CONSTRUCTION LAW INTERNATIONAL

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

Vol 17 ISSUE 3 ISSN 1819-1371 SEPTEMBER 2022

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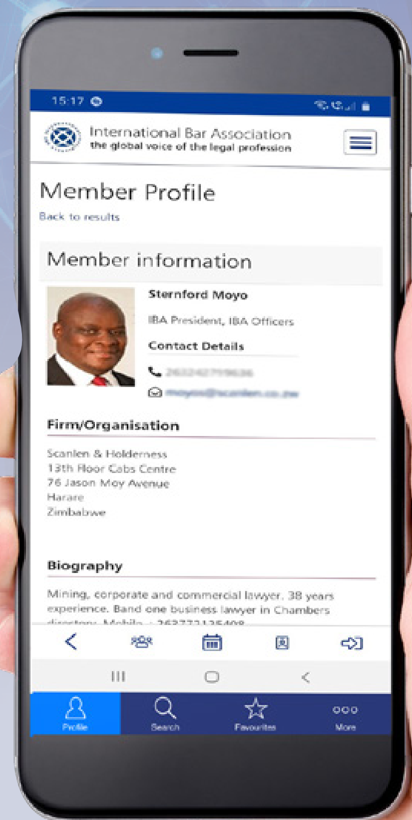

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CONTENTS

Vol 17 ISSUE 3 September 2022

CONSTRUCTION LAW INTERNATIONAL

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

REGULARS

2 **FROM THE EDITORS**

3 **FROM THE CO-CHAIRS**

4 **FIDIC AROUND THE WORLD**

United Arab Emirates

Hong Kong

11 **COUNTRY UPDATES**

United States

Panama

53 **BOOK REVIEWS**

FEATURE ARTICLES

17 **Brazil's new procurement law and its possible impacts on government procured construction contracts**
Ana Carolina Barretto, Mauro Hiane de Moura and Francisco de Andrade Figueira

20 **Legal implications of adopting Building Information Modelling (BIM) in EU public procurement**
Mohammadyasha Sakhavi

28 **Recent decisions of Chile's Supreme Court: can contractors expect a more balanced approach?**
Elina Mereminskaya

33 **Conference report: ICP Working Weekend 2022**
China Irwin and Thomas Denehy

38 **Remote hearings: storm clouds and silver linings**
Russell Thirgood

46 **Innovation challenges in public construction contracts in Brazil: *Municipality of Itu Headquarters Building* case**
Ana Cândida de Mello Carvalho and Victoria Carolina Lima de Oliveira

50 **Liability for innovation: the *Prodema* case in the Netherlands**
Leendert van den Berg

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Cover image: Katara Towers in Lusail, Qatar, which stands 211m (692 ft) tall and is set to open in time for the 2022 World Cup. Credit: matpit73/Adobe Stock

FROM THE EDITORS

Dear readers,

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

In this issue, we continue our FIDIC Around the World series with Ian Dalley and Suzannah Fairbairn looking at the use of FIDIC contracts in the UAE, and Ben Bury and Julie-Anne Mallis outlining their use in Hong Kong. This issue also includes country updates concerning the United States and Panama: R Zachary Torres-Fowler and Albert Bates, Jr explains a recent US Supreme Court decision concerning 28 USC section 1782 relevant to discovery in international arbitration proceedings and Luis H Moreno provides an update on the regime governing public–private partnerships in Panama.

Moving to our feature articles, Ana Carolina Barretto, Mauro Hiane de Moura and Francisco de Andrade Figueira address Brazil's new procurement law and its possible impacts on government procured construction contracts; Mohammadyasha Sakhavi examines the legal implications of adopting Building Information Modelling (BIM) in EU public procurement; and Elina Mereminskaya considers the recent decisions of Chile's Supreme Court, asking whether contractors can expect a more balanced approach.

We are also pleased to include a short report on the ICP Working Weekend 2022, which took place in Vevey, Switzerland in May, as well as articles by Russell Thirgood, Ana Cândida de Mello Carvalho, Victoria Carolina Lima de Oliveira and Leendert van den Berg, expanding on topics addressed during the Weekend.

Finally, Thayananthan Baskaran and Clement Ling review the new edition of *FIDIC 2017: A Definitive Guide to Claims and Disputes* by Nicholas Brown and Tjaart van der Walt reviews *Construction Contracts for Infrastructure Projects: An International Guide to Application* by Philip Loots and Donald Charrett.

We hope this edition offers an enjoyable and informative read. We thank our contributors for their time and support of *CLInt*. We look forward to publishing ICP members' experiences and insights in upcoming issues.

Please submit potential articles to CLInt.submissions@int-bar.org.

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FROM THE CO-CHAIRS

Dear ICP Committee members,

We are pleased to report that planning for the 2022 IBA Annual Conference in Miami is well underway. The Conference will take place from 30 October to 4 November. Our last annual gathering in Seoul seems a long time ago, and it will be good to be in Miami to see old friends and make new ones. We are both very much looking forward to seeing you all there.

This year the ICP will have the honour of hosting five sessions. The moderators for each session have been working diligently with their respective panels to create the high-quality discussions we have come to take for granted. Our sessions will be:

- Infrastructure projects in developing countries: challenges, opportunities and the role of multilateral agencies and their model contract forms
  Monday 31 October, 1115–1230, moderated by Aisha Nadar
- A new era of collaboration? The rise of multi-party and alliance contracting
  Monday 31 October, 1430–1545, moderated by Bill Barton;
- Sustainable project decommissioning – reality or utopia?
  Tuesday 1 November, 1615–1730, moderated by Doug Oles;
- Riding a slippery slope: the balancing act of risk allocation in major construction and infrastructure projects
  Wednesday 2 November, 0930–1230, moderated by Bruce Reynolds; and
- Impact of ESG in construction and infrastructure projects – implications for financing, procurement strategies and delivery
  Thursday 3 November, 1430–1545, moderated by Aarta Alkarimi.

Each session promises to be dynamic and informative. In addition to our substantive sessions, we will hold our annual dinner on Wednesday 2 November and our ICP excursion on Friday 4 November.

We are also happy to announce that our biannual conference is planned to take place in Berlin in early 2023. Rouven Bodenheimer and Rupert Choat are once again coordinating what is always a worthwhile conference. Further details will follow.

We would like to recognise all of the contributors to this month's issue of *CLInt*. You are all indispensable to this publication. We extend special recognition to the editors, China Irwin, Thayananthan Baskaran and Tom Denehy. Thank you for the efforts.

We look forward to seeing you all next month.

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FIDIC around the world – UAE

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

1. What is your jurisdiction?
United Arab Emirates (UAE).

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?
Yes, FIDIC forms of contract are popular for construction projects in the UAE. The FIDIC Red Book is the most common form because it is usual in the UAE for most (if not all) of the design to be carried out by or on behalf of the Employer. The 1987 FIDIC Red Book is still seen commonly on legacy projects, but the most popular form of Red Book for new projects is the 1999 Red Book. The 2017 Red Book has yet to gain much traction. As such, the contract-specific comments in this article refer to the FIDIC 1999 Red Book.

Some other forms of FIDIC are also used, albeit less frequently. In particular, the FIDIC Yellow Book is sometimes used for design and build projects, and the Silver Book is sometimes used for EPC contracts. The Gold, Green and White Books are also seen from time to time, but are less common.

Bespoke contracts are often used for power and industrial projects, or projects involving project finance, or other specialised projects. Bespoke contracts are also increasingly common for megaprojects.

3. Does FIDIC produce forms of contract in the language of your jurisdiction? If no, what language do you use?
FIDIC does produce its forms of contract in Arabic. English is widely used in the UAE and, due to the international nature of the construction industry in the UAE, the majority of parties tend to be most comfortable using the English version of FIDIC on large projects.

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?
Construction contracts, also known as *muqawala* contracts (which are contracts to do work or perform a task), are governed by Articles 872 to 896 of the Civil Transaction Law No. 5 of 1985, as amended by Federal Law No. 1 of 1987 (commonly known as the UAE Civil Code). Other provisions of the UAE Civil Code and other legislation will also be relevant.

Some of these provisions are 'default provisions', which parties must explicitly contract out of if parties do not want those provisions to apply. To the extent that the FIDIC Red Book deals with these provisions, the 'default provisions' will normally be overridden by the FIDIC terms and no further amendments are needed for FIDIC to be operative.

Other provisions in the UAE Civil Code are 'mandatory provisions', which means that parties cannot contract out of them. These mandatory provisions cover various issues such as decennial liability, and the court's ability to vary agreed liquidated damages. The parties should be aware of these issues but, given that they cannot be contracted out of, no amendments to the FIDIC standard forms are required as conflicting FIDIC provisions will normally simply be overridden by the 'mandatory provisions', although it is usual to make amendments to align some of the conflicting FIDIC provisions with the mandatory provisions.

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?
FIDIC contracts are usually amended to be much more heavily in favour of the Employer, such as enabling the Employer to terminate for convenience in order to give the work to another contractor and deleting any Employer indemnities. The Engineer's role is also often usurped such that the Engineer is required to seek the Employer's approval for nearly every material decision it makes under the Contract.

Termination – There are specific provisions dealing with the termination of a muqawala contract under UAE law. In order to avoid unintended consequences, it is advisable for parties to amend the FIDIC provisions to clarify how the termination provisions are intended to operate in the context of the termination provisions in the UAE Civil Code.

Concurrent delay – There are no statutory rules or judicial guidance dealing conclusively with the definition or effect of concurrent delay. As such, it is common to include a clause stating that if a delay caused by an Employer's risk is concurrent with another delay which is caused by the contractor, then the contractor will be entitled to an extension of time for the period of concurrency, but not to any costs for that period of delay.

Nominated subcontractors – Nominated subcontractors are common in the UAE and it is usual to state explicitly that the contractor is liable for the acts, omissions and delays of nominated subcontractors.

Physical conditions – Amendments are often made so that the

contractor takes the risk of the physical conditions.

Dispute resolution – Dispute arbitration boards (DAB) have not yet gained much traction in the UAE, and it is common for the DAB provisions to be deleted.

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)?

This may depend on the particular factual circumstances involved. However, the Employer would not usually lose its rights to notify within a particular time period under Sub-Clause 2.5 because the clause does not provide a specific time period within which to provide the notices.

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)?

There is no clear guidance from the UAE courts as to the enforceability of these types of condition precedents and there are arguments both ways under UAE law. This will also depend on the particular factual circumstances involved.

The starting position is that clear, express contract terms should be upheld (eg Article 126, 234(2) and 257 of the UAE Civil Code). Sub-Clause 20.1 includes a specific time period for filing the notice, and states that the rights will be lost if the notice requirements are not complied with.

However, there are also a number of arguments commonly employed by contractors to argue that Sub-Clause 20.1 should not be considered as a condition precedent, such as whether the party seeking to rely on the condition precedent has performed its obligations in good faith. In practice, whether a notice provision is enforced in an arbitration can also be influenced by the legal background or sympathies of the tribunal.

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?

The position is similar to the response to question 7. There is no clear guidance from the UAE courts on this.

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

Dispute boards are not currently favoured in the UAE and Sub-Clauses 20.2 to 20.4 are usually deleted from most contracts. As such, there is limited evidence to demonstrate UAE courts' willingness to enforce dispute board decisions.

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?

Due to the substantial growth of the construction industry in the UAE, the corresponding increase in legally intricate disputes means that arbitration is the favoured method of dispute resolution. It can be an effective means of unravelling the complex web for these kinds of construction disputes.

Arbitrations in the UAE commonly use the ICC (International Chamber of Commerce), DIAC (Dubai International Arbitration Centre) or LCIA (London Court of International Arbitration) rules. The ADCCAC (Abu Dhabi Commercial Conciliation & Arbitration Centre) rules are used to some extent for Abu Dhabi-based projects, but are less popular than ICC, DIAC or LCIA.

