, it is about investing heavily in the areas of diversity and inclusion so that you change the way the company works to allow more diverse talent to thrive, and keeping the organisation accountable.

At Laing O'Rourke the company set a 50:50 gender target by 2033. In the construction industry, if all things were to stay the same (including current male/female ratio of graduates), this target would be impossible to achieve. But Laing O'Rourke is investing heavily in research and development. It is seeking to convert jobs that previously involved trades (heavy physical labour) to jobs that can be undertaken by technicians (no physical labour) to allow anyone to be part of the industry. To ensure accountability, Laing O'Rourke has tied its finance to achieving these goals and therefore is also financially incentivised. This is a tangible and measurable way to increase diversity.

6. What aspects do you think are still ripe for improvement in organisations?
I believe that there are two key areas for an organisation if they are serious about diversity and inclusion:

1. Representation matters. An organisation can have a diversity and inclusion policy and represent itself as being a diverse workplace. However, when you start digging, if you see that the board are all from one group of people, or see diverse people getting stuck at certain levels (hitting the glass ceiling), I struggle to believe that it are serious about diversity and inclusion but is rather paying lip service. Representation sends a signal that the organisation understands how important representation is to minority groups, and that the minority groups can actually be an integral part of an organisation.
2. Words are cheap. Social media posts, interviews, goals and targets are not worth a thing unless they are supported with:

- Sacrifice – unfortunately you may have to lose your seat at the table to allow someone else's voice to be heard, or you may increase the size of your table so that your voice is diluted;
- Investment–understanding that the way the system is currently set up predominantly benefits only one group of people, so creating a more equal society and one that actually harnesses the best from each individual and unique person involves investment into changing the one-way system to a multidimensional system;
- Courage – to see beyond your immediate income, power or status and realise what is best for the organisation and society is to potentially give up some of that income, power or status; and
- Empathy – to listen and believe someone's journey without undermining it because it does not align with your own journey or the narrative you understand.

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

I believe when we have a system that allows every unique person to thrive (ie, a level playing field, not one that is so heavily weighted against some groups and in favour of others), only then will a reasonable diversity balance be reached. Until that point, it will continue to be a fight between those trying to succeed in a system that is programmed to ensure that they potentially fail, and those in charge of – and who created – the system that allows them to succeed with no impetus to change the system because it may mean that there is a risk that they will fail.

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

Growing up in Australia as a gay man with immigrant parents from Germany and Christmas Island/Singapore, diversity and inclusion is just part of who I am. Being gay and mixed race I had no role models who looked like me (I was too white to be Asian and too Asian to be white), sounded like me, had any shared experiences or were visible in the life or career that I wanted. That is why, at every stage of my career and in my personal life, I have tried to be visible and I have tried to change things for people coming up in our industry. My niece and nephew are German, Chinese and Indian so I'm hoping that the world they grow up in is more accepting than the one in which I did.

I truly believe in the value of diversity and the power of inclusion. Different cultures, experiences, sexualities or cognitive abilities really colour our world; to continue to view the world in black and white is missing out on all the beauty and promise in the world. Empowering people to be the best unique versions of themselves, not the best version of what they can be within constraints, opens up possibilities beyond what we could imagine.

When I started my career as a lawyer, as a man I made sure that I always worked for a female boss as that was a way I could support diversity with my actions and not just my words. Throughout my 10-year career I have worked for some really inspiring women including: Sandra Steele, Head of Construction at K&L Gates; Nicole Green, Head of the Sydney office at Minter Ellison; Julia Court, Head of Construction at KWM/Addleshaw Goddard; and now Madeleina Loughry-Grant, Director of Legal and Tax at Laing O'Rourke. It is so important to me to live by my values as there is no way for me to avoid being diverse.

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

This view may be controversial, but I believe by fast-tracking a work-from-home culture Covid-19 may have decreased diversity in the short term – but may increase diversity in the long term as people are able to be more flexible with their working hours and locations. The '9–5 in the office' system was set up for a particular group at a particular time: the world has changed so drastically and so quickly that the old systems no longer serve society in the way to get the best out of society. So by an external force like Covid-19 changing the system to allow more diverse people to enter or stay in the industry, I believe it may increase diversity within the legal industry.

Iryna Akulenka
Associate Director
HKA Dubai

1. What is your name and current job, role or title?
My name is Iryna Akulenka. I am an associate director with HKA Dubai, dealing with a mix of contractual claims and expert witness work. I am a Fellow of the Chartered Institute of Arbitrators (CIArb), Immediate past Chair of the CIArb UAE Branch and accept appointments as an arbitrator.

2. When starting out in your career, did you have any role models?
I started my career in construction project management some 15 years ago. My first role models were, as you would expect, men. I pretty much learned 'on the job', and the guidance I received on a daily basis was absolute gold!

When I decided to make a complete career shift from project management to construction claims and disputes, it was like starting from scratch. I was (and still am) fortunate to be surrounded by many highly intelligent women and men – perhaps too many to mention!

Since 2015, I became involved with the UAE Branch of the CIArb, and for some six years I have been working under the leadership of the past Chair, Leonora Riesenburg, a highly experienced arbitrator and mediator. I took over from Leonora in March 2021. She was, and still is, a role model in many ways. I am extremely grateful for all the encouragement and the invaluable experience I received while working with her.

3. What advice have you received which helped you progress in your career?
- One: never stop learning. I still learn every day! The pace of change we are witnessing today is extraordinary, particularly in the area of dispute resolution. One must remain continuously up-to-date with the developments in international legislation and recent case law, as well as best practices (guidelines and 'soft' law).
- be proactive, chase and create opportunities. Take on tasks that make you uncomfortable – this is how you learn and develop.
- do not take every opportunity there is – be selective. Take only calculated risks – otherwise this will inevitably lead to burnout.

I often share this last piece of advice with the younger generation of alternative dispute resolution (ADR) practitioners, particularly women. When asked if women can 'have it all', I always say that every one of us defines what is 'all', and that definition also changes with time as our priorities change. Therefore, be wise with the opportunities you take on.

4. Do you think that diversity is improving in your particular professional area?
Yes and no. Forgive me for giving a lawyer-like answer, but it really depends. Diversity is multifaceted so it really depends what aspect of diversity is being looked at. There are other factors to consider as well:
- As an example, if I speak about gender diversity in engineering and construction, we still have a very, very long way to go. Personally, I do not believe we can ever achieve true gender parity in construction, simply because in absolute numbers the majority of contractors' site personnel will always remain men. It is just the nature of construction work. However, there are great strides being made in consultancy and ancillary services.
- Generally speaking, progress is not the same across the board – with some companies and organisations making (somewhat) better progress than others. This applies to any and all players in the ADR world – be it law firms, expert firms, arbitral institutions or users of ADR.
- Taking the international ADR community as an example, the progress is not the same across different areas of diversity. There appears to be an improvement in gender diversity, generally speaking. However, when you look deeper into the data for arbitral appointments of female arbitrators, for instance, you will find that better progress is made in institutional appointments, with lesser progress in party appointments. I would say this equally applies to both arbitral as well as expert appointments.

A lot more needs to be done in terms of the advancement of appointing technical arbitrators as opposed to arbitrators only from a legal background. Internationally, a very wide pool of highly qualified technical arbitrators is available for appointments in suitable cases (whether construction/engineering, oil and gas, energy, infrastructure, technology and many others). However, there is still a prevalence to appoint neutrals from a legal background.

Diversity in race and nationality requires a lot more work. Even when you look at the data for appointments of female arbitrators worldwide – how many of them are women of colour? Women from Asia? Eastern Europe? etc...

Diversity in age is another extremely problematic and often overlooked area. How many arbitrators of the age bracket of, say, 40–45 are appointed in any sizable cases? Let alone actual appointments – how many are given the opportunity to act as arbitral secretaries or at least shadow? This area requires immediate and very careful attention as the ADR community must come together and prepare the next generation of neutrals. The change of generations is part of life and the ADR world is no exception. The question is: are we collectively ready? Nowadays, we speak a lot about the climate change-related disputes and the need to be prepared as the global ADR community. However, I am not too sure we are sufficiently preparing the next generation of

neutrals who are going to be the ones dealing with these disputes, particularly the technical arbitrators. I must say, given the very ambitious goals in the race to 'net zero', the time is now, and we no longer have the opportunity to waste any.

Last but not least, socio-economic diversity is an oft-spoken-about topic recently, but very little is being done on this, practically speaking. Put simply, access to opportunities is not nearly the same for someone born in a major metropolitan city in Europe or North America versus someone born in a tiny village in Africa or Latin America.

We all must actively engage with young folks from under-represented, disadvantaged and less privileged groups. Equal access to formal education across the globe is one of the major social concerns and is a topic on its own.

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

There is much we can all do (and some already do) but first and foremost, we must practice what we preach. This is a starting point of any progress in any area, and equality, diversity and inclusion (ED&I) is no exception. Tick-box and marketing slogans are no good to anyone – inclusiveness starts from within.

From the employment/workforce standpoint generally, it is now evident that nothing happens without leadership buy-in – a top-down approach is a must. This applies not only to organisations but also to countries as a whole – true progress is only seen where the legislation is supportive to that effect.

Targets and key performance indicators (KPIs) must be set. When I used to speak about these some ten years ago, this approach was labelled as some sort of a 'positive discrimination'. Look at us today: the majority of organisations and countries that truly work on improving diversity all have set targets against which the progress is measured.

'Soft' measures alone (such as mentoring) never work – sponsorship and active support of underrepresented groups (not just women) is a must.

Official policies and criteria on ED&I must be set and followed, and leadership held accountable. In the Chartered Institute of Arbitrators, for instance, we have official diversity and inclusion (D&I) policies in place.

Improvements in recruitment and retention policies – and measurement against set targets – are very powerful (gender/race/nationality/age neutral job ads, 'blind' CVs, improved maternity/paternity policies, clear application of criteria for promotion/official feedback on the job across the board, etc).

An inclusive culture, where everyone is heard and respected, is one of the best steps I have seen. This really works. Implementation of anonymous surveys also works, and will give organisations an understanding on whether or not all their people feel equally included.

Investigations as to pay gap are very impactful – not just with regards to gender, but across the board.

ED&I committees really work – we have regional committees at HKA and are witnessing a great progress on many initiatives we report on.

When it comes to arbitral appointments, particularly party appointments, I cannot stress enough how important the role of counsel is. In terms of practical solutions, they are well known to the users of arbitration. But to create a real impact, I strongly encourage the audience to take collective action. For instance, when proposing arbitrators to clients, counsel should propose a diverse list containing 50 per cent female arbitrators. There are plenty to choose from! Needless to say, the list should include arbitrators from diverse backgrounds (not just gender, but also race, age, legal versus technical, nationality, socio-economic aspect, etc).

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

As mentioned in my answer to Q4 above, there is much to be done to address many oft overlooked aspects of diversity, be it age, educational background, race, gender, socio-economic background, etc.

On 11 November 2021, Wendy Miles QC FCIArb delivered CIArb's Alexander Lecture live from COP26. I encourage everyone to read or listen to her outstanding speech – it is very thought-provoking. Of particular relevance to D&I, Wendy raises – rightly so – how representative the tribunals and the counsel teams are in relation to the disputes they are deciding and to the parties they are representing, particularly with reference to race, gender and nationality. We like to think that, as a global ADR community, we have improved in the last couple of decades. However, there is so much we still need to do to be truly representative and inclusive.

I would also urge the readers to have a look at the McKinsey 2021 'Women in the Workplace' report, which highlights many challenges women are still facing. These challenges are even more pronounced for women of colour and women from other underrepresented groups.

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

This is a difficult question if one really wants to get into the substance of the matter.

For example, as I mentioned above – is it reasonable to expect that the site workforce in the contracting business will ever be 50 per cent female? I gather not.

Can we ever reach parity in female arbitral appointments for women of colour?

Will we ever see every tribunal (subject of the dispute permitting) having at least one technical arbitrator (let alone reaching parity)?

Can we expect to see arbitrators under 45–50 appointed on claims exceeding, say, US$5m?

Will we see parity in arbitral appointments of under-represented groups in claims above US$50m?

There is still so much to do. The truth is, apart from gender (moreso, mainly just institutional appointments anyway) very little on other aspects of diversity is being measured or actively pursued, if at all.

I can talk about this for hours, but I guess the bottom line is that reasonable diversity is only reached when we no longer need to talk or write about it, or have specific measures, targets and initiatives implemented, whether organisation-wise or by legislation.

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

To me, it is equality first and foremost. As human beings, we all deserve equal treatment and access to opportunities based on merit.

Being truly inclusive simply means respecting and valuing everyone around you, and it is just the right thing to do.

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

Again, this issue is a little complex if one really wants to go to the substance instead of giving a general answer. I suppose it is generally understood that there has been a negative impact on the caretakers as they had to juggle working from home with kids being home-schooled, caring for the elderly, managing house chores, etc. It has been a very difficult time for many, and I have experienced this myself.

On the positive side, many organisations (including HKA and CIArb) have introduced flexible working or working from home. The two terms are often used interchangeably but may not necessarily mean the same thing. Either way, I am aware that many organisations in the ADR world (such as law firms and expert firms) are still allowing the flexibility of working from home, at least to some extent.

I have to say that, as a full-time working mother of two young children, I really appreciated the opportunity to manage my workload more in line with my family life, which allowed me to spend more quality time with my girls.

FIDIC around the world – Ireland

Eoin Cassidy and Anne McCarthy
Mason Hayes & Curran, Dublin

In this questionnaire, references to International Federation of Consulting Engineers (FIDIC) clauses are references to clauses in the 1999 Red Book, unless otherwise noted.

1. What is your jurisdiction?
Ireland.

2. Are the FIDIC forms of contract used for projects constructed in your jurisdiction? If yes, which of the FIDIC forms are used, and for what types of projects?
FIDIC is widely used in Ireland, particularly for large-scale infrastructure and energy projects in the private sector. The Yellow Book and, to a lesser extent, the Silver Book are used on these large-scale engineering projects which are being procured on a design and build/ engineeering, procurement and construction (EPC) basis.

The Government Construction Contracts Committee standard forms of works contracts are used for public construction projects (and include a suite of contracts to be used for engineering or building works that are being procured on an employer-designed or design and build basis). However, the use of FIDIC contracts is increasing in the public sector. Transport Infrastructure Ireland (TII), the state agency in Ireland dealing with road and public transport infrastructure, approved the use of FIDIC-based contracts on a trial basis. The approval process to allow FIDIC contracts to be considered as an option for publicly funded infrastructure projects is under consideration and is supported by the Office of Government Procurement.[1] Irish Water, the water utility company in Ireland, uses the FIDIC Gold Book in relation to the design, construction and operation of water treatment facilities.

The Red Book is not used as frequently in Ireland. The Royal Institute of Architects in Ireland has, in conjunction with the Construction Industry Federation and the Society of Chartered Surveyors, put together standard form building contracts (typically employer-designed but frequently converted to design and build); these are the most common form of contract used in non-public sector commercial development projects (commercial and residential).

The NEC 4 form of contract is starting to be used on some engineering projects, but it is typically heavily amended.

3. Does FIDIC produce its forms of contract in the language of your jurisdiction? If no, what language do you use?
Yes, English.

4. Are any amendments required in order for the FIDIC Conditions of Contract to be operative in your jurisdiction? If yes, what amendments are required?
Yes, amendments are required to incorporate construction-related statutory requirements. These include the following:

- The Safety Health and Welfare at Work (Construction) Regulations 2013–2021 require that certain health and safety obligations are complied with, including the appointment of a project supervisor for the construction stage (PSCS) and a project supervisor for the design process (PSDP) where a construction project meets certain criteria. The Contractor is often, but not always, appointed as PSCS, and the terms of their appointment are typically included as an amendment to the FIDIC Conditions of Contract. Where the Contractor is not appointed as the PSDP, compliance and cooperation amendments are also incorporated into the FIDIC Conditions of Contract to ensure compliance with these statutory requirements.
- The Building Control Regulations 1997–2020 require the Contractor to perform certain statutory building compliance roles, and provide certificates of compliance and supporting documentation where the works meet certain criteria. Where the Contractor is appointed to perform these statutory roles, its appointment and the documentation requirements are typically included as an amendment to the FIDIC Conditions of Contract.
- The Construction Contracts Act 2013 sets out minimum payment terms for construction contracts and provides for a regime of statutory adjudication. The payment provisions in clause 14 are amended for Irish-based contracts to align with the payment terms included in the Act. The dispute resolution provisions are also amended to incorporate the statutory right to refer a payment dispute to adjudication under the Construction Contracts Act 2013. Issuing proceedings in the High Court or any other forum will not interfere with this right.
- Relevant contract tax is a withholding tax that applies to certain payments by principal contractors to subcontractors in the construction industry. The FIDIC Conditions of Contract are amended for Irish-based contracts to ensure the Employer is provided with the appropriate documentation to enable it to make the payment gross. Where the documentation is not provided, these amendments permit the Employer to make any deduction or withholding

on account of tax as is required by laws or as is required by the published practice of the Revenue Commissioners. The Contractor will be required to accept the net amount paid after deduction or withholding in discharge of the Employer's payment obligations.

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

Design risk: Projects using the FIDIC Yellow Book in Ireland are commonly amended so that Sub-Clause 1.9 is deleted and the final two paragraphs in Sub-Clause 5.1 are deleted or amended. This is so that the Contractor has the full design obligation under the contract. The intention is to remove design responsibility from the Employer in respect of documents provided by the Employer that form part of the Employer's Requirements. This has become a standard amendment in Ireland in the FIDIC Yellow Book for design and build contracts. Generally, funders in the Irish market want all design responsibility to rest with the Contractor, and the Employer looks to make the necessary amendments to reflect this position in the FIDIC Yellow Book.

Setting out: A common amendment in the FIDIC Yellow Book in Ireland is for Sub-Clause 4.7 (Setting Out) to be amended so that a Contractor cannot claim time or money in respect of errors in the positioning or setting out of the works. This effectively aligns the Yellow Book to a Silver Book position. This amendment is particularly common in civil work contracts for renewable energy projects that are project financed. Funders will look for the setting out risk to be passed onto the Contractor.

Ground condition risk: The FIDIC Yellow Book is commonly amended so that a Contractor cannot claim time or money due to the condition of the Site, and accept the ground condition risks in respect of the Site, including its subsurface, hydrological and climatic conditions. The Contractor shall be deemed to have inspected the Site and all information provided, and Sub-Clause 4.10 is amended to reflect this position. An Employer will provide site surveys, reports or other documents it has in relation to the Site, but Employers in the Irish market will not accept reliance on the completeness of the information disclosed. Amendments to Sub-Clause 4.10 (Site Data) reinforces the position that the Contractor will not be entitled to rely on reports or information provided by the Employer, and expressly state the Employer does not provide any warranties in relation to the information provided. In addition, Sub-Clause 4.12 (Unforeseeable Physical Conditions) is regularly deleted, passing the ground risk on to the Contractor. Again, this is a position that funders in the Irish market look to have transferred over to the Contractor to provide security of performance and price.

Multi-contractor co-operation: In multi-contractor projects, Sub-Clause 4.6 (Co-operation) of the FIDIC Yellow Book is also commonly amended and expanded upon to provide that a Contractor will cooperate with and coordinate its design and construction work with other contractors and the Engineer. The use of interface agreements in Ireland has decreased and these are now rarely used. To mitigate the risks involved in large projects that involve multiple contractors, the Employer looks to expand on the cooperation provisions included in Sub-Clause 4.6. The amendments require the Contractor to interface and integrate with the works of other contractors to ensure timely, efficient and cost-effective completion of the various elements of its own work and that of other contractors on Site so that each contractor can comply with the programme.

IP licence and indemnity: Sub-Clause 17.5 is usually amended to provide the granting of a non-exclusive, royalty-free, transferable licence to the Employer in relation to the Contractor's Documents required for the operation of the Works. A reciprocal licence in relation to the Employer's documents is also typically given to the Contractor. The IP indemnity included in Sub-Clause 17.5 is also carved out from the consequential loss limit on liability, ensuring the Contractor is responsible for any loss of profit or consequential loss arising as a result of a breach of IP rights.

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

Yes, an Employer is required to give a notice of the claim detailing the particulars of the claim, including the clause or other basis of the claim, and include substantiation of the amount and/or extension to which the Employer considers itself to be entitled in connection with the Contract. The clause is routinely amended to note the Employer's failure to provide timely notice does not constitute a waiver of any of the Employer's rights to pursue such claim, and the Employer (under the 1999 suite of FIDIC contracts) is not subject to any time requirements on when it may bring a claim against the Contractor. In Ireland, an additional set-off provision is usually included in the amendments to the General Conditions to provide a general right of set-off in favour of the favour of the Employer, over and above the set-off provisions included in Sub-Clause 2.5.

7. Does your jurisdiction treat Sub-Clause 20.2.1 of the 2017 suite of FIDIC contracts as a condition precedent to Employer and Contractor claims?

The 2017 suite of FIDIC contracts has not been widely adopted in Ireland and we regularly see developers continuing to rely on the 1999 suite of FIDIC contracts. Where the 2017 suite of FIDIC contracts are adopted, we have seen Sub-Clause 20.2.1 amended so the time bar provision in this clause only applies to the Contractor, bringing the pre-conditions to an Employer's claim in line with the position in the 1999 suite of FIDIC contracts. In some instances, no time limits apply to an Employer claim; in other instances, we have seen the Employer amend the provisions to provide for a longer time period for bringing claims. There would appear to be an unwillingness in Ireland to adopt the approach included in the 2017 suite of FIDIC contracts, which sought to introduce reciprocity in the obligations of each party in relation to claims.

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

Yes, the Contractor is required to comply with the requirements of Sub-Clause 20.1 where it looks to bring a claim for additional time and/or money (not including Variations). Where the Contractor does not comply with these provisions in their entirety, the Contractor has no contractual right to adjustment of the Time for Completion or the Contract Price. Failure by the Contractor to adhere strictly to the time limits specified within Sub-Clause 20.1 or to comply with any of the provisions of this sub-clause will invalidate any contractual claims by the Contractor for an adjustment to the Time for Completion or the Contract Price.

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

No, the provisions of Sub-Clauses 13.2 and 13.3 are applied where a Contractor looks to make a claim for a Variation and the provisions of Sub-Clause 20.1 are not applied in respect of the Variation process. In some instances, Employers may include a prescribed time period for the submission of Variation proposals as a Particular Conditions amendment to Sub-Clause 13.3.

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

The dispute resolutions provisions in Sub-Clauses 20.2 to 20.8 are regularly amended in Ireland to remove the use of dispute boards in the FIDIC suite of contracts. In Ireland, the dispute provisions are typically amended to provide for a tiered dispute process which usually provides for internal escalation, conciliation and arbitration with allocation also provided for statutory adjudication. Alternatively, some Employers look to refer disputes to the Courts of Ireland rather than arbitration, as disputes of more than €1m can be referred to the Commercial Court. Claims that are submitted to the Commercial Court benefit from a case management system that can in some instances prove to be more expeditious than an arbitration process.

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

Arbitration is frequently used as the final stage for dispute resolution for construction projects in Ireland where the Employer has not opted to provide for disputes to be referred to the Courts of Ireland for final determination. Arbitration in Ireland will be governed by the Irish Arbitration Act of 2010, which gives the force of law to the UNCITRAL Model Law on Commercial Arbitration. Employers in Ireland look to also incorporate the Institute of Engineers Ireland Arbitration Procedure 2011, or in some instances, large multijurisdictional contractors may also look to incorporate the ICC Arbitration Rules. The seat of arbitration is typically Dublin. Before Brexit, some large multijurisdictional contractors would look for the seat of arbitration to be in London, but this request has dwindled since the United Kingdom exited the European Union.

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

From our searches, there are no noted cases in the Irish courts in relation to the interpretation of FIDIC contracts.

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

While not a case involving a FIDIC contract, *Law Society of Ireland v Motor Insurers' Bureau of Ireland*[2] is an important judgment to note in respect of the rules on contract interpretation in Ireland. The judgment delivered by the Supreme Court of Ireland marked a significant shift in emphasis in the law of contract interpretation in Ireland. The judgment retreated from a strictly literal approach, and instead placed considerable emphasis on the importance of understanding 'the background, the context, the knowledge shared between the parties, and the purpose for which the contract was being made' when interpreting a contract. The Supreme Court cautioned against adopting an overly literal approach that puts emphasis on the natural and ordinary meaning of the words regardless of the possibly detrimental commercial consequences, stating that 'this approach elevates the

ordinary meaning of the words to a position which is not perhaps entirely merited'. By adopting a decidedly contextual approach to contract interpretation, the Supreme Court has held that Irish law now requires full account to be taken of the relevant factual background and commercial purpose when interpreting a contract. Interpretation is to be given to the contract as a whole and in its entire context. This is particularly important when considered in the context of the projects in which FIDIC contracts are used and where relevance is given to the factual background and the commercial purpose of the contract.

Another important aspect to note that is specific to Ireland and that applies to liability in multiparty claims is the Civil Liability Act 1961. Under this Act, where two parties are responsible for the same damage, sections 11 to 14 entitle a plaintiff to recover a separate judgment for the whole amount of its damages against each concurrent wrongdoer, provided each contributed to causation. The key feature in establishing whether the parties are concurrent wrongdoers is that the wrong of each party must lead to one injury to the plaintiff. This may be because the wrongdoers have acted in concert to cause a single injury or where the independent wrongs of separate wrongdoers have led to a single injury to the plaintiff. The net effect of sections 11 to 14 of the Act is that a plaintiff is entitled to recover separate judgments for the whole amount against each concurrent wrongdoer: that is, even where there is an apportionment of liability as between concurrent wrongdoers, one wrongdoer can bear the full responsibility. This is colloquially known as the '1 per cent rule'. Under this rule, a plaintiff can elect to recover the total of their judgment against any named defendant(s), even if they are only liable for 1 per cent of the damage caused. The effect of these provisions is most clearly seen where one of the concurrent wrongdoers is insolvent. In this situation, the solvent co-defendants (who are also concurrent wrongdoers) are liable for the entirety of the damages. 'Net contribution clauses' are intended to negate the effects of the Act by limiting a party's liability to such portion of any loss as they ought reasonably to pay, having regard to that party's responsibility for loss and damage suffered as a result of the occurrence. However there is, as of yet, no specific Irish authority dealing with the effectiveness of a net contribution clause, and its impact on the Civil Liability Act 1961.

Notes

1 Jack Horgan-Jones and David Labanyi, 'Contractors on major road projects sought €850m over agreed prices' (*The Irish Times* 6 April 2021), see www.irishtimes.com/news/ireland/irish-news/contractors-on-major-road-projects-sought-850m-over-agreed-prices-1.4529605, accessed 23 May 2022.

2 [2017] IESC 31.

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FIDIC around the world – Pakistan

Khawaja Hamid Mushtaq

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

1. What is your jurisdiction?
Pakistan.

2. Are the FIDIC forms of contract used for projects constructed in your jurisdiction? If yes, which of the FIDIC forms are used, and for what types of projects?
FIDIC forms are commonly used in all types of infrastructure projects in Pakistan, both in the public and private sectors.

With regards to construction projects financed by the public sector, it is mandatory for public sector organisations under the relevant regulations to use FIDIC Standard Forms. In this sense, the Pakistan Engineering Council (PEC), the construction industry's regulator, has prepared Standard Bidding Documents including the standard particular conditions of the 1987 FIDIC Red Book, and published them on its website along with the FIDIC Yellow and Silver Books.

In some China Pakistan Economic Corridor Projects (CPEC) road and infrastructure projects, the FIDIC 1999 Silver Book has been used. The FIDIC 1999 Yellow Book is used mostly in the private sector.

Given recent developments, seminars and meetings at PEC level, it is highly likely that, in the near future, the 2017 FIDIC Rainbow Suite will be adopted in the public sector instead of the 1987 FIDIC Suite.

In addition, almost all the multilateral development banks (MDBs) have obtained exclusive licences to use FIDIC Standard Forms 2017. Therefore, in the future it is anticipated that FIDIC Standard Forms 2017 will be used on MDB-sponsored or aided projects.

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

Urdu is the national language of Pakistan. FIDIC Standard Forms in Urdu are not produced by FIDIC and no official translations of FIDIC Standard Forms are available in the Urdu language.

In the local construction industry, the FIDIC standard forms in English are commonly used.

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

Pakistani law embraces the rights of parties to choose the terms and conditions of their contracts as long as the conditions are not illegal or in contradiction to public policy.

As an example, under Sub-Clause 11.11 of the 1999 FIDIC Silver Book, the Employer is entitled to sell the Contractor's equipment, surplus material and wreckage in the event of the Contractor's failure to remove the same from the Site, after receiving the performance certificate.

Section 172 of the Contract Act 1872 defines 'pledge' as: 'The bailment of goods as security for payment of a debt or performance of a promise.' Similarly, under section 176, the pawnee has the right to sell the goods pledged.

FIDIC Sub-Clause 11.11 does not satisfy this requirement until the Contractor has expressly pledged its Goods and Equipment for such purpose. Thus, the Employer may not be able to sell such equipment through a contractual provision alone. It is pertinent to mention that construction machinery such as cranes, excavators, loaders, dump trucks, forklifts and road rollers requires registration under relevant motor vehicle laws.

In general, FIDIC contracts are generally operative in Pakistan without many amendments.

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

As already stated, the 1987 FIDIC Red Book is the standard form of choice on most public sector projects. As per PEC-approved bidding documents, some amendments we regularly see in Pakistan that are reproduced from PEC bidding documents are:

1. Sub-Clause 2.1 (Engineer Duty and Authority). The Engineer requires specific approval of the Employer in the following matters:
   - (i) consenting to the sub-letting of any part of the Works under Sub-Clause 4.1 (Subcontracting).
   - (ii) certifying additional cost determined under Sub-Clause 12.2 (Not Foreseeable Physical Obstructions or Conditions);
   - (iii) any action under Clause 10 'Performance Security') and Clauses 21, 23, 24 and 25 (Insurance of sorts);
   - (iv) any action under Clause 40 (Suspension);
   - (v) any action under Clause 44 (Extension of Time for Completion);
   - (vi) any action under Clause 47 (Liquidated Damages for Delay) or Payment of Bonus for Early Completion of Works (PCC Sub-Clause 47.3);
   - (vii) issuance of Taking Over Certificate under Clause 48;
   - (viii) issuing a Variation Order under Clause 51, except:
     - a) in an emergency situation, as stated below, or
     - b) if such variation would increase the Contract Price by less than the amount stated in Appendix A to Bid;
   - (ix) fixing rates or prices under Clause 52;
   - (x) extra payment as a result of a Contractor's claims under Clause 53;
   - (xi) release of Retention Money to the Contractor under Sub-Clause 60.3 (Payment of Retention Money);
   - (xii) issuance of the Final Payment Certificate under Sub-Clause 60.8;
   - (xiii) issuance of Defect Liability Certificate under Sub-Clause 62.1; and
   - (xiv) any change in the ratios of contract currency proportions and payments thereof under Clause 72 (Currency and Rate of Exchange).
2. Bonus for early completion of Works, Sub-Clause 47.3.
3. Secured advance on materials, Sub-Clause 60.11.
4. Financial Assistance to the Contractor, Sub-Clause 60.11.
5. Default of a Contractor under Sub-Clause 63.1 is to be notified to the PEC for punitive action under the Construction and Operation of Engineering Works Bylaws 1987.
6. Ad hoc arbitration under Sub-Clause 67.3, under the Arbitration Act 1940 in Pakistan.
7. Integrity Pacts under Sub-Clause 74.1. The Employer usually provides a template of the Integrity Pact in the bidding document, stating that the Contractor shall not be involved in any illegal and corrupt practices, including bribery and commission etc. If the Contractor is found in breach of this Integrity Pact, the Employer can terminate the Contract.
8. Termination for Employer's convenience under Sub-Clause 75.1.