The DIFC–LCIA Rules were popular until the Dubai Government issued Decree No 34 of 2021 on 20 September 2021, which effectively abolished the DIFC–LCIA in order to make DIAC the single unified arbitration centre in Dubai.

Arbitrations that are seated 'on-shore' in the Emirates (ie, except in financial free zones) are governed by the UAE Arbitration Law (the Federal Arbitration Act of 2018), which is heavily shaped by the UNCITRAL Model Arbitration Law. Arbitrations are also commonly seated in the Dubai International Finance Centre (DIFC, which is an off-shore 'free zone') or in London, as well as the Abu Dhabi Global Market (another off-shore 'free zone').

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

There is no system of precedent in the UAE, so previous court decisions are not binding. Furthermore, the facts are often not fully set out in the judgments, so it can be unhelpful to seek to apply previous judgments to new cases.

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?

Agreements are generally enforceable, but some Articles of the Civil Code are 'mandatory' and apply regardless of any agreement between the parties. Some of these mandatory provisions that are particularly important to note in a construction context are:

- Liquidated damages can be adjusted at the discretion of a court (or arguably by extension a tribunal) to reflect the actual loss suffered (Article 390).
- Contractors, designers and architects will be liable for structural defects or the total or partial collapse of the building for ten years following handover of the works (Article 880). This is known as 'decennial liability'.
- The parties are under an obligation to perform the contact in a manner

consistent with the requirements of good faith (Article 246).

Agreements also will not be enforced if they are contrary to public order or morals (Article 205(2)) or the right is exercised in an unlawful manner (Article 106).

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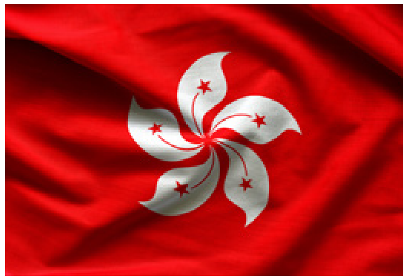

FIDIC around the world – Hong Kong

Ben Bury

Holman Fenwick Willan (HFW), Hong Kong

Julie-Anne Mallis

Holman Fenwick Willan (HFW), Hong Kong

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

1. What is your jurisdiction?

Hong Kong Special Administrative Region of the People's Republic of China (Hong Kong or the HKSAR).

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?

Yes, the FIDIC forms of contract are occasionally used for projects in Hong Kong, but other forms of contract are preferred.

Historically, in the public sector, the HKSAR Government (which is the main employer in the jurisdiction) used its own standard form contracts for civil engineering works, building works, electrical and mechanical works and design and build works which are modelled on the Institution of Civil Engineers (ICE) forms of contract.[1] Although these standard form contracts are still in circulation, since 2009 there has been a notable shift towards adopting the New Engineering Contracts (NEC) forms of contract (including the recently published NEC4) for public works projects including land supply, building, highway, drainage and sewerage, water supply, electrical and mechanical works, geotechnical works and operation and maintenance projects.[2] This shift is consistent with the current trend in the construction industry generally towards collaborative partnerships and collaborative management of construction projects.

In the private sector, standard forms of contract published by the Hong Kong Institute of Architects, the Hong Kong Institute of Construction Managers and the Hong Kong Institute of Surveyors are frequently used. The Joint Contracts Tribunal Limited (JCT) forms of contract are also popular. Having said that, it is not uncommon for parties in the private sector in Hong Kong to adopt clauses from the FIDIC forms of contract.

Stakeholders in the private and public sectors, including certain government departments such as the Hong Kong Housing Authority and certain quasi-government statutory authorities such as the MTR Corporation and Airport Authority Hong Kong, have also developed their own standard form contracts. The MTR Corporation intends to move towards using the NEC forms of contract in due course.

The FIDIC forms of contract are frequently adopted by Hong Kong parties involved in international construction projects including in Mainland China. The FIDIC forms of contract are often the starting point for the Belt and Road Initiative projects.

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

Yes, FIDIC publishes the full suite of the FIDIC forms of contract in English, which is one of the two official languages in Hong Kong, the other being Chinese. Last year,

FIDIC also released a bilingual edition of five of its key forms of contract in English and Chinese: specifically, the 2017 versions of the Red, Yellow, Silver and White Books and the 2008 version of the Gold Book.

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?

Generally speaking, the provisions of the FIDIC forms of contract are compatible and consistent with Hong Kong law and no specific amendments are required for the FIDIC Conditions of Contract to be operative.

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

As mentioned above, FIDIC forms of contract are only occasionally used for projects in Hong Kong. However, when they are used, they are often amended. There are several common amendments made to all standard form construction contracts in Hong Kong. Each of these amendments are addressed below.

Rights of third parties

It is common for parties who wish to deny rights to third parties under their construction contracts to exclude the application of the Contracts (Rights of Third Parties) Ordinance (Cap 623) (CRTPO), which creates a statutory exception to the longstanding doctrine of privity of contract. Pursuant to section 4 of the CRTPO, a third party may be entitled to enforce a term of a contract (including a term that excludes or limits liability) if the contract expressly permits them to do so or purports to confirm a benefit on them. The third party must be specifically identified in the contract by name, as a member of a class or as answering a particular description.[3] Contracting parties can 'opt-out' of the application of the CRTPO by specific agreement and this exclusion is often included.[4]

Mandatory insurance

Construction contracts in Hong Kong will almost always be amended to provide for the mandatory insurance of each consultant and contractors' employee in accordance with the Employees' Compensation Ordinance (Cap 282) (ECO). The ECO sets out the rights and obligations of employers and employees with respect to injuries or death caused by: (1) accidents arising out of and in the course of employment; or (2) prescribed occupational diseases. In the context of FIDIC forms of contract, the compulsory obligations considered above will affect the drafting of Sub-Clause 19.2.5 [Injury to Employees of the FIDIC Conditions of Contract] and may also necessitate the incorporation of Special Provisions.

Opt-in provisions in Schedule 2 of the Arbitration Ordinance

Given the international nature of the FIDIC forms of contract, the FIDIC Conditions of Contract do not specifically provide for domestic arbitration in Hong Kong. Pursuant to section 99 of the Arbitration Ordinance (Cap 609), parties wishing to apply certain domestic arbitration provisions must specifically opt in to all or part of Schedule 2. The opt-in provisions under Schedule 2 of the Arbitration Ordinance include:

- having the dispute submitted to a sole arbitrator;
- consolidation of arbitrations by the court;
- determination of preliminary points of law by the court;
- challenges to awards permitted on grounds of serious irregularity; and
- appeals to the courts allowed on questions of law arising from arbitral awards.

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)?

The Hong Kong courts have not specifically considered the wording of Sub-Clause 2.5 [Employer's Claims] of the FIDIC Conditions of Contract and determined whether it should be treated as a precondition to Employer claims. However, for the reasons set out below, it is almost certain that the Hong Kong courts would consider it to be a precondition to Employer claims.

The Hong Kong courts' strict interpretation of conditions precedent to Contractor claims was illustrated in the recent *Maeda Corporation v Bauer* decisions,[5] and such an approach is likely to be adopted to Employer claims as well – notwithstanding that Sub-Clause 2.5 of the FIDIC Conditions of Contract adopts different wording to Sub-Clause 20.1 [Contractor's Claims] of the FIDIC Conditions of Contract concerning Contractor claims.[6] It should also be remembered that English precedents are persuasive (although not binding) on the Hong Kong courts. In this regard, the Hong Kong courts are likely to be persuaded by the decision of the Privy Council to treat Sub-Clause 2.5 of the FIDIC Conditions of Contract as a precondition to Employer claims in *NI International (Caribbean) Limited v National Insurance Property Development Company Limited (No. 2)* (2015) [2015] UK PC 37.7.[7]

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)?

The Hong Kong courts have not specifically considered the wording of Sub-Clause 20.1 [Contractor's Claims] of the FIDIC Conditions of Contract and determined whether it should be treated as a condition precedent to Contractor claims. However, for the reasons set out below, it is almost certain that the Hong Kong courts would consider it to be a precondition to Contractor claims.

In *Maeda Corporation v Bauer*,[8] Madam Justice Chan of the Hong Kong High Court stated that Hong Kong courts would construe as a condition precedent to a Contractor's claim any clause which employs clear, unambiguous and mandatory language for the service of notices prior to making a claim, with no qualifying language such as 'if practicable', or 'in so far as the sub-contractor is able'. Madam Justice Chan further held that such clause must be strictly complied with and that a failure to do so will result in the Contractor having no entitlement.[9] This decision was upheld on appeal.[10]

In this regard, Sub-Clause 20.1 of the FIDIC Conditions of Contract contains such clear, unambiguous and mandatory language for the service of notices. It requires the Contractor to give notice 'as soon as practicable, and not later than 28 days after the Contractor became aware', thereby setting out a precise period of time for compliance. It further provides that '[i]f the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment', thereby setting out the consequences of any non-compliance.

Applying the *Maeda Corporation v Bauer* decisions,[11] it is almost certain that the notice requirements in Sub-Clause 20.1 of the FIDIC Conditions of Contract would be construed as a condition precedent to entitlement and therefore strict compliance is required.

It is worth noting that in *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* [2014] EWHC 1028, Justice Akenhead confirmed that Sub-Clause 20.1 of the FIDIC Conditions of Contract (1999 Yellow Book) is a condition precedent under English law, and for the reasons stated above it is likely that this decision would be persuasive in Hong Kong.

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, see the response to Question 7 above.

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, dispute boards have been used as an interim dispute resolution mechanism in Hong Kong. An example is the Hong Kong Airport Dispute Board (HKADB) which was established for the Hong Kong International Airport project in the 1990s. A group of six members and a convenor were selected based on their specialist knowledge and experience to cover 22 main contracts awarded by the Hong Kong Airport Authority for the project. When a dispute arose, a panel of one or three members were selected to determine the dispute. A total of six disputes were referred to the HKADB – with one dispute ultimately referred to arbitration.

Generally speaking, dispute board clauses in Hong Kong construction contracts will provide that parties shall comply with the determination of the dispute board. There is no underlying legislation in Hong Kong which provides for the enforcement of dispute board determinations. As such, if a party is in default of a dispute board determination, the enforcing party must commence court or arbitration proceedings against the defaulting party for breach of contract (depending on the precise terms of the dispute resolution clause).

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

Arbitration is the preferred method of dispute resolution for domestic and international construction disputes in Hong Kong. The prevalence of standard form contracts containing an arbitration clause has meant that construction disputes are almost always referred to arbitration.

The Hong Kong International Arbitration Centre (HKIAC) is the main arbitral institution used to administer construction arbitrations in Hong Kong. The seat is generally Hong Kong when HKIAC is selected as the administering institution, but not always. The International Court of Arbitration of the International Chamber of Commerce (ICC–ICA) and China International Economic and Trade Arbitration Commission (CIETAC) (among others) also operate in Hong Kong and are sometimes used.

Ad hoc arbitrations are also common in Hong Kong for domestic construction disputes. Hong Kong has adopted the UNCITRAL Model Law (as adopted on 21 June 1985 and amended on 7 July 2006) with specific Hong Kong modifications and supplementary provisions as the procedural law for both domestic and international seated arbitrations in its primary legislation, the Arbitration Ordinance.

Hong Kong is one of the world's leading international arbitration jurisdictions. In addition to being a regional and global trade port and financial and services centre, the

pro-arbitration and pro-enforcement attitude of Hong Kong's judiciary, presence of prominent arbitral institutions, strong pool of arbitrators and arbitration practitioners, and unique status as an English-Chinese bilingual common law jurisdiction make it an attractive venue for international arbitration, including for construction disputes.

Hong Kong has the added advantage of being a gateway for cross-border disputes involving Mainland Chinese parties and the reciprocal arrangements with Mainland China, namely:

- The Arrangement Concerning Mutual Enforcement of Arbitral Award Between the Mainland and Hong Kong 1999 (as amended in 2020), which provides for the mutual recognition and enforcement of arbitral awards; and
- The Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the HKSAR 2019, which entitles parties of Hong Kong and Mainland Chinese-seated arbitrations administered by qualified arbitral institutions to apply to the Mainland Chinese courts for interim measures.

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

There are very few Hong Kong court decisions interpreting the FIDIC forms of contract. However, Hong Kong courts will frequently refer to English precedents (and precedents of other common law jurisdictions) where local court decisions are not available and therefore precedents from these jurisdictions will be relevant when interpreting the FIDIC forms of contract under Hong Kong law.

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?

Building and development controls

Hong Kong has strict statutory controls relating to:

- the approval and construction of new buildings or new building works, which extends to the supply of construction materials, site preparation, design parameters, engineering loads and stresses, structural requirements, layout, methods of construction, fire safety and demolition works;
- the monitoring and maintenance of existing buildings; and
- planning and development.

The primary statutory control for building works in Hong Kong is the Buildings Ordinance (Cap 123) (BO). The BO and its extensive regulations provide for the planning, design and construction of buildings and associated work, the rendering safe of dangerous buildings and land, and the regular inspections of buildings and the associated repairs to prevent buildings from becoming unsafe.[12] The statutory controls contained in the BO apply regardless of the scale and nature of building works (unless the building works are classed as minor works, in which case, the Building (Minor Works) (Amendment) Regulation 2020 applies).

For projects carried out in Hong Kong, parties should seek competent advice on the statutory controls, especially in connection with Sub-Clauses 1.13 [Compliance with Laws][13] and 4.8 [Health and Safety Obligations] of the FIDIC Conditions of Contract.

Environmental controls

Parties should also be aware of the extensive environmental protection legislation in place in Hong Kong including the:

- the Air Pollution Control Ordinance (Cap 311), which controls the emission of air pollution from stationary sources;
- the Noise Control Ordinance (Cap 400), which controls noise pollution;
- the Environmental Impact Assessment Ordinance (Cap 499), which mandates the assessment of the environmental impact of relevant projects; and
- the Buildings Energy Efficiency Ordinance (Cap 610).

Resourcing

Hong Kong has legislated to encourage companies to employ local workers on construction projects.[14] Employment of foreign workers involves an approval process (granted on a case-by-case basis), payment of a levy of each foreign worker to the Employees Retraining Board and obtaining an appropriate visa/entry permit.[15] Due consideration should be given as to how building, construction and infrastructure works carried out in Hong Kong will be resourced and parties should make appropriate provision for the time it may take to source an appropriate workforce. However, given the current skilled labour shortage, Contractors involved in public works who are experiencing difficulties in resourcing their works can refer to the expedited procedures for the Supplementary Labour Scheme.[16]

Security of payment

Unlike a number of common law jurisdictions, the HKSAR Government has not yet passed security of payment legislation. However, following the below-mentioned recent developments in the public sector in Hong Kong, the introduction of a statutory regime is imminent.

On 5 October 2021, the HKSAR Government Development Bureau issued a Technical Circular[17] introducing an interim contractual security of payment regime which prescribes the mandatory incorporation of security of payment provisions (SOP provisions) into all public works contracts, including design and build contracts and term contracts (and any respective

subcontracts) entered into on or after 1 April 2022.[18]

The key SOP provisions under the interim contractual regime include:

- a prohibition on conditional payment provisions (such as 'pay when paid' and 'pay if paid' provisions);
- prescribed maximum periods for determining payment claims (specifically, payment responses must be served by the paying party within 30 days and payment must be made within 60 days of the date the payment claim was served on the paying party);
- a right to refer payment disputes to adjudication within 28 days from the date when the payment dispute arose;
- a right to suspend or reduce rate of progress if adjudicated/admitted amounts are not paid;
- a mechanism for the Employer to circumvent the Contractor and directly pay Subcontractors unpaid adjudicated/admitted amounts; and
- a requirement for contract administrators to monitor the Contractor's compliance with the regime and to rate the Contractor accordingly. Contractors with a poor record may be prevented from tendering or removed, suspended and/or demoted from the List of Approved Contractors for Public Works in Hong Kong.

Frustrated contracts

Sections 16(2) and 16(3) of the Law Amendment and Reform (Consolidation) Ordinance (Cap 23) (LARO) apply in circumstances where a contract has been brought to an end by frustration and: money has been paid or is owing prior to the frustrating event; or one party has conferred a valuable benefit on the other prior to the frustrating event. The LARO confers a wide discretion on Hong Kong courts and tribunals to determine what it considers to be a 'just sum'; however, such a sum cannot exceed the expenses incurred or the value of the benefit conferred.[19] Parties should review Clause 18 [Exceptional Events] of the FIDIC Conditions of Contract to determine whether it is appropriate in light of the LARO.[20]

Implied terms

As with other common law jurisdictions, in addition to the express terms set out in the FIDIC Conditions of Contract, certain terms may be implied: under Hong Kong law subject to the court or tribunal's interpretation of Sub-Clause 1.15 [Limitation of Liability] of the FIDIC Conditions of Contract;[21] and by statute including pursuant to: (1) Supply of Services (Implied Terms) Ordinance (Cap 457), where the works include the supply of services; and (2) the Sales of Goods Ordinance (Cap 26), where the works include the sale of equipment and/or supplies.[22]

Gross negligence

Sub-Clauses 1.15 [Limitation of Liability], 8.8 [Delay Damages], 11.10 [Unfilled Obligations] and 14.14 [Cessation of Employer's Liability] of the FIDIC Conditions of Contract refer to the term 'gross negligence' as an exception to the application of the limitation of liability.[23] The concept of 'gross negligence' as distinct from negligence is not recognised under Hong Kong law.[24] Therefore, consideration should be given as to whether the phrase is appropriate.

Notes

1 eg, the General Conditions of Contract for Civil Engineering Works 1999, the General Conditions of Contract for Building Works 1999, the General Conditions of Contract for Electrical and Mechanical Works 2007 and the General Conditions of Contract for Design and Building Contract 1999.

2 *See* eg, Practice Notes for New Engineering Contract (NEC) – Engineering and Construction Contract (ECC) for Public Works Projects in Hong Kong (August 2021) published by the Development Bureau.

3 Ben Bury & Julie-Anne Mallis, 'Applying *FIDIC contracts in Hong Kong' in Donald Charrett (ed) FIDIC Contracts in Asia Pacific A Practical Guide to Application* (Informa Law from Routledge, 2022), 208; Ben Bury & Julie-Anne Mallis, 'Hong Kong' in in Donald Charrett (ed) *The International Application of FIDIC Contracts – A Practical Guide* (Informa Law from Routledge, 2020), 230.

4 *Ibid*.

5 *Maeda Corporation and China State Construction Engineering (Hong Kong) Ltd v Bauer Hong Kong Ltd* [2019] HKCFI 916 and *Maeda Corporation and China State Construction Engineering (Hong Kong) Ltd v Bauer Hong Kong Ltd* [2020] HKCA 830. This case is discussed in further detail at Question 7.

6 In particular, unlike Sub-Clause 20.1 of the FIDIC Conditions of Contract, Sub-Clause 2.5 of the FIDIC Conditions of Contract does not prescribe a precise time for compliance or the consequences of any non-compliance, although it does require the notice to be served 'as soon as practicable'.

7 *See* Lord Neuberger's judgment at [38] of *NH International (Caribbean) Ltd v National Insurance Property Development Company Ltd (No 2)* (2015) [2015] UK PC 37.

8 *Maeda Corporation and China State Construction Engineering (Hong Kong) Ltd v Bauer Hong Kong Ltd* [2019] HKCFI 916, [23] and [31].

9 *Ibid*, [23].

10 *Maeda Corporation and China State Construction Engineering (Hong Kong) Ltd v Bauer Hong Kong Ltd* [2020] HKCA 830.

11 *Maeda Corporation and China State Construction Engineering (Hong Kong) Ltd v Bauer Hong Kong Ltd* [2019] HKCFI 916 and *Maeda Corporation and China State Construction Engineering (Hong Kong) Ltd v Bauer Hong Kong Ltd* [2020] HKCA 830.

12 Ben Bury & Julie-Anne Mallis, 'Applying *FIDIC contracts in Hong Kong' in Donald Charrett (ed) FIDIC Contracts in Asia Pacific A Practical Guide to Application* (Informa Law from Routledge, 2022), 209; Ben Bury & Julie-Anne Mallis, 'Hong Kong' in in Donald Charrett (ed) *The International Application of FIDIC Contracts – A Practical*

Guide (Informa Law from Routledge, 2020), 231.

13 Sub-Clause 1.12 is the relevant Sub-Clause in the 2017 Silver Book.

14 Ben Bury & Julie-Anne Mallis, 'Applying *FIDIC contracts in Hong Kong' in Donald Charrett (ed) FIDIC Contracts in Asia Pacific A Practical Guide to Application* (Informa Law from Routledge, 2022), 211; Ben Bury & Julie-Anne Mallis, 'Hong Kong' in in Donald Charrett (ed) *The International Application of FIDIC Contracts – A Practical Guide* (Informa Law from Routledge, 2020), 233.

15 *Ibid.*

16 *Ibid.*

17 HKSAR Government Development Bureau Technical Circular (Works) No. 6/2021 'Security of Payment Provisions in Public Works Contacts'.

18 The roll out of the contractual security of payment regime was staggered with tenders from Group B and Group C Contractors on the HKSAR Government Development Bureau's 'List of Approved Suppliers of Materials and Specialist Contractors for Public Works', subject to the regime from 31 December 2021 and all other Contractors from 1 April 2022.

19 Ben Bury & Julie-Anne Mallis, 'Applying FIDIC contracts in Hong Kong' in Donald Charrett (ed) *FIDIC Contracts in Asia Pacific A Practical Guide to Application* (Informa Law from Routledge, 2022), 208; Ben Bury & Julie-Anne Mallis, 'Hong Kong' in in Donald Charrett (ed) *The International Application of FIDIC Contracts – A Practical Guide* (Informa Law from Routledge, 2020), 230.

20 *Ibid.*

21 The applicable five-fold test is set out *Shirlaw v Southern Foundries* (1926) Ltd [1939] 2 KB 206 at 227; *Kensland Realty Ltd v Whale View Investment Ltd* (2001) 4 HKCFAR 381 at 391.

22 Ben Bury & Julie-Anne Mallis, 'Applying FIDIC contracts in Hong Kong' in Donald Charrett (ed) FIDIC Contracts in Asia Pacific A Practical Guide to Application (Informa Law from Routledge, 2022), 216; Ben Bury & Julie-Anne Mallis, 'Hong Kong' in in Donald Charrett (ed) The International Application of FIDIC Contracts – A Practical Guide (Informa Law from Routledge, 2020), 237-238.

23 Sub-Clauses 1.14, 8.8, 11.10 and 14.4 are the relevant Sub-Clauses in the 2017 Silver Book. Ben Bury & Julie-Anne Mallis, 'Applying FIDIC contracts in Hong Kong' in Donald Charrett (ed) FIDIC Contracts in Asia Pacific A Practical Guide to Application (Informa Law from Routledge, 2022), 212; Ben Bury & Julie-Anne Mallis, 'Hong Kong' in in Donald Charrett (ed) The International Application of FIDIC Contracts – A Practical Guide (Informa Law from Routledge, 2020), 238.

24 *Ibid.*

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UNITED STATES

US Supreme Court Determines that section 1782 does not grant access to US discovery in aid of most international commercial and investor-state arbitration proceedings

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On 13 June 2022, the United States Supreme Court rendered its highly anticipated decision in *ZF Automotive US, Inc v Luxshare, Ltd.*[1] In its decision, the Court established that parties to most international arbitrations seated outside the United States could not avail themselves of broad US-styled discovery pursuant to a peculiar US statute known as 28 USC section 1782.

While the case centred on issues of US law, the Court's decision carries profound implications for the practice of international arbitration around the world. Given the important role international arbitration plays in the international construction industry, the Supreme Court's decision in *ZF Automotive* is of particular note. This article briefly summarises the ruling and its implications.