9. Joint and several liability of joint ventures under Sub-Clause 77.1.

In public sector projects, the FIDIC Yellow Book or Silver Book standard forms also contain some of these amendments.

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

Yes, the Employer must comply with the notice requirements under Sub-Clause 2.5. It has been observed that the parties tend to retain Sub-Clause 2.5 in their contracts without any amendment.

I have frequently observed that dispute adjudication boards (DABs) have not hesitated at all in application of this clause, and have rejected Employer claims that failed to give notice under Sub-Clause 2.5.

The main reason for the applicability of this Sub-Clause is that Pakistani law embraces the right of parties to set any condition of the Contract as long as it is not illegal.

In the case of *Ovex Technologies (Private) Limited Vs PCM PK (Private) Limited* [PLD 2020 Islamabad 52], the observation of Honourable Justice Miangul Hassan Aurangzeb in the Islamabad High Court sums up the position of Pakistani law in relation to all such questions:

> '27 [...] It is for the parties to make their own contract and not for the court to make one for them. A court is only to interpret the contract...'

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

Yes, the procedure set out in Sub-Clause 20.1 can be seen as a condition precedent for Contractor claims for additional time and/or money.

I have experienced many DABs religiously applying the procedure set out in Sub-Clause 20.1. Therefore, the Contractor needs to be vigilant in serving timely notice of its claim under Sub-Clause 20.1. Otherwise it may risk its entitlement for additional time and money.

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

Yes. The law does not distinguish between the requirements of valid notice under Sub-Clause 20.1 for Contractor claim procedures for additional time and/or money arising out of Variations or otherwise.

As explained, the courts restrict themselves to the interpretation of contracts. Therefore, if the parties have set Sub-Clause 20.1 as a condition precedent for contract claims, the courts will interpret it in the same manner and such a condition must be complied with.

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

Yes. In Pakistan, DABs are used on construction contracts as an interim dispute resolution mechanism created by the parties. It is purely contractual and, unlike arbitration, there is no regulation behind it. Therefore, the decision of a DAB is not submitted to the court for enforcement purposes.

In most cases, the decisions of DABs are challenged in arbitration by the parties.

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

Yes. Arbitration is commonly used as a final stage for dispute resolution in Pakistan both in the public and private sectors. Once the arbitral tribunal renders an award, it is filed in the court under section 14 (2) of the Arbitration Act 1940 to make the award rule of the court.

Ad hoc arbitration is the most common in construction projects in Pakistan. However, in recent years, we have seen parties opting for institutional arbitration. The most used institution is the International Chamber of Commerce (ICC), followed by the London Court of International Arbitration (LCIA) and the Singapore International Arbitration Centre (SIAC).

We have also seen a couple of International Centre for Settlement of Investment Disputes (ICSID) arbitrations on construction projects in recent years.

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

Unlike many jurisdictions, disputes on construction projects in Pakistan usually don't end up in court.

In both private and public sectors, the contracts generally have a well-structured and tiered alternate dispute resolution (ADR) mechanism clause. Parties tend to follow this tiered mechanism and attempt to resolve their dispute by arbitration or other alternative methods.

The court usually refers any contract where there is a valid arbitration clause available, and where one party is willing to commence arbitration, to arbitration under section 34 of the Arbitration Act 1940.

There are some areas where the law has been settled over time:

- **Liquidated damages:** Pakistani law does not distinguish between penalty and liquidated damages. The case law developed under section 74 of the Contract Act 1872 puts an additional responsibility on the claimant to prove the loss. Mere stipulation of liquidated damages in the contract will not be sufficient.

In *Investment Corporation of Pakistan v Sheikhupura Textile Mills* [2004 CLD 394], the Sind High Court held: 'By now, it is well-settled that liquidated damages can be recovered only if the party claiming the same can prove the same.'

- **Governing law:** parties are free to choose any law governing their contract, and courts have upheld the choice of the parties in this regard. However, it has been observed in public sector contracts, that the law governing the contract is Pakistani law and this position is generally non-negotiable.

12. Is there anything else specific to your jurisdiction and relevant to the use of FIDIC on projects being constructed?
In Pakistan, FIDIC forms on infrastructure projects are very popular. The local industry is very familiar with the Red, Yellow and Silver Books. The industry regulator PEC also believes that FIDIC forms provide a good ground for the stakeholders due to their balanced risk allocation. At the moment, we don't see any competitor to FIDIC forms in the local market.

Due to a well-structured dispute resolution mechanism, disputes are usually settled through ADR mechanisms and not in courts.

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FIDIC around the world – India

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

1. What is your jurisdiction?
India.

2. Are the FIDIC forms of contract used for projects constructed in your jurisdiction? If yes, which of the FIDIC forms are used, and for what types of projects?
The FIDIC suite of contracts are prevalent in EPC and large-scale projects in India. One of the widely used FIDIC forms of contract in India is the plant and design/build contract. The design and construct contracts prevalent in India take their inspiration from the FIDIC Conditions of Contract for plant and design/build: that is, the FIDIC Yellow Book.

3. Does FIDIC produce its forms of contract in the language of your jurisdiction? If no, what language do you use?
In India, English is the accepted language. Hence, English language versions of FIDIC forms of contracts are used in India.

4. Are any amendments required in order for the FIDIC Conditions of Contract to be operative in your jurisdiction? If yes, what amendments are required?
FIDIC contracts, by their very nature, adhere to the essential elements of a valid contract as per the provisions of the Indian Contract Act 1872. Hence, no amendments are required to make them consistent with the applicable laws of India.

Nonetheless, the construction sector in India is highly regulated and monitored at various levels through numerous legislations and by-laws. Laws governing construction activities are enacted by both Parliament and state legislatures due to the federal structure envisaged under Schedule VII of the Constitution of India. Hence, as well as from the standard conditions of the contract, the parties, depending upon the nature of work, must comply with the relevant central/state legislation.

5. Are any amendments common in your jurisdiction, albeit not required, in order for the FIDIC Conditions of Contract to be operative in your jurisdiction? If yes, what (non-essential) amendments are common in your jurisdiction?
The FIDIC suite of contracts are comprehensive and adequately deal with the rights/obligations of the parties in India. Insofar as non-essential amendments are concerned, there are certain modifications that may be carried out by the parties to cater to the project/sector specifications.

The following conditions are desirable for consistency with applicable laws:
Performance guarantee: As a way of practice, construction contracts necessitate that a Contractor must furnish an unconditional performance bank guarantee to ensure that contractual obligations are fulfilled adequately and in a timely manner. This performance bank guarantee must be kept valid by the Contractor until completion of the defect liability period. In this regard, the FIDIC General Conditions provides that a Contractor shall obtain (at its cost) a performance security for proper performance, in the amount and currencies stated in the particular conditions, if the condition is specified in the contract.

Force majeure: A clause with respect to force majeure is usually made a part of infrastructure contracts. Force majeure has been defined as 'an event or effect that can be neither anticipated nor controlled'. This concept has been recognised under the doctrine of frustration of contracts as per section 56 of the Indian Contract Act 1872. Frustration of a contract discharges the parties of all underlying obligations. Hence, parties usually incorporate this clause in their contracts.

Suspension: Suspension clauses in a contract are quite similar to the provisions dealing with termination. A Contractor may suspend the execution of work due to an alleged breach of contract by the Employer. Similarly, an Employer may suspend payments owed to the Contractor on grounds of delay.

It would be difficult for either party to enforce a right to suspend in the absence of express provisions in the contract. Courts in India have frequently refused to enforce such a right. Thus, a suspension clause which adequately addresses the practical consequences of suspension of work is desirable in construction contracts.

Dispute resolution: Due to poor enforcement of the decisions of dispute adjudication boards (DABs) or dispute review boards (DRBs), the parties make provision for arbitration as a preferred mode for dispute resolution. Usually, clauses for ad hoc arbitration in accordance with the Arbitration and Conciliation Act 1996 are incorporated.

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

In India, freedom of contract is an essential for a valid contract. Hence, it is open for the parties to agree to notice conditions. However, it must be pointed out that, due to the prevalence of FIDIC standard forms of contract in India, the requirement of serving a notice as a precondition is usually retained in such contracts.

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

As stated, the issuance of a notice is a condition precedent for a Contractor to claim additional time or money, unless otherwise agreed. In India, the courts have consistently held that the parties are free to enter into a contract as per their specific requirements.

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

As stated, the parties are free to modify the clauses as per their specific requirements, subject to being in accordance with the applicable laws.

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

In India, dispute boards came into use after liberalisation, when they were mandatory for all projects financed by the World Bank with a value of more than US$50m. Their importance has again been revived and they are being employed in several large construction projects.

However, dispute boards are not an effective forum due to the lack of enforceability of dispute board decisions. The parties are supposed to promptly comply with the decision made by a dispute board. Therefore, to seek a strict enforcement of such contracts, the dispute is often referred to arbitration.

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

The Arbitration and Conciliation Act 1996 is the governing law of arbitration in India and is essentially based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law 1985 and Model Arbitration Rules 1976.

The Indian Arbitration Act provides ample flexibility to the parties to choose the venue (*lex loci*) and seat (*lex arbitri*) of the arbitration.

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

Even though the FIDIC suite of contracts has gained prevalence in India, there are no reported judgments that specifically deal with the FIDIC suite of contracts. However, the general view of the court rendered on the Indian Contract Act 1872 is applicable to the operation of the FIDIC suite of contracts as well.

Judgments often deal with the specific enforcement of a contract.

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

In recent years, the construction industry in India has witnessed astronomical growth. As of 2019, the construction industry is the second biggest industry in India after agriculture and employs nearly 50 million people in the country. While 42.39 per cent of the workforce in India were employed through agriculture in 2019, the other half was evenly distributed among other industries and services. The construction industry contributed over INR 2.7tn to Indian GDP in 2019, accounting for about 11 per cent of total GDP.

As a natural corollary, the reliance on standard forms of contracts such as FIDIC has increased. The convenience of using FIDIC forms of contract is due to the fact that the jurisprudence governing contracts is highly developed in India. The FIDIC suite of contracts are largely coherent with the Indian Contract Act 1872 and are therefore a reliable and predictable document for the parties to execute.

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INDIA

New parameters on public procurement and project management

Gagan Anand

Introduction

The Central Vigilance Commission (CVC), the Comptroller and Auditor General (CAG) of India and the National Institution for Transforming India (NITI Aayog),[1] in cooperation with the Ministry of Finance[2] (MoF), have opened the way to the reorganisation of procurement and project management in India.

India's infrastructure has always been sluggish in terms of cost and time overruns and delays, necessitating a review of procurement and project management methods. The CVC, CAG and the NITI Aayog examined various public procurement and project management procedures and rules, which were implemented by central public authorities, and recommended changes to strategies to address current and future public procurement challenges. The rules were developed under the guidance of the CVC after a thorough consultation process that included experts from a variety of public procurement and project management disciplines. Thereafter, on 29 October 2021, the Ministry of Finance issued the General Instructions on Procurement and Project Management (the Instructions). 'These instructions strive to bring novel standards for speedier, more efficient, and transparent project execution into the sphere of public procurement in India,' the Ministry stated.

For the government and its agencies, completing public projects on schedule, under budget and to a high standard has always been a concern and a difficulty. The importance of procedure and norms, as well as the incentives and disincentives they produce, should be carefully examined as the government seeks to accelerate economic development.

Sketch of the Instructions

Methods of procurement

For projects where quality characteristics are to be given weightage, the quality cum cost-based selection (QCBS) technique has been established as an alternative to the traditional L1 (lowest bidder) system. The Instructions allow procurement agencies to use QCBS if the procurement is 'claimed to be a quality focused procedure by the competent authority' and the projected value of the procurement is less than INR 100m. For international competitive bidding, QCBS is the favoured method. QCBS is used to pick bidders for transportation infrastructure projects, roads and other projects for non-consulting services[3] where the bidder possesses both technical abilities and is competent to improve the public–private partnership. As a result, when the competent authority declares the procurement as a 'quality-orientated procurement', this method of evaluating offers is favoured. QCBS, the least cost system and single source selection are the three ways of selecting consultancy bids now included in the General Financial Rules 2017 (GFR). This list now includes one more way: fixed budget-based selection (FBS), which can now be used to shortlist consultancy offers. In FBS, the cost of consulting services is indicated as a fixed budget in the tender document itself. It should be noted that Rule 192(iv) of the GFR allows non-financial characteristics to receive up to 80 per cent weighting in the purchase of consultancy services.

Preliminary project report (PPR) presentation

The purchasing entity may create a PPR in accordance with the Manual of Procurement of Works 2019 to determine the viability of a project, which may then be presented to the public authority for an overall assessment of the situation, viable choices and mitigation measures. A presentation to the head of the public authority may be made in the event of big projects. The transcript of the presentation's talks may be included in the detailed project report (DPR) and the tender documentation/project record.

Presentation of the DPR

Once a project has been approved by the public authority, a DPR shall be developed and delivered to the authority for projects over a certain threshold value, as established by the project executing agency (PEA). A presentation to the head of the public authority may be made in the event of very significant projects. This presentation will give the public authority an overview of the project's key elements, such as the general layout, project team composition, contractor obligations, key milestones and potential risks and mitigation strategies. The documentation/project record will include a record of the discussion that took place during the presentation.

Land availability and statutory permissions

The primary conditions for starting a project are the availability of land and the acquisition of essential clearances. Because it is not always practicable (or even prudent) to have the full land before awarding the contract, the Instructions state that a minimum amount of encumbrance-free property must be made available before the contract is awarded. In addition, public authorities and the PEAs should plan for and closely monitor the project's progress in acquiring the essential clearances.

Pre-tender activities

To avoid delays in implementation, the Instructions state that architectural and structural drawings must be completed before tenders are invited.

Tender documents

Tender documents serve as the foundation for the public procurement process and become part of the contract once the tender has been awarded. Given the importance of tender documents, the Instructions include provisions such as:

- The tender document's provisions/clauses should be clear to avoid ambiguity, potential cost and time overruns and quality compromises.
- Project milestones should be recognised in a sequential and optimal manner.
- General contract conditions should not be changed unless special contract conditions are specified.
- Customisation of eligibility criteria for bidders, commensurability of payment terms with work done, quality assurance plans and other quality assurance measures should be considered.

Project management

Another important factor is time, which the Instructions suggest should be used to migrate to IT-based solutions. They put the emphasis on electronic measurement books or other modalities to assure efficiency, transparency and superior outputs while carefully reviewing progress and keeping an eye on schedules.

Provision of payment of interest on delay in payment of contractors' bills should be made within 30 working days.

Finally, if the provision of payment of interest is not within the given timeline, then proper explanation must be given to the concerned officers.

Contracts for engineering, procurement and construction (EPC)

Because the execution framework in the tender documents is so important to the success of an EPC contract, the Instructions have clarified the following:

- contractor's payment milestones should promote smooth cash flow and job progress;
- the tender documents should only include: general arrangement drawings and architectural control parameters;
- contractor's submission of drawings and the competent authority's approval of those drawings (including penalties for non-adherence to timelines);
- technical specifications that allow the contractor to optimise the design; and
- important commercials such as the contractor's obligations, the parties' risk matrix, the latent defect liability period, the procedure for scope changes, liability limitations and damages, and so forth.