Background: 28 USC section 1782

According to 28 USC section 1782, the US district courts retain the

authority to order any person within the relevant judicial district to provide testimony (ie, depositions) or produce documents for use in a proceeding before a 'foreign or international tribunal'. In other words, if a party to a proceeding before a 'foreign or international tribunal' wished to obtain broad US-styled discovery from a person located in the US, section 1782 provided that party a powerful mechanism to do so, even if broad discovery was not otherwise available under the rules and procedures of the foreign jurisdiction.

The relevant text of the statute is provided below:

> 'The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a *foreign or international tribunal*, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.'[2]

With the spread of globalisation and increased prominence of international arbitration over the last half-century, section 1782 has increasingly become a discovery tool of interest to practitioners appearing before international arbitral tribunals outside the US. As a result, the US federal courts have wrangled with the question of whether the language of section 1782 includes international arbitral tribunals seated outside the US for several decades.

The history of section 1782, however, dates as far back as 1855 when the US Congress enacted the statute and granted the US courts the authority to permit discovery in the US on the request of a foreign court.[3] More than a century later, and after a series of minor revisions, the US Congress adopted a new version of section 1782(a) in 1964 that expanded the scope of the statute to authorise the US district courts to grant discovery in aid of any 'proceeding in a foreign or international tribunal' in place of the former text: 'judicial proceeding pending in any *court* in a foreign country.'[4] (emphasis added). According to the legislative history of the 1964 revisions to section 1782, the statute's 'twin aims' were to provide 'equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects […] [and to] invite foreign countries similarly to adjust their procedures.'[5]

At the time of the passage of the 1964 revisions to section 1782, the legislation garnered relatively little attention and section 1782 remained on the US statute books for several decades without significant interest. In the late 1990s, a pair of US federal circuit courts of appeals concluded that section 1782 did not apply to international commercial arbitrations because privatised international arbitral tribunals did not fall within the meaning of 'foreign or international tribunal' as used in the statute.[6] In 2004, the US Supreme Court entered the fray when it concluded that the Directorate-General for Competition of the Commission of the European Communities was a 'tribunal' for purposes of section 1782, but did not reach the question of whether section 1782 encompassed proceedings before international arbitral tribunals.[7]

However, beginning in 2019, a groundswell of cases emerged that placed section 1782 at the forefront in the field of international arbitration. Specifically, in October 2019, the Sixth Circuit court of appeals ruled that the statute did, in fact, encompass international commercial arbitration proceedings.[8] In 2020, the Fourth Circuit[9] joined the Sixth Circuit's reasoning and, the Second Circuit court of appeals concluded that 1782 could apply to certain investor-state arbitration matters.[10]

In light of the circuit split, and after a series of fits and starts, the US Supreme Court granted a writ of *certiorari* to resolve this question once and for all in *ZF Automotive US, Inc v Luxshare, Ltd.*

Procedural history

Notwithstanding the title of the case, *ZF Automotive* consisted of a pair of consolidated cases that both involved arbitration proceedings outside the US in which a party sought discovery in the US pursuant to section 1782.

In the first case, Luxshare, Ltd, a Hong Kong-based company, initiated an arbitration against the Michigan-based ZF Automotive, Inc, alleging fraud in a sales transaction between the two companies.[11] The applicable arbitration agreement between Luxshare and ZF Automotive called for the arbitration to take place in Berlin pursuant to the Arbitration Rules of the German Institution of Arbitration.[12] In connection with the arbitration proceedings, Luxshare filed an application under section 1782 in US federal court that sought information from ZF Automotive and its officers.[13] ZF Automotive opposed the application on the basis that the arbitral tribunal overseeing the dispute between Luxshare and ZF Automotive was not a 'foreign or international tribunal.'[14] Following applicable precedent, the lower court granted Luxshare's application and, on appeal, the Sixth Circuit court of appeals denied ZF Automotive's effort to challenge the lower court's decision.[15]

In the second case, known as *AlixPartners, LLP v Fund for Protection of Investor's Rights in Foreign States*, involved a treaty-based investment arbitration concerning the collapse of a failed

Lithuanian bank, AB bankas SNORAS (Snoras).[16] In *AlixPartners*, a Russian corporation representing the interests of a Russian investor in Snoras (the 'Fund for Protection of Investors' Rights in Foreign States' or the Fund), initiated an ad hoc investment arbitration against Lithuania under the Lithuanian–Russian bilateral investment treaty, claiming that Lithuania expropriated the investor's interests in Snoras.[17] The Fund subsequently filed a section 1782 application in US federal court seeking information from Simon Freakley, the CEO of the New York based consulting firm AlixPartners LLP and former temporary administrator of Snoras. Similar to ZF Automotive, AlixPartners resisted the Fund's section 1782 application on the ground that the arbitral tribunal was not a 'foreign or international tribunal' within the meaning of the statute.[18] The lower court rejected AlixPartner's argument and the Second Circuit Court of Appeals affirmed.[19]

Supreme Court Decision: *ZF Automotive US, Inc v Luxshare, Ltd*

On review of the two consolidated cases, the Court reversed the lower courts' rulings. The Court held that: (1) the term 'foreign and international tribunals' found in section 1782 only referred to 'governmental or intergovernmental bod[ies]', not private adjudicative bodies; and (2) the arbitral tribunals in *ZF Automotive* and *AlixPartners* did not satisfy this definition.[20]

In concluding that the term 'foreign and international tribunals' excludes private adjudicative bodies, the Court offered three basic rationales.

- First, the Court explained that, based on its review of the text of the statute, the terms 'foreign tribunal' and 'international tribunal' must refer to government bodies that conferred some form of sovereign authority by one or more nations.[21]
- Second, the Court found that the statutory history of section 1782 supported its interpretation of the language of the statute.[22] As the Court explained, '[f]rom the start, the statute has been about respecting foreign nations and the governmental and intergovernmental bodies they create.'[23] According to the Court, the phrase 'foreign or international tribunals' in the 1964 amendments to section 1782 was intended to broaden 'the range of governmental and intergovernmental bodies included in section 1782', but stopped short of also including private arbitration bodies.[24]
- Third, the Court pointed out that the broadest interpretation of section 1782 created tension with the US Federal Arbitration Act and arguably granted applicants under section 1782 greater access to discovery than even permitted by the FAA.[25] For example, 'the FAA permits only the arbitration panel to request discovery, while district courts can entertain section 1782 requests from foreign or international tribunals or any "interested person."'[26] The Court concluded that this 'mismatch' could not support a broad interpretation of section 1782.[27]

After determining that the phrase 'foreign or international tribunal' only referred to adjudicatory bodies conferred with governmental or intergovernmental authority, the Court concluded that neither of the arbitral tribunals at issue in the case fell within the scope of a 'foreign or international tribunal'.

In the case of the arbitral tribunal in *ZF Automotive,* the Court easily dispensed with the notion that the international commercial arbitration tribunal could constitute a 'foreign or international tribunal.'[28] According to the Court, the arbitral tribunal was created by agreement of the parties, governed by the rules of a private arbitral organisation, and had no connection with a particular government entity. As a result, this 'adjudicative body does not qualify as a governmental body.'[29]

The Court, however, acknowledged that the ad hoc arbitral tribunal in *AlixPartners* raised a closer question.[30] While *AlixPartners* involved a sovereign government and claims that arose out of an international treaty between Lithuania and Russia, the fundamental question was: 'Did these two nations intend to confer governmental authority on an ad hoc panel formed pursuant to the treaty?'[31] The Court concluded that they did not.[32] After listing a series of characteristics of the ad hoc tribunal, the Court explained 'the ad hoc panel at issue in the Fund's disputes with Lithuania is "materially indistinguishable in form and function" from the [...] panel resolving the dispute between ZF and Luxshare.'[33]

Implications

The Court's decision in *ZF Automotive*, in large part, maintains the status quo for the field of international arbitration and suggests that the majority of international commercial arbitrations and investor–state arbitrations fall outside the confines of section 1782.

For many international arbitration practitioners, the Court's decision is likely to come as some relief. Indeed, had the Court reached the opposite conclusion in *ZF Automotive*, many practitioners feared that section 1782 could upset the carefully designed document exchange practices commonly used in international arbitration proceedings around the world. Moreover, parties – particularly those in the US – who opted into international arbitration precisely to avoid the expansive discovery practices in the US no longer faced the risk of being subjected to extensive discovery disputes in the US courts.

To others, however, the Court's decision was a missed opportunity. Indeed, many practitioners in the US have argued for decades that the text of section 1782 was clear and that there should be no real dispute that the statute was intended to include international commercial arbitration and investor state arbitration. To these practitioners, section 1782 was a critical tool that would enable parties to uncover key evidence and enable foreign arbitral tribunals to render more informed determinations in their proceedings.

Notably, the Court did not close the door on all future disputes concerning section 1782 and left open the possibility that an international arbitral tribunal could, under the right circumstances, constitute a 'foreign or international tribunal'.[34] According to the Court, '[g]overnmental and inter-governmental bodies may take many forms, and we do not attempt to prescribe how they should be structured […] [t]he relevant question is whether the nations intended that the ad hoc panel exercise governmental authority.'[35]

As a result, we expect that US courts will continue to grapple with the question of when an arbitral tribunal is imbued with specific government authority, particularly in the field of investment arbitration where some institutions, such as ICSID, carry unique quasi-governmental characteristics. As a result, it would be wrong to conclude that *ZF Automotive* is the last we will hear of section 1782 and practitioners in the field of international arbitration and even international construction disputes should continue to keep their ears to the ground.

Notes

1 *ZF Automotive US, Inc v Luxshare, Ltd*, 21-401, 2022 WL 2111355 (US 13 June 2022).
2 28 USC s 1782(a).
3 33 Cong Ch 140; 10 Stat. 630 (2 Mar 1855); *see also* New York City Bar, International Commercial Disputes Committee, 28 USC s 1782 as a Means of Obtaining Discovery in Aid of International Commercial Arbitration – Applicability and Best Practices, 2-3 (29 Feb 2008).
4 New York City Bar, International Commercial Disputes Committee, 28 USC s 1782 as a Means of Obtaining Discovery in Aid of International Commercial Arbitration – Applicability and Best Practices, 2-10 (29 Feb 2008).
5 S Rep No 88-1580 (1964), reprinted in 1964 USCCAN 3782, 3793.
6 *NBC v Bear Stearns & Co*, 165 F.3d 184 (2d Cir 1999) (holding that private international arbitration falls outside Section 1782's coverage); *Republic of Kazakhstan v Biedermann Int'l*, 168 F3d 880 (5th Cir 1999) (same).
7 *Intel Corp v Advanced Micro Devices, Inc*, 542 US 241, 248 (2004).
8 *Abdul Latif Jameel Transp. Co Ltd v FedEx Corp*, 939 F3d 710 (6th Cir 2019).
9 *Servotronics, Inc v Boeing Co*, 954 F3d 209 (4th Cir 2020); *but see Servotronics, Inc v Rolls-Royce PLC*, 975 F3d 689, 694 (7th Cir 2020)
10 *Fund for Protection of Investor Rights in Foreign States v AlixPartners, LLP*, 5 F4th 216 (2d Cir 2021).
11 See generally *LuxShare, LTD v ZF Automotive US, Inc*, 547 FSupp3d 682 (E D Mich 2021); *LuxShare, LTD v ZF Automotive US, Inc*, 555 FSupp 3d 510 (6th Cir 2021).
12 See generally *LuxShare, LTD v ZF Automotive US, Inc*, 547 F Supp3d 682 (E D Mich 2021).
13 *Ibid.*
14 *Ibid.*
15 *LuxShare, LTD v ZF Automotive US, Inc*, 555 F Supp 3d 510 (6th Cir 2021).
16 *In re Fund for Protection of Investor Rights in Foreign States*, 19 Misc 401 (AT), 2020 WL 3833457 (S D N Y 8 Jul 2020).
17 *Ibid.*
18 *Ibid.*
19 *In re Fund for Protection of Investor Rights in Foreign States*, 19 Misc 401 (AT), 2020 WL 3833457 (S D N Y 8 Jul 2020); *Fund for Protection of Investor Rights in Foreign States v AlixPartners, LLP*, 5 F 4th 216 (2d Cir 2021).
20 *ZF Automotive US, Inc v Luxshare, Ltd*, 21-401, 2022 WL 2111355, at *10 (US 13 June 2022).
21 *ZF Automotive US, Inc v Luxshare, Ltd*, 21-401, 2022 WL 2111355, at *5-7 (US 13 June 2022).
22 *ZF Automotive US, Inc v Luxshare, Ltd*, 21-401, 2022 WL 2111355, at *7-8 (US 13 June 2022).
23 *ZF Automotive US, Inc v Luxshare, Ltd*, 21-401, 2022 WL 2111355, at *7 (US 13 June 2022).
24 *Ibid.*
25 *Ibid.*
26 *Ibid.*
27 *Ibid.*
28 *ZF Automotive US, Inc v Luxshare, Ltd*, 21-401, 2022 WL 2111355, at *8 (US 13 June 2022).
29 *Ibid.*
30 *Ibid.*
31 *Ibid.*
32 *ZF Automotive US, Inc v Luxshare, Ltd*, 21-401, 2022 WL 2111355, at *9 (US 13 June 2022).
33 *Ibid.*
34 *ZF Automotive US, Inc v Luxshare, Ltd*, 21-401, 2022 WL 2111355, at *10 (US 13 June 2022).
35 *Ibid.*

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COUNTRY UPDATE: PANAMA

Update on Panama's PPP regime

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It has been almost three years since Panama adopted its first public–private partnership (PPP) regime through Law 93 of 2019 (the Law). It regulates the institutional framework and processes for the development of investment projects under the PPP category, and seeks to promote the development of infrastructure and public services, contribute to economic growth, job creation, competitiveness, and improve the living conditions.

Since the enactment of the Law in 2019, additional complementary regulations listed in this article have been issued. The first two PPP projects – before similar contracts were executed with a general concessions law, but not with a PPP law – are advancing through the prefeasibility and feasibility stages, and into prequalification phase.

The governing body of the PPPs in Panama is called the Ente Rector (the 'governing body'). It comprises the ministers of the Presidency, economy and finance, public works, commerce and industry, and foreign affairs. It also includes the Comptroller General of the Republic, who does not have right to vote.

Through Resolution No ER-02-01-2021 of 28 October 2021, the official website of the governing body was created at https://enterector.gob.pa. Through this website, interested parties have full access to relevant information about Panama's PPP projects, including: relevant laws, resolutions, decrees, and guidelines, bidding documents/RFPs, FAQs, step-by-step explanation of the process, among other key information regarding the regime and projects.

Moreover, Resolution No ER-01-R1-2021 of 28 October 2021, approves the Rules of Internal Procedure of the Governing Body *Reglamento Interno de Funcionamiento del Ente Rector*. These rules include essential regulatory aspects of the operation of the governing body, such as its scope of application, general principles, attributions, announcements, quorum and decision-making process, technical and operational support responsibilities, duties of its members, exclusions, formalities. The adoption of this resolution was probably the single most important step for the implementation of PPP projects in Panama, as the governing body is the leading authority in PPP projects, being responsible for defining the priority areas for the projects and the analysis criteria on the identification, selection, and prioritisation of projects, as well for the approval of projects, tender documents, and PPP contracts, among others.

As mentioned in previous articles, the Law is designed to contain four main stages for the implementation of a PPP project:

Stage 1 – prefeasibility

- Public Contracting Entity (EPC) submits the Initial Technical Report (ITI) to the PPP Secretariat (SNAPP), complying with eligibility criteria established in the Law.
- SNAPP analyses the ITI and the Ministry of Economy and Finance (MEF) verifies if the project complies with fiscal/budgetary capabilities.
- SNAPP shares the ITI and PPP project request with the governing body.
- The governing body issues its approval (with or without recommendations), or objection to the PPP project request received together with the EPC report.

Stage 2 – feasibility

- EPC prepares and files the Definitive Technical Report (ITD) as well as a draft of the tender documents and PPP contract, to the SNAPP.
- SNAPP analyses ITD and MEF verifies if project complies with fiscal/budgetary capabilities.
- SNAPP shares the ITD to the governing body, which will then issue its approval or non-approval of the project.
- EPC carries out the bidder's prequalification process, with prior authorisation from the governing body.

Stage 3 – bidding process

- EPC carries out preparatory activities for the tender process.
- EPC begins the promotion and publicity of the PPP project, with the support of the SNAPP.
- If adjustments are required to the tender documents and contract model, SNAPP and MEF prepare and submit them to the governing body.
- The tender process takes place, proposals are received, analysed and the PPP contract is formally awarded.

Stage 4 – execution

- Signed PPP contracts are submitted to the office of the General Comptroller for its endorsement.
- PPP project execution phase commences under the supervision of the EPC.

Resolution No ER-04-M1-2021 of 23 December 2021, approved the Procedural Guideline for the Stage 3 bidding process of the PPP Institutional Framework. This guideline was drafted by the SNAPP in collaboration with the General Direction of Public Contracting of Panama, as a useful instrument for EPCs in the implementation of their PPP projects.

Although the Law and its regulation sets the rules for the tender process, the Procedural Guideline involves the practical details of the tender process and its implementation, including the tender documents content, its approval and required modifications, consultation period, public homologation meeting, announcement of the tender process, formalities, rejection and acceptance of bid proposals, composition, attributions and responsibilities of evaluation commissions, terms and deadlines within the tender process, available claims within the tender process, among others.

Who bears the risks in PPP projects? This is a fundamental question in any PPP contract, as the core of this development modality is to procure the efficient assignment of risks, allocating them to the party which is better suited to bear them.

Resolution No ER-02-L1-2022, of 31 March 2022, approves the Guideline for Risk Evaluation, Allocation, and Assessment. In a highly technical and detailed manner, it provides the elements to be considered in the preparation of a risk matrix and the identification, allocation, mitigation, and qualitative and quantitative assessment of the most common risks in PPP project, including (amongst others), design, construction, property expropriation and liberation, social, geological and geotechnical, environmental, archaeological, licences and permits, additional investments, financial closing, interest rates, currency exchange, regulatory changes, inflation, *force majeure*, early termination of PPP contract, accidents and third party liability, cost overruns, revenue, political and non-payment risks.

Resolution No ER-03-L2-2022, of 31 March 2022, approves the Guideline for the Preparation of the Value-For-Money Analysis, including both qualitative and quantitative approaches. This resolution is of particular interest for financial institutions and advisors which focus on the economics of PPP projects, as it establishes criteria for determining the need for public funding and how to calculate it, efficient management of terms and costs, budgetary allocation, bankability, risk transfer levels, base cost calculation, social opportunity cost, risk analysis, project revenue calculation, management costs and other important indicators.

Applying the PPP Law

Two important projects have been prioritised: (1) rehabilitation, improvement, and performance standards maintenance of the Pan-American Highway (east side); and (2) the Construction of the Fourth Transmission Line (500KV).

The first project is led by the Ministry of Public Works of Panama. Its prequalification tender document was published on 26 May 2022, and proposals are expected to be received on 19 September 2022.

In order for the prequalification phase to begin, the Ente Rector issued Resolution No ER-05-P1-2021 of 23 December 2021, approving the ITI corresponding to Stage 1 of the project, and Resolution No ER-04-P1-2022, authorising the prequalification tender document.

The second project is led by the Empresa de Transmición Eléctrica, S A (ETESA), which is an entirely government-owned electricity transmission company with exclusive rights on the transmission of electricity in Panama.

The ETESA's current transmission system consists of three trunk transmission lines, and the above project seeks to increase ETESA's transmission capacity with a fourth. It is expected that the prequalification tender documents for this project will be released in the second half of 2022, as the ITI corresponding to Stage 1 of the project has already been approved through Resolution No ER-01-P2-2022 of 31 March 2022.

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Aerial view of Avenida Brigadeiro Faria Lima, São Paulo, Brazil. Credit: pedro/Adobe Stock

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Brazil's new procurement law and its possible impacts on government procured construction contracts

Introduction

The national public procurement process in Brazil became extremely rigid following the 1993 public procurement statute, which was approved to establish a detailed procurement procedure to prevent administrative wrongdoings. Under statute, procurement contained several internal and external stages and a number of procedural limitations imposed on public agents. As a result, construction contracts would need to be procured with detailed engineering designs and bidders were required to produce in-depth documents and certification of their compliance with law, proof of good standing regarding federal, state and local taxes and labour management, before they could have their bids considered.

Marginal adjustments have been introduced in the last decade, mainly in the form of a more agile procurement procedure aimed at the public works related to the 2014 World Cup and the 2016 Summer Olympics. More drastic improvements, however, have been made in the last couple of years: a 2020 statute imposed limits and conditions for administrative or judicial decisions rendering administrative contracts null and void; and, in particular, a 2021 statute,[1] which will come into force in April 2023, overhauls the national system for government procurement and contracts.

The new statute

The new statute, which was approved by Congress and enacted in April 2021, will come into force in April 2023. Consequently, after April 2023, all public tenders in Brazil will have to conform to its measures. In the meantime, public authorities can choose whether they will structure public tenders according to the 1993 or the 2021 statute. In the interim period, the government has been producing regulatory norms and ordinances that further develop the new statute's key concepts.

For international bidders, the new statute means an easier path to bidding in public procurement, as it simplifies rules and bans any preferential treatment to Brazilian enterprises except when specifically mentioned in the appropriate government policy, or when there is a tie in the bidding session, in which case, a Brazilian company would be favoured.

The general steps to facilitating the general procurement process, not specific to international bidders are:

- accreditation documents will no longer be requested from all bidders before the economic bids;
- the law separates standardised from non-standardised goods and services, forcing a longer period of procurement for the latter (ie, common services should have less technical requirements and smaller term between publication of the request for quote (RFQ) and the bidding session, whereas special goods and services should prompt the bidding period after the publication of the RFQ to increase to, at least, 25 business days); and
- every RFQ must be published online on a web portal created by the federal government (the *Portal Nacional de Compras Públicas* or National Public Procurement Website).[2]

Technical accreditation documents

The new statute simplifies the conditions imposed on foreign bidders for the presentation of their technical documents. The 1993 statute allowed the presentation of apostilled or certified documents. However, it was not unusual to see the RFQ require registration of the company at the Regional Engineering Council (a professional board) of the place of execution of the project and the technical accreditation documents to be translated and approved by the Regional Engineering Council. This onerous requirement would often make international companies decide not to participate in public tenders in Brazil. The new law specifically states that an application for company registration in the Regional Engineering Council should only be requested at contract signing phase, and authorises the presentation of technical certificates issued by foreign companies when accompanied by the appropriate translation. The new law also specifically allows subcontractors to present technical accreditation documents under certain conditions. This innovation will allow international groups to bid by means of their Brazilian subsidiaries and present accreditation documents based on their group's international experience.

The new statute has followed the recent trajectory of government policy to facilitate the participation of foreign bidders in public tenders. As such, foreign bidders may take part in tenders with fewer bureaucratic hurdles.

International procurement

The new law creates a new type of procurement in which the RFQ allows international bidders to bid in foreign currencies. Such a change in the law is compatible with recent legislation which updated the Brazil's Foreign Exchange Law (Federal Law 14.286/2021) and granted Brazil's Central Bank greater authority to regulate the market.

Construction procurement: overcoming design obstacles

Brazil's public procurement based on the 1993 statute was originally two-phased: the public authority would procure the engineering design and, once the detailed design was received and reviewed, the public authority would then publish a new RFQ for the construction contract. The creator of the engineering design would not be allowed to participate in the construction procurement.