Arbitration and dispute resolution

The instructions also rule out litigation as the first resort in case of any dispute that arises in the implementation of projects. As litigation has unfavourable implications on the timelines and overall cost of the project, the Instructions direct officials to proceed with discussion, mediation and consultation before resorting to arbitration/litigation.

Conclusion

The Instructions cover all aspects of a public procurement/project cycle and prescribe best practices for addressing inefficiencies. They will undoubtedly improve India's public projects landscape if implemented with the same rigour and spirit. The Instructions will aid in the introduction of novel standards for project execution that are speedier, more efficient, and transparent in India's public procurement sector. They will enable executing agencies to make judgments in the public interest that are faster and more efficient.

Only the federal government and its departments are affected by the new Instructions. Hopefully, states will see the value of the rules and put them in place at the regional level as well. The states of India account for more than half of all public bids in the country; such initiatives will not only increase the quality of work being done, but will also set new standards for bidders to demonstrate potential project execution results. It would also contribute to the achievement of Digital India's[4] aim by simplifying and standardising the digitalisation of public procurement.

Notes

1 NITI Aayog, 'Measures to revive the Construction Sector', 6 September 2016.
2 Department of Expenditure, 'Office Memorandum: Insertion of Rule 227A in General Financial Rules (GFRs) 2017 – Arbitration Award', 29 October 2021.
3 'Non-consulting services' are defined as any subject matter of procurement (as distinguished from 'consultancy services') that involves physical and measurable deliverables/outcomes, where performance standards can be clearly identified and consistently applied, other than goods or works, except those incidental or consequential to the service, and includes maintenance, vehicle hiring, and outsourcing of building facilities.
4 See www.digitalindia.gov.in. Digital India is a flagship programme of the Indian government with a vision to transform India into a digitally empowered society and knowledge economy.

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MILAN ARBITRATION WEEK WEBINAR

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Construction claims when asserted as an investment

In collaboration with the International Construction Projects Committee of the IBA, Milan Arbitration Week hosted a webinar on *'Construction claims when asserted as an investment'* on 7 February 2022, during the week of its annual conference.

The speakers at the webinar were Pierre Tercier, emeritus professor of the University of Fribourg and honorary chairman of the ICC International Court of Arbitration; Troy Harris, associate professor of the University of Detroit Mercy School of Law; and Simon Hughes QC of Keating Chambers in London.

We share highlights of the speakers' presentations below.

Typical construction claims

Professor Pierre Tercier kicked off the webinar by providing a helpful introductory overview to typical construction claims.

In particular, Tercier identified the key actors/participants in construction disputes, including the employer – which may be a developer, a government or state entity or investor or end user – and the contractor or subcontractor engaged to perform the work, as well as banks/lenders which play a key role in financing construction projects. Although the typical construction arbitration dispute is between the employer and contractor, a variety of other types of disputes can arise between various participants. Tercier also explained common forms of contractual structures, including build-only, turnkey and construction management contracts.

He also looked at the typical construction claims that may be brought by either the contractor or the employer.

The most common contractor claims against the employer relate to requests for extensions of time or variation, loss and expense, non-payment by the employer, force majeure events or termination. To trigger these rights, the contractor must generally comply with any notice requirements, maintain adequate contemporaneous records and comply with production obligations.

Common employer claims are claims for delay or defects in the works. If a claim for delay is made, liquidated damages are usually the available recourse. The employer may also choose to terminate the contract, with the employer generally benefiting from contractual termination rights which are broader in scope than those of the contractor.

Tercier also considered the most common reasons for construction disputes, referring to a 2019 survey conducted by Queen Mary University of London and Pinsent Masons,[1] as well as a 2020 survey conducted by the global consultancy firm HKA.[2] While there are many causes for construction disputes, late performance and design issues have been reported as the most common causes for construction disputes. Poor contract management, poor contract drafting, changes in scope, incomplete design and deficiencies in workmanship have also been reported as causing a large number of disputes.

Lastly, Tercier said a word about the difficulties typical to construction disputes, including the technicalities of facts, variety of contractual provisions and governing laws at issue, and the variety of authorities competent to resolve the disputes.

Resolving construction disputes by commercial arbitration

In his presentation, Professor Troy Harris focused primarily on the pros and cons of resolving construction disputes by commercial arbitration as opposed to court litigation.

As to the pros of commercial arbitration, Harris considered the enforceability of awards, the neutrality of the arbitral forum, the choice of forum and party autonomy. The enforceability of arbitration awards is considered particularly crucial in jurisdictions such as the United States, which has no treaty with other jurisdictions for the enforceability of court judgments, whereas arbitral awards obtained in the US can be enforced in jurisdictions that are signatory to the New York Convention. The advantage of neutrality in arbitration is evident where international contractors operate in foreign markets with employers that may be well connected locally. The principle of party autonomy is another advantage in arbitration, as it permits a range of choices that allow parties to shape the process, subject only to minimal due process or natural justice restraints. The principle of party autonomy is significant to addressing many of the perceived disadvantages of international arbitration. As such, it is therefore arguable that the advantages outweigh the perceived disadvantages of arbitration, as the disadvantages can be anticipated and countered at the drafting stage.

However, one must also consider the cons of commercial arbitration, which Harris identified as: the lack of appellate review of the merits of awards; limited exchanges of information in arbitration; the difficulty of joining non-parties to the arbitration agreement; and the difficulty of consolidating related arbitrations.

There are concerns about the lack of appellate review in arbitration, as complex and

high-value disputes are at the mercy of the arbitrator's determination, without the potential of further appellate review on the merits. While such concerns may not arise in investment treaty arbitration, where annulment proceedings are available under arbitral/institutional rules, such as the International Centre for Settlement of Investment Disputes (ICSID) Rules, for the most part, it is considered that arbitration is final with limited grounds of appeal. Harris suggested that parties can, however, utilise party autonomy and tackle any such concerns at the contract drafting stage by permitting an appellate merit review. Harris made this suggestion with the caveat that an appellate arbitrator may not necessarily be in a better position to correct an erroneous award, and suggested that appointing qualified arbitrators may be the most effective means of preventing a bad award.

Another perceived disadvantage of arbitration is the limited exchange of information when compared to requirements under litigation. In particular, the US standards of discovery are considered highly limited. However, parties can again offset such concerns in the terms of the arbitration agreement. This is particularly key for construction disputes which are often very document intensive. Parties should consider their document production expectations when drafting their arbitration agreement, taking into account the type of documents each side is expected to maintain during the project life cycle and afterwards.

The difficulty of joining non-parties and consolidating multiple complex arbitrations, where the institutional arbitral rules do not make specific allowance for such situations, may also be a deterrent to choosing arbitration. This is particularly relevant in construction disputes, which typically involve multiple parties and multiple contracts. However, this concern can again be anticipated and addressed during contract drafting.

The best way to address the perceived disadvantages of arbitration and the concerns that may arise is by already considering the kind of disputes that are likely to arise when drafting the arbitration agreement.

Construction claims asserted as investment claims

In his presentation, Simon Hughes considered what happens when construction claims are asserted as investment claims, and examined the intersection between commercial claims and bilateral investment treaties (BIT) claims through the lenses of specific case law.

In considering a treaty claim, the threshold questions to be determined are whether: (1) the contractor qualifies as an 'investor' of the home state and therefore benefits from the host state's obligation to protect investors of the home state; (2) the BIT in question confers upon the contractor, as an investor of the home state, protection such that contravention by the host state gives rise to a right of action; and (3) the basis on which the investment dispute is to be resolved as provided in the relevant BIT.

The protections accorded an investor in a BIT are different from the interests protected under commercial contracts. A BIT will routinely provide that the host state will not treat investors or their investment less favourably than the host state's own investors – the National Treatment Provision – or those of any third country – the Most Favoured Nation Provision.

However, questions have been asked on whether construction contracts can be regarded as 'investments' for the purposes of treaty claims. In the seminal decision of *Salini v Morocco* [ICSID Case No ARB/00/4], the tribunal considered this question and developed indicators in identifying a sufficient 'investment' for the purposes of a treaty claim. The tests laid down are: (1) contribution: whether the contractor is making a contribution to the host state; (2) duration of the contribution: eg the project in question having been implemented over a certain duration; and (3) risk: whether the contractor has taken on operational risk in the host state.

Based on the test laid out, Hughes observed that construction contracts may qualify as an investment for purposes of bringing a treaty-based claim. However, to successfully advance 'construction claims' as an investment, great care must be taken to ensure that claims and remedies are laser-focused on the language of the BIT (ie, the specific protections afforded). This was illustrated in *Vivendi v Argentina* [ICSID Case No ARB/97/3], where the tribunal held that a treaty cause of action is not the same as a contractual cause of action; conduct contrary to the relevant treaty standards must have occurred. Therefore, care should be taken in presenting treaty claims, as the fundamental basis of the claim is the decisive indicator in determining the tribunal's jurisdiction in an investment dispute.

Notes

1 Queen Mary University of London and Pinsent Masons, *International Arbitration Survey – Driving Efficiency in International Construction Disputes* (2019).

2 HKA, *CRUX Insight, Engineering and Construction: A Regional Analysis of Causation* (2020).

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FIDIC TASK GROUP 17

Collaboration as a method to develop a collaborative contract – a sneak peak of how Task Group 17 of FIDIC works together

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Introduction

Report after report indicates that construction projects are becoming increasingly large and complex. Projects are now being delivered in rapidly changing environments – technological, social, political and environmental. A broad range of innovative solutions have been employed to help respond to these developments. One of these solutions is the use of collaborative contract forms. In several jurisdictions these contract forms are already regularly used, but there is an emerging call to boost their usage on an international scale. The International Federation of Consulting Engineers (FIDIC) is well known for its internationally recognised and globally used suite of contracts. In 2021 it established Task Group 17 (Collaborative Contracts) to prepare a collaborative contract form as an addition to this suite. Obviously, for lawyers the content of such a contract will be particularly interesting.

It is also interesting to gain insight into the process being used to develop such a contract: a collaborative process that has features that can be used by construction lawyers everywhere.

Over the past few decades, the international construction industry has witnessed the emergence of collaborative forms of contract as a procurement model. Countries such as Australia, the Netherlands, the United Kingdom and the United States have developed contract solutions that aim to combat adversarial and dispute-prone attitudes on construction projects – attitudes that can give rise to disputes and failing projects. Collaborative contract forms are designed to deliver long-term value and promote win-win outcomes through aligned purpose, continuous dialogue, good faith and cooperative attitudes, early warnings, risk and opportunity sharing, early involvement of the supply chain and collaborative targets. Collaborative forms of contract are categorised by users as relational contracts (as opposed to transactional) – the contracts provide a structure and incentives that support the parties working together to deliver complex, multiparty and high-risk scenario projects.

In 2020, the FIDIC Board approved an initiative by the FIDIC Contracts Committee to define and develop a form of collaborative contract (or contracts) that would best complement the existing FIDIC suite of contracts, especially as these contracts already include collaborative elements. The selection process of Task Group members was done in a thorough manner, where potential members were identified, followed by a series of interviews. The FIDIC Contracts Committee, which overlooks this Task Group 17, knew that the future members of this Task Group would need to reflect a broad range of knowledge and experience, would not be well known to each other and would have a considerable task ahead. Finding Task Group members meant looking for people who could be team players, would be able to build constructive debate across their broad experiences and would be able to support the project over the long term. Every prospective member was asked to stop and really think about whether they could make the commitment to the project. This already shows similarities to how innovative procurement processes are being set up to find advisers, contractors and suppliers to deal with complex projects.

This selection process resulted in the formation of Task Group 17 in 2021. It consists of ten professionals active in the construction industry. The background of the members is diverse: technical, legal, project management, working for employers and contractors, academic, as well as independent consultants, with and without experience of collaborative contracts and based in a range of jurisdictions that is wide enough to obtain global perspectives (albeit limited to a certain range of time differences to allow for all members to attend all calls).

This was one of the challenges identified right at the start by the Task Group: the members do not (or hardly) know each other, nor do they know each other's views and cultural or professional backgrounds. Yet, the Task Group has a task that will help the construction industry: to prepare one or more collaborative contracts that will benefit the international/global construction industry. So the Task Group needs to make this a success.

To that end, the very first priority of the Task Group was to agree what it wanted to achieve and how the members wanted to work together.

The principles agreed by the Task Group, and around which all of its work is orientated, are:

- We can have an impact the market for the generations to come.
- How we work must resonate how we feel parties on construction projects should work.
- Applying collaborative principles when working together:
  - act in good faith;
  - communicate and keep each other updated;
  - act proactively, transparently and flexibly;
  - be focused on good collaboration and the goals of Task Group 17;
  - dare to raise discussions and concerns, and settle these in a professional manner; and

  - dare to flag your own and others' (potential) mistakes and pitfalls, and actively seek and help with solutions.
- We, as a team, can create the new standard(s) on collaborative contracting.
- We all need to have an open mind.
- 360-degree view of the relevant laws and practices across the globe .
- Stay away from too domestic-centric approaches.
- Dare to question.
- No preconceptions.
- No bias. Re any precedents, earlier approaches, etc: it is OK to share for inspiration, but it is not OK to copy/replicate (ie, no 'putting an international stamp on a national precedent').
- No promises towards third parties.
- We will start from an empty piece of paper.
- We will all be involved and have our voice heard.
- Principle: consensus – voting is the absolute last resort.

During each meeting of the Task Group these principles are emphasised, and are reflected upon during discussions.

As a result, the Task Group has observed during the execution of its own tasks that (especially in an international context):

- It is important to understand that language and labels can have an impact on how suggestions are understood or perceived. The person who hears a certain word or concept might have preconceived notions regarding what that word or concept means.
- Working from first principles means the members can tackle preconceived notions, orientate conversations more constructively, overcome any implied assumptions or biases and focus on the goals of the project.
- The diversity of perspectives brought out through constructive debates supports deep analysis and original thinking.
- A contract is more than just a legal tool, it is a project management tool. This is one of the reasons why it is critical to have engineers, project managers and other professionals with direct experience delivering projects at the core of the problem-solving team.
- Two heads are better than one. When dealing with complex projects, it is always beneficial to engage the wisdom of the crowd (as the Task Group has done in early 2022 by circulating a survey).

At the time of writing this article, the Task Group has made considerable progress towards its goals. Given that the collaborative approach is working for this Task Group, we hope that this experience can provide inspiration for the lawyers within this IBA group who are having to design their own approach to drafting construction contracts. Collaboration processes can be built in everywhere: they are not just for the project delivery team.

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Geotechnical Baseline Reports in the FIDIC Emerald Book – a fair allocation of ground risks?

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Construction projects such as transport infrastructures or buildings are built on or in the ground, requiring adequate characterisation of subsurface conditions, design of temporary and permanent systems, and appropriate means and methods for construction. Adverse ground conditions can have a significant impact on these construction projects. Addressing the impact might require complex technical solutions and lead to delays. They can also lead to a rise in onerous claims and disputes between designers, contractors, owners and occasionally third parties, such as neighbouring property owners.

Ground-related delays are frequent and costly. Chapman[1] (2012) estimates that

17 to 20 per cent of projects are delayed due to ground problems. These problems relate to the inherent uncertainty of the geological and geotechnical conditions, and the behaviour of the ground during construction. Field investigations are routinely carried out during the design stage to reduce the uncertainty related to the ground conditions. However, in many instances, it is not possible or economically feasible to implement the physical investigations due to site constraints such as geographical impediments or access restrictions.

Several attempts have been made to turn geological and geotechnical risks into a risk that forms part of the contract. The most common is to include specific contract clauses in the general conditions or general provisions of a contract. Even so, these clauses are often too general to represent a specific allocation of risks.[2]

The Geotechnical Baseline Report (GBR) was developed in the United States with the intent of avoiding and resolving ground-related disputes. A GBR is a 'contract document that sets out realistic contractual assumptions regarding the anticipated subsurface conditions'.[3]

During the past decade, the GBR has become gradually more common in construction contracts, especially for underground works. In May 2019, the International Tunnelling Association presented a new FIDIC standard form of contract for underground works (the Emerald Book). The Emerald Book includes the GBR as a compulsory contractual document, with the purpose, among other things, of setting out a risk-sharing mechanism.

This paper will outline the performance of the physical conditions clauses, assess the past performance of the GBR and will discuss the benefits and potential challenges of the GBRs in the Emerald Book.

Ground risk allocation in standard forms of contract

Most standard forms of contract prevalent in the construction industry include ground risk clauses that try to share the burden of unexpected adverse ground conditions among the parties.

The US Federal Acquisition Regulation allows for relief to the contractor for 'physical conditions which differ from those indicated in the contract or unknown physical conditions of an unusual nature, which differ materially from those ordinarily encountered'.[4]

Most standard forms of contract in the US recognise different site conditions (DSC) through clauses with similar wording. These clauses recognises two types of DSC, which are referred to as Type I and Type II (Type III involves hazardous and/or toxic waste but is not discussed in this paper). In the US, the Code of Federal Regulations (CFR) describes these conditions as:

> '(1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.'[5]

Most standard forms of contract prevalent in the construction industry include ground risk clauses that try to share the burden of unexpected adverse ground conditions among the parties.

Under Clause 12 of the Institute of Civil Engineering (ICE) Conditions of Contract,[6] the contractor is entitled to relief from the encountering of physical conditions or obstructions which could not 'reasonably have been foreseen by an experienced contractor'.

Similarly, Sub-Clause 4.12 of the FIDIC Red and Yellow Books provides that 'if the Contractor encounters physical conditions which the Contractor considers to be unforeseeable and that have an adverse effect on the progress of the Works', the contractor is entitled to an extension of time and payment of such cost. The Red and Yellow Books further provide that the 'Engineer may take account of any evidence of the physical conditions foreseen when submitting the tender', which is an invitation to state clearly what were the assumptions made.

Sub-Clause 4.12 of the FIDIC Silver Book 2017 places the risk entirely on the contractor. The validity of this clause in view of the applicable statutory law has been questioned in some civil law countries.

In Nigeria, Clause 64 (g) of the Nigerian General Conditions of Contract for the Procurement of Works (GCC 2011) defines a compensation event to include circumstances where:

> 'ground conditions are substantially more adverse than could reasonably have been

assumed before issuance of the Letter of Acceptance from the information issued to Tenderers (including the Site Investigation Reports), from information available publicly and from a visual inspection of the Site'.

Clause 64 (g) of the GCC 2011 further describes a compensation event to include instances where 'the Engineer gives an instruction for dealing with an unforeseen condition, caused by the Employer'.

Similarly, Clause 60 of the New Engineering Contract (NEC) 2005[7] classifies unexpected ground conditions as a compensation event provided that: 'an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for them'. In other words, the burden of proof relates not to the unforeseeability but to the probability of the ground conditions in question (hence the term 'small chance of occurring').

In summary, all the above clauses, with the exception of DSC Type I, demand the contractor to prove the unforeseeability of the different site or physical conditions.

The definition of unforeseeable conditions is open to interpretation and is a common source of disputes. The interpretation of foreseeability has been extensively discussed in literature.

The definition of unforeseeable conditions is open to interpretation and is a common source of disputes. The interpretation of foreseeability has been extensively discussed in literature. Cushman and Tortorello (1992) defined an unforeseen ground condition as a physical condition other than the weather, climate or another act of God discovered on or affecting the construction site that differs in some material respect from what was reasonably anticipated.[8] Abrahamson (1979) stated that:

> 'The mere fact that some risk of meeting the conditions was foreseeable can hardly be enough, since an experienced contractor will know that anything can happen, particularly in work underground. It is suggested that a claim is barred only if an experienced contractor could have foreseen a substantial risk.'[9]

Abrahamson's view is that a physical condition can be deemed as foreseeable only if an experienced contractor would consider the risk of it being encountered as 'substantial'. Furst et al (2012)[10] also criticised the foreseeability test, stating that 'determining whether a condition could reasonably have been foreseen habitually gives rise to the greatest difficulty of interpretation'. The probabilistic approach applied under the NEC has been described as being 'wide off the mark in practical terms'.[11]

Interpretation of foreseeability by the courts

The pertinent case law shows that courts apply varying interpretations regarding the question whether or not a physical condition can be considered foreseeable:

CJ Pearce & Co Ltd v Hereford Corporation[12]

The dispute related to the installation of a pipe which had been obstructed by a 100-year-old sewer at an 'approximate' location different to the one shown on a map supplied to the contractor. The witnesses for both parties agreed that the contractor should have expected to encounter the sewer 'approximately' 10–15 feet on either side of the specified line. The contract was based on an Institution of Civil Engineers (ICE) form. The court ruled that the uncertainty in the location of the sewer was foreseeable and that the contractor should have made provisions for this uncertainty. Therefore, the contractor was not entitled to extra payment on the basis of an adverse physical condition and artificial obstruction.

Compagnie Interafricaine De Travaux v South African Transport Services[13]

In this South African case, a long tunnel designed with a minimal amount of ground investigation was expected to have 2 per cent of length with poor rock mass quality. The design report stated the following warning: 'Variations from the predicted conditions may be encountered, or fault zones, due to circumstances which could not reasonably have been foreseen particularly in areas of geological contact or faults'. Furthermore, 'the interpretations given in no way absolve the Contractor from making his own assessment,

or fault zones, due to circumstances which could not reasonably have been foreseen'.

Clause 2(b) of the contract allowed for claims for 'adverse sub-surface conditions which in the opinion of the engineer could not reasonably have been foreseen'. During the construction, 35 per cent of the ground encountered was classified as very poor. The Appellate Division of the Supreme Court of South Africa held that, given the lack of information at tender and the vast difference, the contractor was entitled to compensation.[14]

The decision in *Compagnie*'s case implies that the foreseeability is not binary, in the sense of being a question of anticipating the presence or absence of a type of soil or ground. Rather, the foreseeability is the amount or extent in which the ground in question is expected to be encountered. The ruling also considered the difficulties faced by the contractor in making its own interpretation or investigation at the tender stage. The court held that:

> 'The Mountain report, together with the core samples, were virtually the only sources of scientific information available to Spie-Batignolles at the time of tender and it did not have the opportunity to make an independent investigation of its own.
>
> [The Contractor] should have made some allowance for the predictions being overly optimistic and thus built a safety margin into its tender [...] but it seems to me to be unlikely that any such allowance would have come anywhere near to bridging the gap between the Mountain predictions and actuality.'

Humber Oil Terminals Trustee Ltd v Harbour and General Works (Stevin) Ltd[15]

The dispute related to the collapse of a barge during lifting due to an unusual condition of the soil under stress. The contract was based on an ICE form. In this case, the unforeseeability was not related to the type of soil, which was as anticipated. Rather, the unforeseeability was related to the ground's behaviour when subjected to forces. The Court of Appeal held that the unusual behaviour of the ground was an unforeseeable physical condition as described in clause 12. This decision implies a wider interpretation of what constitutes a physical condition.

Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar[16]

In this case, the Gibraltar Government engaged Obrascon Huarte Lain (OHL) to design and construct a road close to the airport based on the FIDIC Yellow Book. The Government of Gibraltar subsequently terminated the contract due to the delays caused by the remediation works in the contaminated ground. The presence of contaminated ground as a result of military activities was known from the outset of the project. However, the site investigation showed that the contaminated ground was not distributed uniformly, and large areas were free of contamination. Mr Justice Akenhead, and later Lord Justice Jackson in the Court of Appeal, dismissed OHL's claim. In particular, Lord Justice Jackson held that an experienced contractor would make its own assessment of all available data, and that 'the contractor cannot simply accept someone else's interpretation of the data and say that is all that was foreseeable', and furthermore has to 'make provisions for a possible worst case scenario' as well as 'make a substantial financial allowance within the tendered price'.

an experienced contractor would make its own assessment of all available data, and that 'the contractor cannot simply accept someone else's interpretation of the data and say that is all that was foreseeable'

Lewis argues that one of the principles that flow from this case is that a contractor who appreciated a risk, in this case of contaminated land, would price its tender based on the worst-case scenario.[17]

Van Oord UK Ltd & Anor v Allseas UK Ltd[18]

The defendant, Allseas UK, was the principal contractor responsible for undertaking both offshore and onshore construction of gas pipelines in the Shetland Islands in Scotland. The claimant, Van Oord, was engaged as the sub-contractor to carry out the procurement, supply, construction, and installation of pipelines. The contract, with conditions matching FIDIC Red Book,[19] contained Article 12.2.3, which provided that:

> 'should contractor during the performance of the work encounter subsurface conditions different from those described in the contract documents, and which an experienced contractor could not reasonably have been expected to foresee [...] which substantially modifies the Scope of Work [...] Then the Contractor [...] shall be entitled to request a change order'.

During the excavation, more peat layers than expected were encountered. This delayed the completion of the works. The claim was rejected by Mr Justice, who stated that 'every experienced contractor knows that ground investigations can only be 100 per cent accurate in the precise locations in which they are carried out. It is for an experienced contractor to fill in the gaps and take an informed decision as to what the likely conditions would be overall'.

The judge confirmed the inherent uncertainty of ground investigations and ruled consistently with the *Obrascon* case that the contractor should have undertaken its own assessment of the ground conditions.

PBS Energo AS v Bester Generacion UK Ltd[20]

This recent case concerned the extent and depth of the presence of asbestos in the site for a biomass energy plant to be located in the UK under a FIDIC Silver Book contract. This form places the risk of unforeseen site conditions on the contractor. However, in this contract, Sub-Clause 17.3 regarding the employer's risks was amended to include: 'occurrence of any event of Unforeseeable Difficulties'.

In the same contract, unforeseeable difficulties were defined as: 'difficulties and cost, which the Contractor acting with Good Industry Practice could not reasonably foresee, especially events of Force Majeure, occurrence of Employer's Risks and any other unforeseeable difficulties as expressly stated in the Contract'.

The court questioned the clarity of the amended clause and also limited the relevance of the existing factual information by ruling that: 'It is not enough therefore for PBS to point to the discovery of asbestos in more granular detail than previous reports had suggested. It must show that the asbestos discovered was unforeseeable.'

Therefore, the court expected the contractor to conduct a risk assessment based on the existing data, similarly to the decision of the court in the *Obrascon* and *Van Oord* cases.

A careful study of the court decisions in the aforementioned cases confirms that the foreseeability of adverse ground conditions is interpreted based on any knowledge scientifically and technically available to the contractor at the time of tendering. Also, one may conclude that the contractor is expected to approach ground uncertainty by pricing the worst-case scenario in its tender.

Geotechnical Baseline Reports in the FIDIC Emerald Book

The FIDIC Emerald Book tries to resolve the ambiguity of the foreseeability by including the Geotechnical Baseline Report as part of the contract documentation. Sub-clause 4.12 of the Emerald Book defines unforeseeability as 'all subsurface physical conditions not addressed in the GBR'.

The GBR has been listed as the sixth most important document out of the 12 contract documents listed in clause 1.5 of the Emerald Book. The GBR is defined in the Emerald Book as the report

> 'that describes the subsurface physical conditions to serve as the basis for the execution of the Excavation and Lining Works, including design and construction methods, and the reaction of the ground to such methods'.

The *Guidance for the Preparation of Tender Documents* under the Emerald Book explicitly indicates that 'the GBR sets out the allocation of the risk between the parties for such subsurface physical conditions'.

The theoretical principles of the administration of the GBR are straightforward. The document sets a baseline with a range of contractually agreed (foreseeable) ground conditions. The risks relating to the conditions being different from those described in the GBR (unforeseeable) are allocated to the employer. In the so-called Schedule of Baselines, the contractor will include its estimation of the production rates for the ground types presented in the GBR. The risk of the production rates for a given set of baselined parameters is allocated to the contractor, since Sub-Clause 13.8 allows for an automatic adjustment of time for completion and costs for physical conditions which are outside the limits of the GBR.

The GBR is often specific to a construction method. In other words, a mechanised tunnel

and a drill-and-blast tunnel would have different GBRs (or a single GBR would need to explicitly develop both possibilities) for the same ground. Therefore, the employer's reference design should be detailed enough to propose a construction method that can be used to set out the baseline statements in the GBR, and also for the tenderers to prepare the Schedule of Baselines.

The complexity of preparing a Geotechnical Baseline Report

The GBR in infrastructure projects, first adopted in the 1970s in the US, has since been employed in numerous underground projects, especially in the US. Although the principles behind these documents are relatively simple, their application in practice is more complex.

Essex[21] noted in his guideline for the preparation of GBRs that lack of clarity, precision and conciseness in the baseline statements have constituted one of the most common problems regarding GBRs (eg, use of terms such as 'may' or 'frequent'). This type of language is, in part, due to the variability of the ground that leads to the use of fuzzy language when communicating uncertainties, thereby resulting in possible different interpretations and risk perceptions.[22] When appropriate, this language should be avoided in a GBR.

The authors of the Emerald Book acknowledge this problem and therefore recommend the use of 'quantitative terms [...] to the extent practicable'. However, quantification does not come without its own problems. The guideline in the Emerald Book suggests that 'parameters shall have the ability to be confirmed by the physical condition encountered to reduce ambiguity'. The Emerald Book equally suggests that 'the parameters contained in the GBR shall focus on ground behaviour or ground response rather than geologically oriented parameters'.

Another uncertainty relates to the assessment of the combined effect of several ground properties on the ground behaviour. For example, two variations in rock properties can have opposite effects (stronger and more fractured than in the GBR) in the excavation rate. This effect of combined ground properties on ground behaviour could result in disputes related to adjustments under Sub-Clause 13.8 of the Emerald Book.

Finally, Essex also highlights that many GBRs include conservative baselines to limit claims.[23] Hatem[24] too suggests that GBR authors frequently seek to protect themselves from potential professional liability implications. The Emerald Book guidance for GBRs acknowledges this issue by recommending that 'the Employer should avoid establishing an overly conservative [GBR]' and 'the Employer is advised to provide realistic statements'.

Discussion

Although it is too early to assess the performance of the GBR under the Emerald Book, previous experiences and the literature suggest that GBRs are not a panacea, given the complexity of the task and the problems which have been formulated in the literature. Consequently, if not properly drafted, the benefits of the GBR may be diminished.

the employers need to decide on a project-by-project basis whether the GBR is the appropriate strategy for the allocation of ground risks.

First, a GBR needs to be based on a thorough ground investigation as required by the *Guidance for the Preparation of Tender Documents*. According to the Emerald Book guidance, the GBR must include 'a sufficient range of information commensurate with the size, nature and complexities of the project' and 'interpretations based on experience and other sources of information'. However, major underground projects are sometimes located in remote areas where access to carry out a sufficient site investigation is difficult and costly. The employer should consider if other types of risk allocation are more adequate to that context.

Regarding the widespread use of fuzzy baseline statements, the technical authors should understand the purpose of the GBR and choose appropriate language.

As to the criticism of GBRs establishing conservative baselines, the employer must be informed of the consequences of 'optimistic' or 'conservative' interpretations. The baseline statements should be in line with the risk appetite of the employer, and its understanding of the cost a contractor would consider in its bid (eg, a likely higher bid price if the GBR describes overly pessimistic conditions compared to what the data supports).