This dual system created several consequences for the second procurement. As the designer would be forbidden to bid on the construction RFQ (due to natural advantages they could have when bidding for the construction phase against other

bidders), most of the construction know-how would be reserved for the construction bid. As the final bid would be based on a pre-approved detailed design, any deviation from the design would create change orders for the construction company. In construction work, the procurement would occur before the environmental permitting process was concluded, and therefore any additional conditions arising from the environmental permitting phase would either change the implementation procedure or even resize the construction altogether. This would lead to new change orders and price adjustments.

The new statute establishes two instruments to overcome the challenges of the traditional form of contracting: integrated contracts and competitive dialogue.

Integrated contracts

Integrated contracts and semi-integrated contracts will go for bid before the final detailed engineering design is produced. The RFQ should then: (1) include a risk matrix, and (2) forbid any price adjustments except for *force majeure*, changes to the project at the government's request and additional events that are listed as the government's responsibility in the contract. Bidders can therefore choose their own engineering solution for such performance, subject to the approval of the government authority of the detailed engineering design.

Such contracts have been in use in Brazil over the past few years in specific sectors and by government-owned enterprises. According to government data, standard construction contracts have had change orders of more than 10 per cent of the contract price in 52 per cent of the cases in which they were employed, whereas integrated contracts have had no change orders affecting the price in 87 per cent of the cases in which they were employed.[3]

Competitive dialogue

Inspired by a European Union Directive, the competitive dialogue can be used when the government intends to: (1) contract a technological or technical innovation, is incapable of finding a technical solution in the market, or to sufficiently define its solution for an RFQ; or (2) explore market conditions for technical solutions, technical requirements, or financial or legal contractual conditions. The process starts with a call to bidders with the approval of any company that meets certain criteria specified by the government. Afterwards, the government can hold individual discussion rounds with the different candidates. After the negotiation rounds have been completed, the government elects one of the proposed solutions and publishes a new RFQ for the final contract.

Efficiency contracts

So-called 'efficiency contracts' are a means by which government can engage in contracts aimed at generating public authority savings, in the form of reducing the current expenses and the contractor being paid based on such reductions. Bidders will present their proposals, the estimated savings and price proposals. The actual payment will be based on the offered price plus any effective savings generated. However, if the economic return from the bid does not occur, then the value of the savings which should have been generated will be deducted from payments to the contractor. It is expected that certain recurrent costs, such as energy supply contracts, will be used in this new mechanism.

Final remarks

The new statute has followed the recent trajectory of government policy to facilitate the participation of foreign bidders in public tenders. As such, foreign bidders may take part in tenders with fewer bureaucratic hurdles. The new statute also allows improved engineering services and construction contracts, with better engineering solutions and greater adaptability to performance. It is hoped that, in fostering increased competition and more efficient contract designs, the new statute will contribute to modernising public procurement in Brazil and cut government expenditure.

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Notes

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2 The portal is already available and operational at www.gov.br/pncp/pt-br, accessed 19 July 2022.

3 The New Bidding Law, Law no 14,133/21 Innovations and overview www.gov.br/compras/pt-br/nllc/lei-14133-seges-completa.pdf, accessed 19 July 2022.

FEATURE ARTICLE

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Legal implications of adopting Building Information Modelling (BIM) in EU public procurement

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The use of Building Information Modelling (BIM) in tendering facilitates the early involvement of contractors and ensures that the knowledge and experience of contractors are fully utilised in the design process of a construction project. Nevertheless, the use of BIM in tendering raises legal issues regarding BIM ownership and the protection of information. To address these issues, this article reviews and analyses the relevant regulations, literature, and case law. It also conducts a comparative analysis with a primary focus on the Directive 2014/24/EU and the case law of the European Court of Justice (ECJ). The Directive gives EU Member States wide discretion in regulating the duty. Consequently, each Member State has imposed different levels of confidentiality obligations on its contracting authorities.

Introduction

Contractors on construction projects possess valuable knowledge and experience that is useful in developing the design of the projects and their overall success. To take full advantage of this knowledge and experience, early contractor involvement in the design is necessary. Involving contractors early in the design phase can avoid subsequent wasted time, cost and effort that is common in such projects. This is because a large proportion of construction problems are due to a poor understanding of the design and the impact of design decisions made prior to project delivery.[1]

Building Information Modelling (BIM), as an information-sharing technology, facilitates the early involvement of contractors in the tendering process. However, as a BIM model contains information that is shared by its participants, its inclusion in a tendering process raises legal issues regarding ownership of the model and protection of confidential information.[2] The open sharing of information in tendering processes through BIM increases the risk of disclosure of confidential information and even collusion, as the contracting authority and winner will have the opportunity to use an unselected provider's information and ideas. This would be harmful to economic operators and discourage them from participating in competitive tendering. This article examines the ownership of the BIM model and the liability of contracting authorities in relation to information shared via the BIM platform during the tendering phase.

Building Information Modelling (BIM)

BIM as a collaborative system is described as using:

> '[…] advanced computer systems to build 3D models of infrastructure and hold large amounts of information about its design, operation and current condition. At the planning stage it enables designers, owners and users to work together to produce the best possible designs and to test them in the computer before they are built. In construction it enables engineers, contractors and suppliers to integrate complex components cutting out waste and reducing the risk of errors.[3]

BIMs are deployed in four levels from Level 0 to Level 3, which are defined based on their collaboration level. BIM Level 0 is the simplest type of BIM, which works by using hand-written or electronically generated paper documents. Level 1 works by creating 2D and 3D models and sharing information electronically without the use of a detailed database. In Level 2, each project participant develops their own 3D models and information is shared using a common file format. Level 3 and beyond is a completely open process based on a single 3D model where all participants share their model development information.[4] Level 3 eliminates the possibility of conflicting information and ensures consistency.[5] BIM Level 3 was introduced to encourage open and collaborative work between project participants by allowing straightforward sharing of data. Some important functions of BIM are cost estimation, time evaluation, energy efficiency analysis, or utilisation optimisation.[6]

BIM ownership

When a design is based on a 2D model there is no uncertainty about ownership of the model and its elements, since the ownership of a drawing is asserted on each of its pages.[7] However, IP ownership becomes an issue in 3D and 4D models when project participants contribute their experience and information in the development of a single BIM model.

As BIM Level 3 requires the creation of transparent information sharing and a highly collaborative environment, it is the best solution for project delivery systems such as integrated project deliveries where early contractor involvement is required. However, the inclusion of BIM in the tendering process raises the legal issue of ownership of the BIM model. Since the BIM model is developed collaboratively by its participants, its ownership is uncertain. To address this issue, it is necessary to determine whether the elements of the model are distinguishable.[8] This distinction will be more difficult where multiple people have the possibility to change elements of the model.[9]

Applicable IP law

BIM models created in the tendering process prior to the award of the contract will not usually be registered, and therefore cannot be protected by Design Law, as Article 10 of the EU Design Directive,[10] conditions

protection of design on registration. However, unregistered designs can be covered by copyright under the concept of artistic work,[11] although EU Member States differ in how national copyright law protects unregistered designs. For instance, the German Act on Copyright and Related Rights (*Urheberrechtsgesetz – UrhG*)[12] in section 2.4, the French Intellectual Property Code (*Code de la propriété intellectuelle*) in section L112-2.7, and the Danish Consolidated Act on Copyright 2014, Consolidated Act No 1144 of 23 October 2014 (*Bekendtgørelse af lov om ophavsret* (LBK nr 1144 af 23/10/2014)) in section 1.1, all list works of architecture under protectable copyright law.

Joint ownership of the BIM model

Determining the ownership of IP rights over the BIM model and its elements is necessary to determine the lawful exercise of ownership. Generally, an owner of a model is granted exclusive right regarding the use of IP and consequently to copy and disclose it as it wishes.[13] In BIM Level 3, however, the authors of the model are regularly indistinguishable. However, if the contracting authorities are to be granted ownership of a BIM model jointly with a tenderer or winner, exercising their right by disclosing it to a third party would be contrary to the interest of the other joint owner. Therefore, the French, German and Danish legislatures grant joint ownership of jointly developed BIM models and regulate in their copyright laws the right of the owners in exercising ownership rights.

In this regard, the French Intellectual Property Code section L113-3[14] provides:

> 'The collaborative work is the common property of the co-authors. The co-authors must exercise their rights by mutual agreement. In the event of disagreement, it is for the civil jurisdiction to rule.'

The German Act on Copyright and Related Rights, section 8.1[15] also provides for joint ownership if the individual shares of each author in the work are not separable. Section 8.2[16] further states that the right to use the work and its modification is only possible with the consent of the co-authors. The Danish Consolidated Act on Copyright 2014, in section 6[17] also grants joint ownership where individual contributions are not separable as independent works, with all joint owners being entitled to bring an infringement action. Therefore, exercising joint ownership rights will usually require an agreement between the owners or the consent of the other joint owner. Arbitrary exercise of ownership rights would raise the issue of infringement of IP rights and consequently lead to civil liability claims.

In BIM Level 3, however, the authors of the model are regularly indistinguishable

In conclusion, it can be stated that a BIM model developed in a tendering process by contracting authorities, architects and tenderers cannot be the sole property of the contracting authority as far as indistinguishable elements are concerned. This means that the model is jointly owned and the exercise of ownership rights by any of the parties without the consent or agreement of the other owners is an infringement of copyright and gives rise to civil liability. Therefore, the contracting authorities do not have the right to disclose the model to the other tenderers in exercise of their ownership right without the consent of the tenderer who co-owns the model.

Confidential information

The importance of confidentiality in tendering is stated in Article 21.1 of EU Public Procurement Directive 2014/24 section 21.1.[18] However, there is no clear and unified definition of confidential information in the EU.

In this context, it is worth noting that Article 39 of the TRIPS[19] Agreement refers to 'commercially sensitive information' and recognises protection against the disclosure of such information if it:

(1) is secret in the sense that it is not [...] generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
(2) has commercial value because it is secret; and
(3) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.[20]

In the *Postpank* case, the European General Court described the notion of business secrets as follows: '"Business secrets are information of which not only disclosure to the public but also mere transmission to a person other than the one that provided the information may seriously

harm the latter's interests.'[21] German legislature in the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) takes a broad approach towards subjects of confidential information. Article 134.3[22] of the Act provides that contracting authorities are free of any obligation of disclosure where such disclosure relates to confidential information and would therefore 'harm legitimate commercial interests of undertakings'. Additionally, section 89(c)(3)[23] gives courts broad discretion to reject a disclosure request of confidential information if there are 'important reasons' to keep that information confidential. The German legislature does not limit the confidential information to the conditions recognised in Article 39 of the TRIPS Agreement, nor to cases where the consequence would be serious harm as required by the General Court in the *Postpank* case. Instead, German law in its confidentiality evaluation relies on the (broad) concept of 'important reasons'.

As confidential information is crucial for businesses, its protection is also crucial, especially when BIM is used as a method of sharing information in the tendering process. Since information is not treated as property in the EU, it is not protected under

As confidential information is crucial for businesses, its protection is also crucial, especially when BIM is used as a method of sharing information in the tendering process.

Intellectual Property laws.[24] Copyright excludes contents and its protection covers only the author's original treatment of data or its structure, not its content.[25] In this regard, Article 3.2 of Directive 96/9/EC[26] states: 'The copyright protection of databases provided for by this Directive shall not extend to their contents and shall be without prejudice to any rights subsisting in those contents themselves.'

However, the protection of confidential information in public procurement can be provided under private law by way of an agreement or under public law as a general duty of confidentiality recognised in Directive 2014/24/EU for contracting authorities.

Confidentiality agreement

The protection of information that tenderers share, through the use of a BIM model, can be ensured through a confidentiality agreement. Where information is concerned that is critical to their business, tenderers will regularly enter into confidentiality agreements with the contracting authority before sharing such information. In such cases the contracting authority is prohibited from disclosing the information to third parties.

Duty of confidentiality

The general duty of confidentiality of the contracting authorities is recognised by the EU Public Procurement Directive 2014/24. Article 21.1 of the Directive provides:

> 'Unless otherwise provided in this Directive or in the national law to which the contracting authority is subject, [...] the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.'