A third issue relates to the difficulty of finding baseline parameters that can be measurable and monitored during construction, and that can also be linked to the design and the data obtained during the ground investigation stage. Even under optimal conditions, there is a risk of a disconnection between the parameters described in the GBR and the information and data that can be obtained during construction.

Some of the difficulties discussed in the paper can only be surmounted if the employer allocates sufficient resources, not only to investigate the ground, but to prepare a GBR by a multidisciplinary team (technical and commercial) that understands the implications of the document. Other difficulties are inherent to the preparation of the GBR and the employers need to decide on a project-by-project basis whether the GBR is the appropriate strategy for the allocation of ground risks.

Notes

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FEATURE ARTICLE

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NEC3 clause 63.1: a tale of necessary assumptions, the principles of sound construction and uncertain equity

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Background

The key provision governing the methodology for assessment of a contractor's monetary compensation under both NEC2 and NEC3 is clause 63.1 of the core clauses. Those who are familiar with both documents will doubtless be aware that the wording of this clause under the newer NEC3 differs significantly from that under NEC2: the distinction being that the NEC3 rendering of the clause has been augmented by an all-important final paragraph. Thus, as well as providing that the cost element of a compensation event is to be assessed on the basis of the defined cost for work already done and the defined cost of work not yet done, clause 63.1 of NEC3 also adds that the date dividing the work already done from the work not yet done is the date when the project manager *instructed or should have instructed* the contractor to submit quotations.

There is no doubt that this additional paragraph was introduced by a drafting committee motivated by the very best of intentions in seeking to strengthen a contractual framework whose primary objective from the outset has been the preservation of mutual trust and cooperation

between the contracting parties and, in particular, the avoidance of contractor and sub-contractor exploitation by employers and main contractors in a position of dominance. Indeed, the official guidance notes on NEC3[1] indicate that the shorter version of clause 63.1 contained in NEC2 had proven inadequate to impede the exploitation of contractors by employers through the dubious manipulation of the existing change management procedure. As a result, the new concluding paragraph was the committee's considered solution in countering a disturbing trend of retrospective cherry picking between quotation and final recorded costs.

Nevertheless, situations can, and frequently do, arise in which the final paragraph of clause 63.1 of NEC3 has the potential to produce the very sort of injustice for the employer that it was designed to eliminate for the contractor. Before dealing with this aspect further, we first need to understand the correct application of the final paragraph of clause 63.1 within the context of the compensation event procedures. For the sake of brevity, I will refer to the paragraph in question as '63.1 final paragraph' throughout this article.

Situations can, and frequently do, arise in which the final paragraph of clause 63.1 of NEC3 has the potential to produce the very sort of injustice for the employer that it was designed to eliminate for the contractor.

The definition of the 'switch date'[2] as the date when the project manager *instructed or should have instructed* the contractor to submit quotations for the relevant compensation event initially obscures the vision of the user more than it attempts to clear it. According to the wording in question, the 'switch date' can either be the date when the project manager instructs the contractor to submit a compensation event quotation, or the date when he should have done so. The problem is that, while it is customary in commercial contracts to qualify this choice with such words as 'whichever is the earlier', 'whichever is the later', or some other suitable linguistic compass enabling the parties to determine clearly which of the two options will be applicable to a given set of circumstances, no such qualifier exists under 61.3 final paragraph. The situation is then exacerbated further by the absence of any cross-referencing to those provisions of the contract dealing with how and when the project manager is to instruct quotations.

There are two instances in which the project manager is under an obligation to instruct the contractor to submit quotations. The first of these arises under clause 61.1 of the core clauses, which provides that the project manager is required to notify a compensation event and immediately instruct quotations for any of the events described in clauses 60.1(1), 60.1(4), 60.1(7), 60.1(8), 60.1(10) and 60.1(17). The second arises in terms of the project manager's obligation to instruct quotations under clause 61.4, by way of response to a valid compensation event notified by the contractor under clause 61.3.

Thereafter, so as not to leave a quotation open to allegations of invalidity due to the project manager having wrongfully defaulted on their notification obligations in either of the two instances prescribed in clauses 61.1 and 61.4, clause 61.4 incorporates a helpful deeming provision. This states that, subject to the contractor having issued the project manager with a written reminder within one week of having received no response, a further two weeks of silence by the project manager triggers a procedural mechanism whereby the project manager is deemed to have instructed quotations on the date of the written reminder.

The importance of notifying assumptions

Let us now consider a scenario based on a recent dispute. The contractor notifies a valid compensation event under clause 61.3 of NEC3 ECC. The project in question is highly complex from both a technical and logistical perspective, such that the project manager acts on a representation by the contractor that the project manager should withhold its instruction to quote until a clearer picture of the impact of the compensation event presents itself. This is based on an affirmation by the contractor that it is currently impossible to forecast the relevant defined cost, and that it would therefore be better for it to wait until actual costs are known before quoting.

Ultimately, the employer (in conjunction with the project manager) takes steps to ensure that the contractor's costs of the additional work arising from the compensation event are reduced by a margin far greater

than the contractor could have anticipated at the time when the project manager should have instructed quotations.

Shortly before completion of the additional work, the project manager instructs the contractor to submit quotations in respect of the compensation event in question. Pursuant to the second bullet of clause 63.1 and 63.1 final paragraph, the contractor then submits a quotation based on a forecast of defined cost as it would have been at the date when the project manager should have instructed quotations but for the informal agreement to postpone. In doing so, the contractor formulates their quotation as if they were looking at the situation on the day when the quotation should originally have been instructed, without taking into account any of the employer-motivated mitigating factors that have occurred in the meantime. Consequently, the contractor submits a quotation that is excessively high in comparison with their actual costs of completing the additional work, calculated by reference to the shorter schedule of cost components. The project manager rejects the quotation on the basis that the contractor's assessment is incorrect, and proceeds with their own assessment in accordance with clause 64.1. The contractor takes issue with the project manager's assessment and declares a dispute. The dispute is submitted to adjudication, and the adjudicator upholds the contractor's original quotation on the grounds that their calculation of the change to the prices is correct in accordance with clause 63.1 bullet 2 and 63.1 final paragraph.

In conclusion, the employer is required to pay an amount in excess of what justice and common sense would at first sight demand.

So how could the situation have been avoided? If the adjudicator's interpretation of 63.1 final paragraph is correct, yet the true impact of a compensation event is so uncertain that a project manager does not feel capable of determining the correctness of a quotation were it to be submitted shortly after the date when they should instruct quotations under the contract, what are they to do other than instruct and pray?

The answer to these questions is deceptively simple. Indeed, it lies in another clause of NEC3 chapter 6 that is, in my experience, generally ignored and, at best, misunderstood by most project managers. The provision in question is clause 61.6, which expressly provides for the project manager to furnish the contractor with assumptions upon which to base their quotation whenever defined cost is too uncertain to be forecast accurately, and further provides that these assumptions can be changed if later proven to be wrong.

Thus, within chapter 6 of NEC3 ECC, there exists a very straightforward and accessible mechanism for preventing the pain described in the above illustration. To guard the employer against financial loss of punitive proportions, all the project manager has to do is to reject the contractor's non-contractual, albeit understandable, plea for postponement, and to instruct them instead to base their quotation for forecast defined cost on conservative assumptions designed to confine the amount quoted within reasonable parameters. Ultimately, if the assumptions turn out to be wrong to the detriment of the contractor, and their actual costs are higher than forecast, the assumptions can be corrected, thereby triggering a further compensation event under clause 60.1(17) and preserving fairness. Alternatively, if the assumptions turn out to be wrong to the detriment of the employer, the contractor's costs being lower than expected, they can be corrected using the same procedure, and fairness is still preserved.

The contractor with assumptions upon which to base their quotation whenever defined cost is too uncertain to be forecast accurately, and further provides that these assumptions can be changed if later proven to be wrong.

In this context, the wording of clause 65.2 of NEC3 is also of the utmost significance. That clause provides as follows: 'The assessment of a compensation event is not revised if a forecast upon which it is based is shown by later recorded information to be wrong.'

In other words, as far as the letter of NEC3 is concerned, clause 61.6 is the only mechanism that enables the project manager to revise an assessment that turns out to be incorrect on the basis of an erroneous forecast, even where the relevant error could not have been detected at the time of quotation.

The importance of a correct understanding and application of the common law rules of construction

What happens in the same scenario if the project manager fails to utilise clause 61.6? Is the employer left with no option but to pay the excess or does common law provide him with an alternative solution?

Given that, in my own personal experience, the two bodies of law by which NEC3 contracts are most frequently governed are those of England and Wales on the one hand and South Africa on the other, we will examine this question from the perspective of the laws of both of these jurisdictions in turn.

The two bodies of law by which NEC3 contracts are most frequently governed are those of England and Wales on the one hand and South Africa on the other

The rules pertaining to the construction of contract terms as applied by the courts both in England and Wales, and in South Africa are broadly equivalent. For both jurisdictions, the following four principles apply:[3]

1. every contract is to be construed by reference to its object and the whole of its terms;
2. where words contained in a contract are disputed, they are to be construed by reference to their ordinary and natural meaning as it would be understood by a reasonable person having full cognisance of the unitary context in which they were written, including the purpose of the relevant provision and the circumstances in which the contract came into being;
3. the fact that a particular construction leads to an unreasonable result must be a relevant consideration, as follows:
   - the more unreasonable the result, the less likely it is that the parties could have intended it; and
   - if there are two possible constructions, the decision-maker is entitled to favour the construction which is consistent with business common sense; and
4. decision-makers must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. In the words of Lord Hoffmann, 'it clearly requires a strong case to persuade the court that something must have gone wrong with the language' in order to justify a meaning which departs from the words actually used.[4]

The correct construction of clause 63.1 final paragraph

The most significant and reliable indicator of the purpose of 63.1 final paragraph is the official statement to that effect articulated in the NEC3 Guidance Notes. The statement in question affirms that the absence of the paragraph would:

- give the project manager carte blanche to make a retrospective and selective choice between a quotation and the final recorded costs related to a compensation event; and
- thereby trigger the sort of 'adversarialism' and game playing that NEC3 is designed to eliminate.

Remembering that 61.3 final paragraph was absent from NEC2, and deducing from the commentary in the Guidance Notes that it was introduced into NEC3 to cure a perceived flaw with its predecessor form, it is impossible for us to establish the true unitary context of the paragraph without first taking a look at the relevant clauses of NEC2 chapter 6 and comparing them with their counterparts under NEC3.

When we recall that one of the key founding objectives of the NEC standard forms was to avoid injustice and adversarial behaviour on the part of the employer, it does not require too careful an examination of the wording of clauses 61.4 and 62.3 of NEC2 in to realise why the NEC3 drafting committee was reluctant to leave chapter 6 unmodified.

As the section of the Guidance Notes pertaining to clause 63.1 indicates, one of the favourite practices of employers and project managers during that era was to leave the determination of any extension of time and compensation entitlement arising from a scope variation or an employer risk event until after the relevant delay had ended and/or the resultant additional costs had been incurred. Accordingly, should the contractor be required to carry out additional work on the basis of the variation or event, the contractor would necessarily have to perform the entirety of such work at their own expense, and then face protracted argument as to the proper amount due with an employer to whom the benefit of the completed work had already accrued.

While strong in spirit and intent, the relevant wording of NEC2 is demonstrably weak in its capacity to prevent the type of abuse just described:

- The wording of clause 61.3 does not contain an express time bar, and the vagueness of the wording is such as to lure a busy and eager-to-please contractor into postponing notification of a compensation event until a time when the project manager would inevitably have the upper hand as described.
- One only has to read clause 64.1 of NEC2 through site-experienced eyes in order to note the absence of any efficient sanction, other than the prospect of a formal, costly and disruptive common law application for specific performance, against an unscrupulous project manager who simply decides to postpone the instruction of quotations until a far later time advantageous to the employer. Any hint of the corrective deeming provision introduced into the corresponding clause of NEC3 is noticeably absent.
- The existence in NEC2 of clauses 62.3 and 62.4, without any corresponding deeming provision of the kind included under clause 62.6 of NEC3, is but another opportunity for an unscrupulous project manager/employer to achieve an outcome similar to that referred to previously by deliberately delaying its reply to the contractor's quotation.

All of the aforementioned flaws have, to some extent, been addressed in NEC3 via the modifications made to the wording of clauses 61.3 and 61.4, and by the introduction of an additional clause in the form of 62.6. Nevertheless, for reasons which will become apparent, the NEC3 drafting committee also saw fit to add 63.1 final paragraph.

In this regard, we have already seen that there are two instances under the contract when the project manager 'should', or ought to, instruct the contractor to submit quotations: these being the circumstances provided for under clauses 61.1 and 61.3.

Remembering always the purpose of the wording stated in the Guidance Notes and the unitary context of the quotations to which the wording refers, based on an application of the ordinary and natural meaning test, the date referred to in 63.1 final paragraph as the 'date when the Project Manager instructed or should have instructed the Contractor to submit quotations' must surely be as follows:

- in the event that the project manager instructed the contractor to submit quotations strictly in accordance with whichever is applicable of clauses 61.1 and 61.4, *the date when they did so*; and
- in the event that the project manager failed to instruct the contractor to submit quotations strictly in accordance with whichever is applicable of clauses 61.1 and 61.4, *the date when they should have done so* under the wording of whichever of those clauses is applicable.

One of the key founding objectives of the NEC standard forms was to avoid injustice and adversarial behaviour on the part of the employer

Only on this interpretation will the contractor be placed in the position in terms of cost compensation that they would have been in but for the failure of the project manager to comply with their instruction obligations under clause 61.1 or 61.4, and on this interpretation alone will the abuse which the paragraph is expressly intended to prevent (according to the Guidance Notes) be avoided.

Based on the ordinary and natural meaning of the words in the unitary context, it would thus seem that the only reasonable construction of 63.1 final paragraph is that the 'switch date' is *whichever is the earlier* of the date when the project manager instructed quotations and the date when he should have instructed quotations in accordance with the contract.

A useful way of verifying this is to examine the outcome if the alternative construction is adopted and the 'switch date' is consequently interpreted to mean *whichever is the later* of the date when the project manager instructed quotations and the date when he should have instructed quotations in accordance with the contract. The result of this would be as follows:

- In terms of a compensation event that is notifiable under clause 61.1, there would be nothing to stop the project manager from taking advantage of a breach of their contractual obligation to instruct quotations simultaneously upon notification, and instead waiting until the entirety of the additional work was completed before issuing an instruction to quote, thereby placing all of the additional work into the category of 'work already done', and

triggering the very opportunity for game playing and 'adversarialism' that the wording of 63.1 final paragraph is allegedly designed to avoid.

- In terms of a compensation event notifiable under clause 61.3, the potential outcome would be exactly the same, albeit that the scope for an abusive unilateral postponement would be significantly reduced, assuming communication by the contractor of the reminder notification necessary to trigger the deemed instruction to submit quotations under clause 64.1.

That the construction favoured above is the correct one is further reinforced by the fact that clauses 61 and 62 of NEC3 contain suitable safeguards, the effect of which is that the 'whichever is earlier' interpretation would not be prejudicial to the employer in circumstances where the contract is properly administered.

Indeed, depending on the facts, the project manager has an array of alternatives open to them in order to ensure that they are ultimately only required to accept a quotation which is fair and accurate, from the option to provide the contractor with (modifiable) assumptions where reasonable forecasting is impossible (clause 61.6 of NEC3), to the option of requiring a revised quotation to be submitted in cases where the contractor is clearly in error (clause 62.3 bullet 1 of NEC3), to the option of the project manager making their own assessment of the compensation due in circumstances where the contractor has failed to act in accordance with certain key provisions of the contract (clause 62.3 bullet 4 of NEC3).