The first part of the above article gives the EU Member States broad discretion to regulate their non-disclosure obligation in public procurements. This, besides the fact that there is no uniform definition of confidential information in the laws of the EU Member States, has led to different practices of information protection in the EU Member States. Although most EU Member States provide a minimum level of protection for information shared during the tendering process, some states take a more liberal approach towards such information. In Finland, for example, tender documents are made available to the public after the confidential information has been removed. Confidential information may also be disclosed if this information has an impact on the evaluation of a tender, as it is considered that the principle of transparency and public interest outweighs considerations of confidentiality.[27]

Such a liberal approach towards information disclosed in the context of public procurement can potentially harm competition. Too much openness of information provided by tenderers creates the fear of losing advantages gained from the information and, consequently, distorts competition, while

according to the European Court of Justice (ECJ) in *Impresa Pizzarotti & C. SpA v Comune di Bari*,[28] protecting competition is the ultimate purpose of the EU Directive. The fear of sharing information also jeopardises the main purpose of using BIM in the tendering process, which is to benefit from contractors' and suppliers' design information and to minimise future design defects due to the lack of information.

Business information is critical to the success of businesses, so disclosing confidential information or even a too extensive disclosure of non-confidential information would make the businesses uncomfortable and consequently harms competition.[29] The ECJ in *C-450/06 Varec*[30] highlighted the importance of maintaining fair competition in public procurement as an important public interest and concluded that:

> '[i]n order to attain that objective it is important that the contracting authorities do not release information relating to contract award procedures which could be used to distort competition, whether in an on-going procurement procedure or in subsequent procedures.'[31]

Moreover, considering the deterrent effect of the information disclosure policy in the tendering procedure and its impact on competition, the ECJ stated:

> 'Those operators must be able to communicate any relevant information to the contracting authorities in the procurement process, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to them.'[32]

The nature of BIM as an information-sharing platform in combination with a duty to protect confidential information exposes contracting authorities to a greater risk of liability. The use of BIM in the tendering process implies a higher risk of information leakage and/or misuse of information and, consequently, a greater responsibility for contracting authorities to ensure a safe environment and fair competition. Otherwise, contracting authorities would expose themselves to possible claims for breach of confidentiality obligations and failure to ensure a secure tendering process.

Obligation of disclosure

The duty of confidentiality conflicts with the general duty of disclosure arising from the transparency principle expressed in Article 18.1 of the EU Procurement Directive 2014/24. It has been argued that, since the principle of transparency is an important measure in the fight against corruption, this principle (together with the principle of democracy) outweigh the duty of confidentiality, and that therefore tender documents should be treated as public information and be available to the general public.[33] The Finnish Act on the Openness of Government Activities (*laki viranomaisten toiminnan julkisuudesta 621/1999*) has taken this approach and given the fellow tenderers the right to comprehensive access to information, including even confidential information and trade secrets if such information is assessed as part of the tender evaluation.[34]

However, in the *Varec* case[35], the ECJ held that the effectiveness of the contracting authorities' in providing fair competition in the public procurement process would be severely undermined if 'in an appeal against a decision taken by a contracting authority in relation to a contract award procedure, all of the information concerning that award procedure had to be made unreservedly available to the appellant, or even to others such as the interveners.'

The ECJ further held that '[s]uch an opportunity could even encourage economic operators to bring an appeal solely for the purpose of gaining access to their competitors' business secrets.'

Additionally, the ECJ has repeatedly emphasised that one of the fundamental purposes of EU Public Procurement rules is to ensure open and undistorted competition in the Member States, as well as to develop effective competition in the field of public contracts.[36]

Some EU Member States, such as Germany, France, and Denmark, place more emphasis on fair and effective competition than on the obligation of disclosure, as they believe fair competition is necessary to ensure the effectiveness of the tendering process. In this regard, the French Public Order Code 2020 (*Code de la commande publique (CCP) 2020*) in section L. 2132-1,[37] the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) in section 134(3),[38] and the Danish Public Procurement Act (*Udbudsloven*) in section129 (5),[39] rule out the disclosure obligation of the contracting authorities in tendering processes if doing so would harm fair and effective competition in public procurements.

In this regard, a judge in the UK Appeal Court case *Veolia v Nottinghamshire CC*[40] expressed concern about the detrimental effect of disclosure of confidential information on public interest and its negative effect on competition by stating:

> '[…] it is plain that there is a strong public interest in the maintenance of valuable commercial confidential information… If the penalty for contracting with public authorities were to be the potential loss of such confidential information, then public authorities and the public interest would be the losers, and the result would be potentially anti-competitive.'

The duty of confidentiality and the duty of transparency present the contracting authorities with a dilemma

Therefore, the protection of confidential information is not only a matter of private law in order to protect interests of undertakings, but also a matter of public interest as it is necessary to ensure undistorted competition in the tendering process.[41] Recognising fair competition as a matter of public interest, the ECJ states in the *Varec* case:[42] 'the maintenance of fair competition in the context of contract award procedures is an important public interest.'

Although the principle of transparency in tendering processes counters corruption, effective competition is the main element of success in public projects. While the use of BIM in tendering processes contributes to transparency, the aspect of open exchange of information carries a greater risk of breach of confidentiality obligations by contracting authorities. This is because contracting authorities are responsible for protecting confidential information. Providing a secure environment for information exchange while using an open platform for information exchange demands higher standards. The general duty of contracting authorities to ensure effective competition would compel them to provide for such standards. Therefore, failure to provide a secure environment for information exchange in a BIM-based tendering process would be considered a breach of the contracting authorities' obligation to ensure effective competition.

As can be seen, the duty of confidentiality and the duty of transparency present the contracting authorities with a dilemma. This problem must be solved by creating more certainty in the application of the principles of transparency and confidentiality in the EU Member States through explicit rules on transparency and confidentiality in public procurement at the EU level. As the ECJ stated in the *Varec* case:[43] 'that right of access must be balanced against the right of other economic operators to the protection of their confidential information and their business secrets.'

Conclusion

The developers of a BIM model in a tendering process will be the joint owners of the model and the exercise of their ownership right is governed by the copyright law of the relevant EU Member State. Since the exercise of its ownership right by each owner can potentially conflict with the interests of another owner, such exercise would generally only be permitted with the consent of the other owner(s). Therefore, the contracting authorities would not have the right to disclose the BIM model to third parties without the prior consent of the tenderer with whom they developed the BIM model.

As for the shared information in a BIM model, the protection of the information cannot be covered by copyright law, since copyright does not protect the content of databases.[44] In this situation, the common practice of entering into confidentiality agreements between a tenderer and the contracting authority is the most viable solution.

Where there is no such confidentially agreement, Article 21.1 of the EU Public Procurement Directive 2014/24 imposes a duty of confidentiality on principals, mainly on the grounds of effective competition and ultimately to protect public interest. However, this provision gives a broad discretion to the EU Member States to regulate the duty of confidentiality of the contracting authorities in tendering processes. In this respect, some states, such as Finland, favour transparency over confidentiality where the confidential information has an impact on the evaluation of a tender. Other states, such as France, Germany and Denmark place a greater emphasis on confidentiality to promote fair and effective competition. The ECJ has taken the same approach, proclaiming effective competition as the ultimate purpose of

Directive 2014/24 and prohibiting contracting authorities from releasing any (confidential) information shared by tenderers in their tender which could distort competition. Therefore, the acceptance of BIM in a tendering process of such states where the confidentiality obligation of contracting authorities has a higher priority would expose contracting authorities to greater liability. However, in states such as Finland, where the principles of openness and transparency outweigh confidentiality, the implementation of BIM in the tendering process would have little impact on the general liability of contracting authorities with regard to shared information.

Notes

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12 Copyright Act of 9 September 1965 (*Federal Law Gazette* I, 1273), as last amended by Art 1 of the Act of 28 Nov 2018 (*Federal Law Gazette* I, 2014).
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14 *Code de la propriété intellectuelle*, s L113-3; '*L'oeuvre de collaboration est la propriété commune des coauteurs. Les coauteurs doivent exercer leurs droits d'un commun accord. En cas de désaccord, il appartient à la juridiction civile de statuer. Lorsque la participation de chacun des coauteurs relève de genres différents, chacun peut, sauf convention contraire, exploiter séparément sa contribution personnelle, sans toutefois porter préjudice à l'exploitation de l'oeuvre commune.*'
15 *Urheberrechtsgesetz – UrhG* s 8.1; '*Haben mehrere ein Werk gemeinsam geschaffen, ohne daß sich ihre Anteile gesondert verwerten lassen, so sind sie Miturheber des Werkes.*'
16 S 8.2; '*Das Recht zur Veröffentlichung und zur Verwertung des Werkes steht den Miturhebern zur gesamten Hand zu; Änderungen des Werkes sind nur mit Einwilligung der Miturheber zulässig. Ein Miturheber darf jedoch seine Einwilligung zur Veröffentlichung, Verwertung oder Änderung nicht wider Treu und Glauben verweigern. Jeder Miturheber ist berechtigt, Ansprüche aus Verletzungen des gemeinsamen Urheberrechts geltend zu machen; er kann jedoch nur Leistung an alle Miturheber verlangen.*'
17 *Bekendtgørelse af lov om ophavsret* s 6; '*Har et værk to eller flere ophavsmænd, uden at de enkeltes bidrag kan udskilles som selvstændige værker, har de ophavsret til værket i fællesskab. Enhver af dem kan dog påtale retskrænkelser.*'
18 '*[…] the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.*'
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21 *Postbank NV v Commission of the European Communities* (T-353/94) [1996] E C R II-921, para 87.
22 '*Die Informationspflicht entfällt in Fällen, in denen das Verhandlungsverfahren ohne Teilnahmewettbewerb wegen besonderer Dringlichkeit gerechtfertigt ist. Im Fall verteidigungs- oder sicherheitsspezifischer Aufträge können öffentliche Auftraggeber beschließen, bestimmte Informationen über die Zuschlagserteilung oder den Abschluss einer Rahmenvereinbarung nicht mitzuteilen, soweit die Offenlegung den Gesetzesvollzug behindert, dem öffentlichen Interesse, insbesondere Verteidigungs- oder Sicherheitsinteressen, zuwiderläuft, berechtigte geschäftliche Interessen von Unternehmen schädigt oder den* lauteren *Wettbewerb zwischen ihnen beeinträchtigen könnte.*'
23 '*Das Gericht hat von der Offenlegung Betroffene und die Wettbewerbsbehörde vor der Zugänglichmachung oder Auskunftserteilung anzuhören. Tatsachen und Beweismittel, deren Geheimhaltung aus wichtigen Gründen verlangt wird, sind von der Zugänglichmachung oder Auskunftserteilung auszunehmen.*'
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34 See n 29, above, 529.
35 Case 450/06*, Varec,* para 39.

36 See n 29, above, 531.

37 '*L'acheteur ne peut communiquer les informations confidentielles dont il a eu connaissance lors de la procédure de passation, telles que celles dont la divulgation violerait le secret des affaires, ou celles dont la communication pourrait nuire à une concurrence loyale entre les opérateurs économiques, telle que la communication en cours de consultation du montant total ou du prix détaillé des offres.*'

38 '*Die Informationspflicht entfällt in Fällen, in denen das Verhandlungsverfahren ohne Teilnahmewettbewerb wegen besonderer Dringlichkeit gerechtfertigt ist. Im Fall verteidigungs- oder sicherheitsspezifischer Aufträge können öffentliche Auftraggeber beschließen, bestimmte Informationen über die Zuschlagserteilung oder den Abschluss einer Rahmenvereinbarung nicht mitzuteilen, soweit die Offenlegung den Gesetzesvollzug behindert, dem öffentlichen Interesse, insbesondere Verteidigungs- oder Sicherheitsinteressen, zuwiderläuft, berechtigte geschäftliche Interessen von Unternehmen schädigt oder den lauteren Wettbewerb zwischen ihnen beeinträchtigen könnte.*'

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40 UK Court of Appeal (2010), *Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council*, EWCA Civ 1214.