Trapped on the horns of a dilemma?

Nevertheless, as we have seen from the outline at the beginning of this paper, if we are to apply the 'whichever is earlier' construction to the specific scenario at issue, we surely arrive at an outcome which is as unjustly absurd as that which 63.1 final paragraph is, in normal circumstances, designed to prevent.

The reason for this is that the circumstances of the case scenario at hand are far from normal, due to the project manager and contractor having agreed a significant departure from the ordinary rules of engagement as prescribed by the contract, and having failed to reduce such agreement into writing as required by clause 12.3 of NEC3.

In view of the aforementioned, the only option left open to the employer would be a plea of estoppel.

Estoppel under English Law

In the context of a binding contract, to succeed in a defence of estoppel under English law, the employer would need to demonstrate the existence of the following five criteria:

1. There must be a pre-existing legal relationship between the parties.[5]
2. There must be a promise, or an assurance or representation in the nature of a promise, which is intended to affect the legal relationship between the parties, and which indicates that the promisor will not insist on their strict legal rights against the promisee (or which induces the promisee reasonably to believe that the promisor will not insist on their strict legal rights), to the extent that such rights arise out of the relevant legal relationship.[6]
3. The promise or representation must be 'clear' or 'unequivocal;[7] however, it need not be expressed, with an implied promise or representation being sufficient.[8] In terms of the degree of implication required, the promise must be sufficiently certain that it would have been backed by consideration in the event that a contract were being entered into.
4. The promisee's conduct must be influenced by the promise.
5. The promisee must alter their position in reliance on the promise, so that it would be inequitable for the promisor to act inconsistently with it.[9]

Case scenario viewed in light of the criteria under English law

Our case scenario certainly satisfies the requirements of criterion 1, as there is an existing contractual relationship between the parties.

Moving to criteria 2 and 3, matters become a little trickier. The best way to determine whether these criteria have been met is by reference to the facts in the leading English case of *Central London Property Trust Ltd v High Trees House Ltd* (*High Trees*).[10] In that case, a landlord made an oral promise to a tenant to reduce rent for a certain number of

years and the tenant relied on the promise. At the end of the period the landlord sued the tenant for the balance of the reduced payments. The Court of Appeal ruled that the landlord was estopped from doing so based on the tenant having placed reasonable reliance on the earlier contradictory promise made by the landlord.

In the present scenario there is no doubt that the contractor made an oral promise to the effect that, contrary to an express contractual obligation, the project manager would only have to instruct quotations for a compensation event once the actual additional costs arising from the event were known, rather than shortly after the event had happened and been notified. It seems evident that this promise was sufficiently certain to have been binding if backed by consideration.

With this in mind, and applying the principle articulated in *High Trees*, the evident outcome is that a project manager with knowledge of the contract would reasonably have relied on such a promise to conclude that, for the purposes of 63.1 final paragraph, the date when the project manager *should have* instructed quotations was to be the date when the additional costs of the event were known, rather than the early date required by the letter of clause 64.1 of the contract.

Hence criteria 2 and 3 are satisfied and, provided that criteria 4 and 5 are also satisfied, the contractor is therefore required to base its quotation on the actual prices of all the work that was done before the new promise-induced switch date.

In terms of criteria 4 and 5, it goes without saying that the project manager, as agent of the employer, was influenced by the above promise. Further, in reliance on the promise, the project manager sacrificed their opportunity to instruct, obtain and assess a quotation at an early stage, and the employer took steps to mitigate the actual costs arising from the compensation event. It would be therefore inequitable for the contractor to go back on their promise and base their eventual quotation on a strictly legal construction of clause 63.1.

Estoppel under South African law

To succeed in a defence of estoppel under South African law, the employer would need to demonstrate the existence of the following six criteria, which are essentially derived from the English law doctrine of estoppel by representation:[11]

1. There must be a representation by words or conduct.
2. The representation must have been made in such a manner that the representor would reasonably have expected the representee to rely on it.
3. The representation must be unequivocal.[12]
4. The representee's reliance on the representation must be reasonable.
5. The representee must have acted in reliance on the representation to its financial detriment.[13]
6. The representor must have been blameworthy in making the representation: in other words, at the very least, it must be demonstrated that, as a reasonably prudent person, it would have foreseen detriment of the kind suffered, and have guarded against it in order to prevent abuse.[14]

Case scenario viewed in light of the criteria under South African law

Criteria 1 and 2 are satisfied for the same reasons as those described in the analysis of criteria 1 and 2 of the English law test.

While criteria 3 and 4 are broadly the same as criterion 3 of the English law test, the nature of the sub-test applied under South African law to determine whether or not a representation is unequivocal for the purpose of a defence of estoppel is slightly different from its English counterpart. Instead of asking whether the representation would have contractual effect if it were backed by consideration, the South African courts ask whether a reasonable person in the position of the estoppel assertor would have made more enquiries before acting to their detriment in reliance on the perceived meaning of the words and/or conduct which constitute the relevant representation.

For the reasons already discussed in relation to the application of English law:

- there is no doubt that the contractor in the example scenario made a representation to the effect that the project manager would only have to instruct quotations for a compensation event once the actual additional costs arising from the event were known; and
- both this representation and its broader meaning would be so clear to a reasonable project manager with knowledge of the

contract, that they would have no reason to make further enquiries before engaging in prejudicial conduct in reliance on it.

It is thus my view that criteria 3 and 4 of the South African test would be satisfied.

Based on the decision in *Jonker v Boland Bank PKS Bpk*,[15] the sub-test applied by the South African courts to establish the existence of criterion 5 consists of a comparison between the position in which an estoppel assertor actually finds itself, and the position in which it will probably be if the estoppel denier is permitted to resile from the representation on which the estoppel assertor relies. If the position in which it finds itself is better than the position it would probably be in, then prejudice or detriment exists.

In the example scenario, if the contractor were permitted to resile from the representation, the following outcomes would result:

- Based on the second bullet of clause 63.1 and on 63.1 final paragraph, the contractor would be entitled to submit a quotation based on a forecast of defined cost as it would have been at the date when the project manager *should have* instructed quotations *but for the representation.*
- In doing so, the contractor would be entitled to formulate its quotation as if it were looking at the situation on the day when the quotation should originally have been instructed, without taking into account the consequences of the representation, including the employer-motivated mitigating factors that have occurred in the meantime.
- As a result, the employer would be placed at a considerable financial disadvantage when compared to the situation it would be in were the contractor estopped from resiling on its representation: as we have already seen during the course of the English law analysis, by reason of the representation the contractor is required to base its quotation on the actual prices of all the work that was done prior to the new promise-induced switch date, which in this case would result in a far lower figure than that derived from a forecast in terms of the first two bullet points above.

There is thus a strong argument that criterion 5 of the South African test is met.

If ever a South African project manager were inclined to take a relaxed approach to the proper application of NEC3 in the type of situation that we are presently analysing, on the assumption that an estoppel defence will provide the employer with a robust safety net in the event of a fall, then the uncertainties involved in satisfying criterion 6 of the South African estoppel test are probably sufficient to prompt a serious rethink of that approach.

The key to criterion 6 lies in three leading decisions from the late 1990s, namely *ABSA Bank Ltd v IW Blumberg and Wilkinson*,[16] *ABSA Bank Ltd v De Klerk*[17] and *Koekemoer v Langeberg Stene BK.*[18] In all three, the respective courts make it clear that, in terms of blameworthiness, to successfully argue a defence of estoppel the assertor must prove a minimum of negligence on the part of the representor, along with a sufficient causal link between the negligence proved and the harm suffered.

The relevant sub-test is based on the traditional formulation applied in the South African law of delict, as laid down in the case of *Kruger v Coetzee*,[19] and comprises two limbs. First, one must consider whether a diligent person in the position of the representor would have foreseen a reasonable possibility that its conduct would injure another to the point of causing that other financial loss. Second, one must consider whether the same diligent person would then have taken steps to minimise or divert the possible loss.

The application of this test to the example scenario sadly tends to raise more questions than it answers, and consequently stirs up more uncertainties than it resolves.

On the one hand:

- It can be argued that a diligent person in the position of the contractor would be sufficiently familiar with the contract terms and their change management mechanisms to know that, by inducing the project manager to postpone its decision, it would cause the latter:
  - to abandon its option to notify assumptions in terms of clause 61.6, in the reasonable belief that the change to the prices would in any event now be calculated by reference to actual costs; and
  - based in the same reasonable belief, simultaneously stimulate a willingness on the parts of project manager and employer to take steps to mitigate the contractor's actual costs;
- In light of the express contractual obligation under clause 10.1 of NEC3 to act in a spirit of mutual trust and cooperation, it can be argued quite convincingly that a diligent person in the position of the contractor

would have taken steps to mitigate the loss which the employer would suffer, were the contractor to resile from its representation.

On the other hand:

- In terms of the assertor, we are dealing here not with an uncommercial layman or a casual passer-by, but with a project manager who is deemed by law to possess the skill and knowledge of a professional project manager experienced in the relevant discipline;
- The assertor is therefore deemed to be sufficiently versed in the terms of the contract to be expected to know all about clauses 12.3 and 61.6, and to recognise the risk to which it would expose the employer by relying on the contractor's representation; and
- with this in mind, one must surely question
  - the extent to which the project manager's choice to rely on the representation, rather than exercising its power under clause 61.6 or formalising the revised switch date in terms of clause 12.3, was in and of itself negligent; and
  - the extent, therefore, to which such contributory negligence would neutralise the effectiveness of the estoppel defence by erasing the necessary causal link between the representation at issue and the potential loss.

Accordingly, there is a significant risk that the facts of our example scenario do not satisfy the requirements of criterion 6 of the estoppel test prescribed by South African law.

Conclusion

Based on the comprehensive analysis set out above, we may articulate the following practical conclusions:

- The purpose of clause 61.6 in the context of the NEC3 change management regime is clear and essential, as opposed to obscure and peripheral.
- At the time of notifying a compensation event under clause 61.1 or accepting a compensation event under clause 61.4, if there is any reasonable doubt whatsoever in the mind of the project manager as to whether the impact of the compensation event is sufficiently certain to be forecast reasonably, they must use their power under clause 61.6 to state assumptions upon which the contractor is to base its quotation, in the knowledge that, unlike accepted quotations, assumptions can be changed to incorporate an accurate reflection of the true impact of the compensation event once it becomes clear.
- Another valid (albeit unorthodox) approach is for the parties to reach mutual agreement as to a later switch date. However the presence of clause 12.3 means that such an agreement will only be binding if the prescribed formalities as to writing and signature are strictly observed.

The purpose of clause 61.6 in the context of the NEC3 change management regime is clear and essential, as opposed to obscure and peripheral.

- While, in terms of the example scenario, the common law doctrine of estoppel may be a source of just relief for an employer in the event that the two options above have been overlooked, such an alternative under South African law is far too uncertain to be considered a substitute for compliance with the letter of the contract.
- Even in the case of the more favourable approach furnished by the English law doctrine of promissory estoppel, estoppel can only ever be employed as a defence to an action for relief by the contractor and, even then, it can only ever be pleaded successfully in the relatively narrow circumstances that have been described.

Notes

1 *NEC3: Engineering and Construction Contract Guidance Notes* (April 2013).

2 The date dividing that portion of a compensation event quotation which must be based on actual defined cost from that portion of the same quotation which must be based on forecast defined cost.

3 See *Mannai Investment Co Ltd v Eagle Star Life Assurance Co. Ltd* [1997] AC 749; *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 [2012] Lloyd's Rep 34 at [21]; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014(2) SA 494 (SCA) at [10] – [12].

4 See *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 at [15], cited in Joseph Chitty, *Chitty on Contracts* (34th ed, 2021, 12-055) p 939.

5 *Ibid*, 3-088 at p 348.

6 See *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130; *Spence v Shell* (1980) 256 EG 55, 63; *James v Heim Galleries* (1980) 256 EG 819; *Collin v Duke of Westminster* [1985] QB 581.

7 See *Low v Bouverie* [1891] 3 Ch 82, 106; *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741; *The Schackleford* [1978] 2 Lloyds Rep 155, 159; *Channel Island Ferries v Sealink UK Ltd* [1987] 1 Lloyd's Rep 559, 580.

8 *Spence v Shell* (1980) 256 EG 55, 63.

9 See *James v Heim Galleries* (1980) 256 EG 819, 825; *Societe Italo-Belge pour le Commerce et l'Industrie v Palm & Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser)* [1981] 2 Lloyd's Rep 695, 701; *Youell v Bland Welch & Co Ltd (The Superhulls Cover Case) (No 2)* [1990] 2 Lloyd's Rep 431, 454; *Fortisbank SA v Trenwick International Ltd* [2005] EWHC 339; 2 Lloyd's Rep IR 464 at [13].

10 [1947] KB 130.

11 For a summary of the criteria see *Company Unique Finance (Pty) Ltd v Johannesburg Northern Metropolitan Local Council* 2011 (1) SA 440 (GSJ) 458H – 459A, applying the decisions in *NBS Bank Ltd v Cape Produce Co (Pty) Ltd* 2002 (1) SA 396 (SCA) and *Glofinco v ABSA Bank Ltd t/a United Bank* 2002 (6) SA 470 (SCA) at 12.

12 *Saflec Security Systems (Pty) Ltd v Group Five Building (East Cape) (Pty) Ltd* 1990 (4) SA 626 (E).

13 *Jonker v Boland Bank PKS Bpk* 2000(1) SA 542(O).

14 *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420(A).

15 See n 13 above.

16 1995 (4) SA 403 (W).

17 1999 (1) SA 861 (W).

18 1999 (1) SA 361 (NC).

19 1966 (2) SA 428 (A).

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Dispute boards and government contracts in Brazil

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Context

The need to resolve increasingly complex disputes has expanded the use of alternative dispute resolution methods in Brazil, including dispute boards and arbitration. Compared to traditional lawsuits, the advantages of these alternative methods are speed, confidentiality and narrower grounds for challenging the decisions made.

In Brazil, despite being present in the nation's legal framework from the early 19th century, arbitration only became firmly established as a dispute resolution mechanism with the enactment of Law 9,307 of 23 September 1996, known as the Arbitration Law.[1] Its later consolidation occurred mainly due to the absence of the need for judicial ratification of arbitral awards[2] and the autonomy of the parties to

choose the mechanism in an arbitration clause or separate arbitration agreement.

Although arbitration also stands out for its confidentiality, when a government entity is one of the parties, the rule of confidentiality must yield to the principle of publicity.[3]

Despite the several advantages of arbitration, its high costs and the time to resolve the dispute (more reasonable than traditional lawsuits, but also long) made other alternative dispute resolution methods gain prominence.

A current example is the dispute board, which is a permanent committee to monitor contract execution. The purpose of a dispute board is to solve relatively minor issues and disputes arising during the contract execution period, trying to prevent them from becoming the subject of a lawsuit/arbitration.

Compared to traditional lawsuits, the advantages of these alternative methods are speed, confidentiality and narrower grounds for challenging the decisions made.

Although both arbitration and dispute boards end with decisions, their natures and legal effects are different. While arbitrators end up playing the role of judges,[4] a dispute board is an advisory body appointed by the parties with expanded powers and functions. The decisions of the arbitral tribunals have the force of a judgment and are not subject to appeals to the judiciary. On the other hand, a dispute board's decision has the force of a contractual amendment, and may be reviewed in an arbitration or by the judiciary, depending on the final form of dispute resolution chosen by the parties in the contract.

Legal framework and main concepts

In 2015, the Federal Justice Council (Conselho da Justiça Federal) approved three statements that set the grounds for the use of dispute boards in Brazil, especially in infrastructure and civil construction contracts.[5] At the time, the aim was to establish dispute boards as a valid alternative dispute resolution method and consolidate essential concepts, which took substantial effort given the lack of information about dispute boards at the time.

Dispute boards were later introduced by the São Paulo Municipal Law 16,837 of 8 February 2018 and, later, at the federal level by Law 14,133 of 1 April 2021 (New Public Procurement and Government Contracts Law).[6] Both provide for dispute boards in the context of public works and service contracts entered with government entities and state-owned companies.

Two bills (9.883/2018 and 2421/2021) pending in the Brazilian Congress aim to allow all public administration entities (direct or indirect) to include dispute board clauses in their contracts.

There are three types of dispute boards: (1) the dispute review board (DRB), which only makes recommendations to the parties; (2) the dispute adjudication board (DAB), which has the power to decide and impose solutions; and (3) the combined dispute board (CDB), which can both issue non-binding recommendations and render binding rulings.

In the case of the DRB, normally the rules specify a timeframe for the parties to formally challenge the recommendation issued by the board. Generally, this time limit is contractually defined. In such cases, the party that does not agree with the recommendation can generally refer the matter to arbitration or to the judiciary, depending on what was provided in the contract.

Until a competent arbitral tribunal or the judiciary rules on the matter, the parties are not obliged to comply with the board's recommendation – although, in many cases, the arbitral tribunal or the judiciary may decide on the provisional validity and need to comply with the recommendation.

If neither party formally protests within the period contractually established to formally challenge the recommendation issued by the board, the recommendation becomes contractually binding.

The decisions of the DAB, on the other hand, have a contractually binding effect from the moment they are issued. A party that does not agree with the dispute board's decision can submit the matter to arbitration or judicial review, but until a final ruling is rendered, the parties must continue performing the contract according to the board's decision.

Finally, the CDB – as the name indicates – is a combination of the two previous types. Contractual clauses providing for the use of

this type of dispute board should indicate the specific disputes that may trigger recommendations or decisions, as well as the procedure to request each of them.

In any case, parties may also agree to abide by specific dispute board rules, instead of regulating the matter contractually.

Case study: dispute boards and the public administration

In Brazil, a groundbreaking use of the dispute board mechanism, and perhaps one of the most relevant for the resolution of contractual disputes with government entities, involved the agreement for the construction of Line 4 (Yellow) of the Metro system in the city of São Paulo, between the Companhia Metropolitana de São Paulo (a state-owned company of the São Paulo government) and a consortium formed by the construction companies TIISA – Infraestrutura e Investimentos S/A and COMSA S/A (Consórcio TC Linha 4 Amarela).

The use of the DRB in this case was provided for in the tender documents published in 2003 by Companhia Metropolitana de São Paulo. The project was to be financed by the International Bank for Reconstruction and Development (IBRD), part of the World Bank, which has required the adoption of the dispute board mechanism in contracts worth more than US$50m since 1995. Due to IBRD involvement, the draft contract annexed to the tender notice was the first government contract in Brazil to provide for a dispute board as part of the dispute resolution mechanism.

The tender notice divided the project to build the Yellow Line into three lots, resulting in three turnkey agreements signed in October 2003. The project aimed at implementing a 12.8-kilometre expansion of the Metro (all underground), the complete construction of five and partial construction of four Metro stations, as well as the supply and assembly of systems for the partial operation of the Yellow Line. Together, these contracts exceeded BRL 1.8bn and involved integration of civil works and services with the supply and installation of customised systems and equipment.

From its establishment in 2004 until the completion of its duties in 2015, the DRB intervened in ten disputes and carried out one mediation.

The first intervention occurred in October 2006 and was widely disclosed to the public. The trigger for this initial intervention was a cost increase caused by a change in the project's construction method for Lot 2 requested by the client, in reaction to delays of approximately 14 months in the project's timetable due to expropriation of land issues. This caused the contractor to submit a new execution program extending the initial timetable for 18 months, which prompted the client to request the submission of a new proposal with the tunnel boring machine (TBM) method, also known as the new Austrian tunneling method (NATM).

Two bills (9.883/2018 and 2421/2021) pending in the Brazilian Congress aim to allow all public administration entities (direct or indirect) to include dispute board clauses in their contracts.

In November 2004, the contractor submitted an updated proposal considering the new construction method requested by the client. In May 2005, the client finally recognised the technical feasibility of the proposal and the right of the contractor to be reimbursed for the added costs caused by the delay in expropriating the lands. However, it did not recognise the contractor's right to be reimbursed for the additional costs resulting from the modification of the construction method.

In May 2006, the contractor submitted a new budget for the revised basic design plan. In the same year, the contractor asked the São Paulo state government for immediate approval and payment of the new budget submitted, or the start of negotiations to reach a settlement to avoid an imbalance in the contracting parties' rights and obligations. Due to the refusal of the client to reimburse the additional costs resulting from the alteration of the construction method, the contractor submitted the dispute to the DRB for the issuance of a recommendation.

In August 2007, the DRB issued its recommendation, based on the consensus of its members. However, the client did not agree with this recommendation and notified the contractor of its intention to resort to arbitration, as stipulated in the contract, to resolve the matter. This action brought the case to the attention of the general public and is considered a watershed moment for the first DRB in a government contract in Brazil.

With the agreement of the consortium, in November 2007 the parties submitted the matter to the International Court of Arbitration of the International Chamber of Commerce (ICC). In June 2009, the court issued the first partial award, recognising the right of the contractor to the rebalance of the economic-financial equation of the contract and reimbursement of the additional costs resulting from the change in the construction method determined by the client.

In response, the client filed a lawsuit for annulment of the arbitral award and pleaded for a preliminary injunction against the contractor, which was assigned to the 13th Treasury Court of São Paulo. In June 2010, the court granted the injunction to allow expert engineering evidence during the course of the arbitration, to examine the balance of the economic-financial equation of the contract and the additional costs caused by the change in the construction method.

The contractor then decided to appeal to the São Paulo Court of Appeals against the injunction. By doing so, the contractor acted against what was stipulated in the contract between the parties, which had national and international negative repercussions. The matter was the subject of an article published by the *Global Arbitration Review*,[7] which described the decision of the São Paulo court as unexpectedly interfering in the arbitral proceeding.

Pros and cons of using dispute boards in government contracts

Although the use of dispute boards is increasingly common internationally, partly due to the requirement for contracts financed by the IBRD worth more than US$50m to adopt this mechanism, its use is still very limited in Brazil.

In part, this can be attributed to limitations created by the law. For example, a restriction exists in the capital of São Paulo, the highest gross domestic product state in Brazil: according to São Paulo Municipal Decree 60,067/2021, which regulates Municipal Law 16,873/18, only contracts for infrastructure projects worth BRL 200m or more can stipulate the use of dispute boards. This causes dispute boards to be a relatively rare mechanism for resolution of disputes in this municipality.

Another limitation on the use of this mechanism is the impossibility of dispute boards to issue final and binding decisions, unlike an arbitral tribunal. When one of the parties does not agree with the dispute board's recommendation or decision, it can resort to arbitration or to court. Indeed, the aforementioned case study, considered to be a pioneering case of the use of dispute boards in Brazil, culminated in arbitration and in a lawsuit.

Despite these hurdles, dispute boards are efficient mechanisms for resolving disputes or even to avoid major ones, especially in long-term government contracts. With a dispute board, contractual issues, which individually can often be quite simple, do not accumulate and can be solved as they appear throughout the execution period, avoiding major disputes at the end of the contract or even avoiding accumulating disputes that may later hinder its conclusion.

The advantage of using dispute boards also comes from the technical expertise, experience and background of their members, and the practical benefit they can bring to the project with their recommendations and decisions. Their impartiality, independence and absence of conflicts of interest is also crucial for the success of the mechanism.

A survey released by the Instituto de Engenharia in 2020 about dispute boards in Brazil shows that, in 98.7 per cent of the cases in which there was a decision by the dispute boards, it was complied with until the end of the project without being challenged by a subsequent arbitration or judicial proceeding. In 60 per cent of the cases, the contract period ended without any disputes. In addition, implementing dispute boards costs an average of 0.15 per cent of the final cost of the project and are shared between the parties.

Statistics confirm that the dispute board can be a very efficient dispute resolution method in the Brazilian context, especially in government contracts. The positive results of the implementation of dispute boards in government contracts are expected to stimulate their use in an increasingly broader range of contracts, with the maturing of the applicable law.

Notes

1 As observed by Rafael Francisco Alves in his work *A inadmissibilidade das Medidas Antiarbitragem no Direito Brasileiro*, although the 'arbitral tribunal' was established in Brazil as a legacy of the colonial Ordinances of the Kingdom, and was received in

most constitutions along with the Civil Code of 1916 and the Civil Procedure Code of 1973, in reality until 1996 the mechanism was virtually moribund in the country. The reason for that change was the enactment of Law 9,307/96 (Arbitration Law), which eliminated many obstacles to the development of arbitration in Brazil. Among these legal hurdles were the absence of efficacy of arbitration clauses and the need for judicial ratification of arbitral awards, meaning the need for double recognition of foreign arbitral awards.

2 Art 18, Law 9,307/96.

3 Art 2, s 3, Law 9,307/96.

4 Art 18, Law 9,307/96.

5 Statement No 49: 'Dispute Resolution Committees (Dispute Boards) are a method of consensual conflict resolution, as provided for in § 3 of art. 3 of the Brazilian Civil Procedure Code'; Statement No 76: 'Decisions rendered by a Dispute Board, when the contracting parties have agreed for their mandatory adoption, bind the parties to comply with them until the Judiciary or the competent arbitration court issue a new decision or confirm it, if sought by the party who does not agree with the board's recommendation'; and Statement No 80: 'The use of Dispute Boards, with the insertion of the respective contractual clause, is recommended for construction or infrastructure works contracts, as a mechanism aimed at preventing disputes and reducing of related costs, allowing the immediate resolution of conflicts that arise along the execution of the contracts'.

6 Art 151: 'In the contractual relations governed by this law, alternative means of preventing and resolving disputes may be utilised, notably conciliation, mediation, dispute resolution committees and arbitration. Sole paragraph. The provisions of the main section of this article shall be applicable to controversies related to disposable pecuniary rights, such as questions related to reestablishment of the economic-financial balance of contracts, the default of contractual obligations by either of the parties and the calculation of indemnities.' (unofficial translation); Art 154: 'The process of choosing the arbitrators, the arbitral bodies and dispute resolution committees shall observe egalitarian, technical and transparent criteria.' (unofficial translation).

7 S Perry, 'Brazil downplays "anomalous" court injunction' *Global Arbitration Review* (11 June 2010, London) https://globalarbitrationreview.com/brazil-downplays-anomalous-court-injunction, accessed 7 March 2022.

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Contracts for Construction and Engineering Projects

By Donald Charrett

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This book is the second edition of a collection of essays on the role of contracts in construction and engineering projects. Suitable, perhaps, for a short train trip? Be warned. You may well miss your station.

This revised, updated and expanded book is a work of great insight. It could only have been written by an author with a lifetime in engineering and the law, and an international perspective. Readers of all levels of experience will be enriched by this book. I had previously read some of the papers and made suggestions on a partial draft of this book. Despite this familiarity with the material, I found myself highlighting sentences, dog-earing pages and muttering in support (and occasional, hesitant disagreement).

It may help to describe the scope of the book before saying more about its quality.

The book consists of 37 chapters stretching to 546 pages. The chapters have been carefully sequenced into five parts:

- Part 1: The Engineer and the Contract (nine chapters, including several on design risk);
- Part 2: The Project and the Contract (13 chapters illuminated by case studies from Australia, Canada, New Zealand, Scotland and beyond);
- Part 3: Avoidance and Resolution of Disputes (seven up-to the-minute chapters, including one on construction disputes after Covid-19, two covering the 2017 FIDIC suite, and commentary on the Singapore Convention);
- Part 4: Forensic Engineers and Expert Witnesses (four chapters, with an especially helpful seven-page table comparing the requirements for expert evidence in Australia, England and Wales, and Singapore); and
- Part 5: International Construction Contracts (three chapters, culminating in 'final comments' that warrant the rare luxury of a second read).

The hardcover book is attractive and well-structured. The ebook is easy to navigate, thanks to an expansive table of contents and helpful but unobtrusive hyperlinks. Both benefit from 15 tables, a helpful glossary and a reliable index. A particularly charming feature of the book is the emphasis it places on case studies from around the world, including the Scottish Parliament House, the Sydney Opera House and the Quebec Bridge. More than 30 illustrations accompany these case studies.

The scope of the book is clearly impressive, but why is it worth reading? Charrett modestly describes the book as 'a collection of papers written on a variety of topics, at different times, and for a variety of audiences' (page 525). This might suggest a hotchpotch of unconnected, outdated papers. The opposite is true.

The book is unified in a way that Wittgenstein describes best: 'the strength of the thread does not reside in the fact that

some one fibre runs through its whole length, but in the overlapping of many fibres'.[1] These unifying fibres include the parties' expectations about time, cost and quality; the role of the contract as a charter of risk but also as a contract management manual; the special significance of design; and the geographic and temporal universality of most construction problems. The result is a book that can easily be read in standalone chapters, but which nonetheless forms a coherent narrative.

The book is current in three senses. First, much of the material is timeless, particularly in Part 2, where Charrett's analysis of troubled projects will prompt readers to draw parallels with their own experience.

Second, where law, commercial practice or risks have evolved, the book features new or revised chapters. The obvious example is the Covid-19 pandemic. One new chapter concerns the impact of Covid-19 on construction contracts. Another is devoted to the pandemic's implications for construction disputes. The index references Covid-19 more than 20 times. One further example of the currency of the book is its focus on the 2017 editions of the FIDIC suite of contracts.

Finally, the book is not only current but prophetic. Chapter 35 is titled 'Lex Constructionis — or my country's rules?'. It extrapolates from the basic principles of freedom of contract and enforcement of bargains to universal principles of construction law. Charrett proposes 20 such principles designed to 'encourage projects that provide better value for money and promote international trade and greater comity between nations whilst fulfilling the parties' legitimate expectations' (page 499).

Thoughtful construction lawyers around the world would do well to buy this book, read it and debate its central themes.

1 Ludwig Wittgenstein, *Philosophical Investigations* (G E M Anscombe translation, 3rd ed, Basil Blackwell, 1963) 67.

Construction Law International

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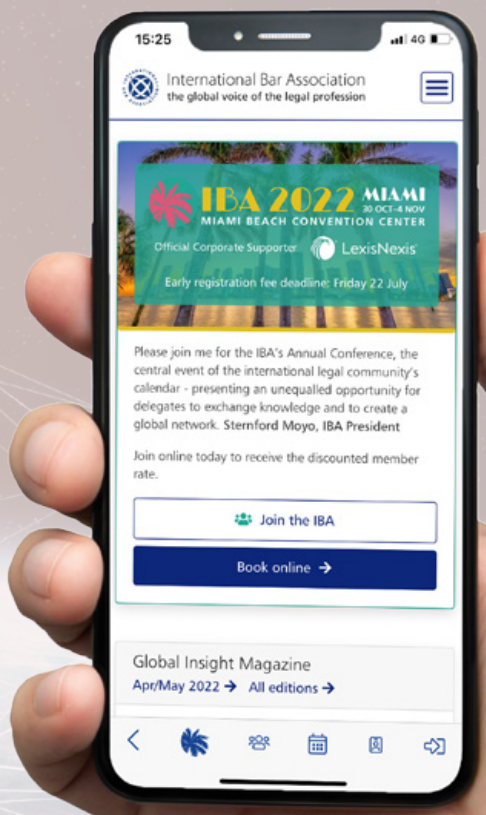

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