41 Halonen, *supra* n. 29, 532.

42 Case *450/06, Varec*, para 50.

43 Case *450/06, Varec*, para 51.

44 Art 3.2, Dir 96/9/EC of the European Parliament and of the Council of 11 Mar. 1996 on the Legal Protection of Databases.

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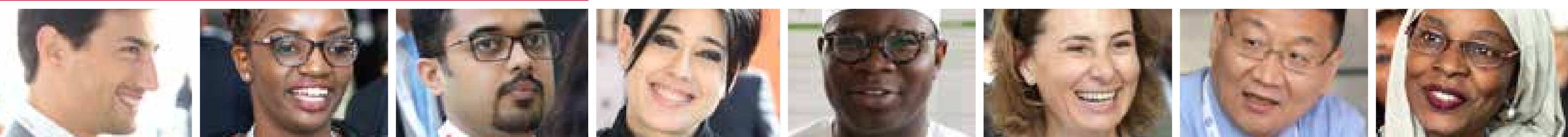

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Supreme Court of Chile, Santiago. Credit: f11photo/Adobe Stock

Recent decisions of Chile's Supreme Court: can contractors expect a more balanced approach?

Elina Mereminskaya
Santiago

Under Chilean law, public entities cannot enter into arbitration agreements unless they have been specifically authorised by law.[1] For example, the Law of Concessions of Public Works establishes a specific ad hoc arbitration mechanism,[2] which allows disputes subject to this law to be resolved through such a mechanism. However, disputes arising from other types of public contracts – general construction contracts, design and build, etc – are usually submitted to the ordinary courts.

An unpublished analysis carried out by Wagemann Lawyers & Engineers of Supreme Court decisions issued in the last decade and involving the state, the treasury and local authorities, revealed that in 51 per cent of the cases considered, the contractors' claims were rejected in their entirety. In 29 per cent of the cases, the contractors obtained less than half of the amount claimed, and they only obtained more than half of the amount claimed in the remaining 30 per cent of the cases.[3]

This article discusses five of the most relevant decisions issued by the Chilean Supreme Court so far during 2022. For a better understanding of the case law discussed below, three general features of the Chilean legal practice are relevant:

- The regulations applicable to public contracts tend to transfer a wide range of risks to the contractors, even those which are beyond the contractors' control.[4] This sets a rather prejudicial framework to the contractors' general interests, which may explain the low rate of success before the courts.
- During the execution of the works, it is not unusual for a public entity and a contractor to sign a modification agreement granting the contractor a time extension but providing no compensation for cost overrun. Such an agreement usually includes a waiver of all claims that the contractor could have raised at that point. Contractors tend to accept these agreements and waivers to avoid the application of delay damages. Nonetheless, in court proceedings, they tend to revive their claims despite the waivers included in the modification agreements.

The regulations applicable to public contracts tend to transfer a wide range of risks to the contractors, even those which are beyond the contractors' control

- The cases that will be analysed below reached the Supreme Court by way of recourse of cassation (casación), which is an extraordinary recourse aimed at annulling the Court of Appeals' decisions only where the decision is based on errors of law. The Supreme Court can either accept or reject a request for cassation, and, in that last case, it can issue a replacement decision. However, the Court is bound by the facts as established by the lower courts. Consequently, the Supreme Court is often limited in its powers, as it cannot access new evidence, for example, a new calculation of damages.

Supreme Court, Case No 63,190-2021, *Empresa Constructora Salfa S A con Fisco de Chile*, 21 January 2022

The court of first instance and the Court of Appeals of Santiago rejected the claim for damages filed by Constructora Salfa S A (Salfa) against the Ministry of Public Works (MOP). The case involved a road construction project in which the original execution period was 540 calendar days and for which four modifications were subscribed. Salfa alleged that the MOP breached the contract in failing to grant timely access to the site, resulting in an increase in the direct costs: namely labour, machinery and diesel. Salfa argued that it was entitled to claim the direct costs plus 30 per cent of the values of those costs to compensate for general cost and overheads in line with Article 138 of the Public Works Construction Regulations of the MOP (RCOP).[5]

Salfa argued that the bidding terms did not contain a schedule for handing over the site and, based on the RCOP provisions, MOP should have handed over the entire site no later than 15 days from the date on which Salfa had fulfilled certain formal requirements.[6] However, the MOP handed over the land in instalments, according to the progress of the expropriation process conducted by the state, which caused it more than ten months of delays.

The Supreme Court rejected Salfa's request for cassation relying on the finding of the Court of Appeal that in

> 'clause 7.2 "Official Programme" of the Bidding Terms, it was expressly established that the contractor should schedule the execution of the works according to the status and procedural status of the expropriations of the project land and that the same would have occurred with the land occupied by the electricity poles' (Consideration 9).

In other words, the Supreme Court understood that the bidding terms did indeed include a provision on the handover of the site as the contractor was under obligation to plan the works according to the advancement of the status of the expropriations of the land. Therefore, the MOP did not breach the contract by handing over of the site in instalments.

By way of *obiter dictum*, the Supreme Court highlighted that, in all four modification agreements signed by the MOP and Salfa, 'it was recorded that the claimant expressly waived the right for any compensation for extension of time of the contract' (Consideration 6).

Two brief conclusions follow from this decision. First, the way the bidding terms provisions were construed by the courts requires contractors to program the works based on the unknown progress of the expropriation process conducted by the state. It creates a supposition which is at odds with the real-world exercise of construction activities and assigns the contractor an unforeseeable financial burden. Second, all waiver of their rights signed by the contractors will be interpreted by the courts strictly and held against them.

Supreme Court, Case No 5,342-2021, *Constructora Alvial S A con Municipalidad de Peñalolén*, 24 January 2022

Constructora Alvial S A (Alvial) filed a claim against the Municipality of Peñalolén, alleging that the 'Construction of Las Perdices Peñalolén Park' project was extended by 190 days in addition to the 300 days established in the contract, causing an increase in general costs and overheads for the contractor.

The Municipality granted a 190-day extension due to the illegal occupation of part of the land by third parties and because of extraordinary works it had instructed the contractor to perform. Nonetheless, the Municipality argued that the contract was entered on a lump sum basis, which meant that Alvial should have foreseen and covered the additional expenses generated by the works.

Alvial claimed the proportional daily value of the general cost, multiplied by 190 days. The court of first instance ruled that Alvial did not prove the actual damages and rejected the claim, which was confirmed by the Court of Appeals of Santiago.

The Supreme Court, relying on Article 147 of the RCOP, found that where an instruction is issued by a public entity modifying the contractor's work schedule, the contractor must be

> 'compensated for the higher overhead costs proportional to the increase in the term incurred. To this effect, and in the silence of the bidding terms, the general costs/overhead should amount to 12% of the total value of the proposal and the compensation will be proportional to the increase in time in relation to the initial term' (Consideration 8).

In the same vein, the Court ruled that in such cases, it was sufficient to show that the extension of time was due to the instructions of the public entity, which was

> 'recognised in this case by the corresponding administrative act and its justification, without it being necessary to prove the actual expenses incurred by the contractor during the period of extension of the term for the execution of the works' (Consideration 11).

The Supreme Court accepted cassation and issued a replacement ruling, in which it considered that some of the modification agreements included the contractor's waiver of its right to seek compensation. Consequently, Alvial was given damages equivalent to the overhead daily value, applied to 100 days unaffected by the waiver.

The decision renders a more positive outcome for the contractor. It is valuable that the Court rejected the view that the lump sum price should cover all contractors' costs and damages, even those caused by the direct intervention of its counterparty. However, the Court also applied the waiver included in the extension of time agreements, reducing compensation owed to the contractor.

Supreme Court, Case No 124,397-2020 *Épsilon Asesorías y Proyectos S A con SERVIU*, 11 April 2022

The Public Housing and Urban Development Service (SERVIU) entered into four contracts with the construction company Épsilon Asesorías y Proyectos S A (Épsilon). SERVIU committed a series of breaches, disrupting Épsilon's performance. Even so, SERVIU collected the guarantee bonds corresponding to each of the four contracts. This triggered Épsilon's inability to respond to its contractual and legal obligations, which led to its inclusion in a public registry of debtors. However, pursuant to SERVIU's own regulations, its contractors must have a sound financial background and cannot have unpaid obligations.

the Court rejected the view that the lump sum price should cover all contractors' costs and damages, even those caused by the direct intervention of its counterparty

The Supreme Court determined that SERVIU breached the contract, acting with inexcusable negligence. The improper collection of the guarantee bonds caused the particular financial situation that affected Épsilon, which became unable to continue in the contracts it had in force and was prevented from participating in new tenders conducted by SERVIU. It was therefore shown, in general terms, that the contractor suffered damages. The relevant issue which remained open was the specific amount of damages.

The Supreme Court accepted Épsilon's request for cassation of the second-instance unfavourable decisions and issued a replacement ruling. The Court made an

effort to quantify the specific damages, but always within the limits imposed by cassation, that is, without being able to establish new facts. Due to certain omissions in the claim, the Court was only able to award loss of profits of the expected annual profits under the contracts that had been terminated when Épsilon became financially unreliable.

At the same time, the Court did not find sufficient evidence in the file to project these amounts to future possible contracts and ruled out damages for lost opportunity. The Court contended:

> 'The projection of loss of opportunity must be based not only on data from previous years, but also on other data referring specifically to the actual activity of projects developed by the SERVIU in the following years, in order to establish the real possibilities of the claimant to participate in those projects, and the amounts that such participation could have meant, as an initial parameter for calculating the value of the chance' (Consideration 7 of the replacement decision).

This case is somewhat notorious as it accepts the possibility of claiming damages for loss of opportunity and for providing general guidelines on their calculation.

Supreme Court, Case No 63,273-2021, *Empresa Constructora Santa Elena Limitada con Municipalidad de Buin*, 9 May 2022

Constructora Santa Elena (Santa Elena) argued that the original contract term of 180 days was extended three times, due to the Municipality of Buin's failure to give access to the work areas, extending its duration by an additional 270 days. It claimed damages for general costs and overheads, originally estimated at 13 per cent of the net budget of the works. The first- and the second-instance tribunals ruled in favour of Santa Elena, awarding it the amount claimed, as was quantified by an expert report.

The Municipality submitted a request for cassation, arguing that, although the parties agreed on three extensions of time, it was a lump sum contract in which a lump sum was established, with no possibility of its increase except in the case of *force majeure*. On the other hand, the bidding terms and conditions did not provide for payment of the overhead in the case of an extension of time.

The sound approach taken by the first-instance tribunal is noteworthy, which the Supreme Court reproduced in its ruling, stating that, although the public entity has the possibility of unilaterally altering the contract,

> 'it appears as an elementary imperative of justice that the exercise of this prerogative finds limits as the private contractor is not under the obligation to bear public burdens that do not correspond to him, under the pretext of the need of the authority to ensure the common good' (Consideration 5).

The Supreme Court took into consideration that, first, the Municipality did not provide reliable and truthful information at the time of the tender since it had not disclosed that certain work areas were not yet available; and second, the execution time was increased due to the same reason of lack of areas.

With respect to the nature of the lump sum contract, the Supreme Court held that it was not in accordance with contractual good faith to interpret this type of price determination 'in the sense that the contractor cannot request compensation for higher expenses arising from the extensions of time not attributable to it' (Consideration 5). The Court reached this conclusion by applying both the RCOP and the general rules on contractual liability. Consequently, the cassation filed by the Municipality was rejected.

Here once again, the courts have rejected the surprising argument that the lump sum price would cover all costs and damages, even those directly caused by the public entity. This case offers a correct interpretation of contractual and legal provisions and leads to a result that is in line with the commercial expectations of construction companies.

Supreme Court, Case No 71,675-2021, *Constructora Tara Compu Ltda. con Fisco de Chile*, 23 May 2022

The factual background of this case and the rules applicable to it are almost identical to the first case reviewed above. Indeed, the contract did not provide a schedule for the handing over of the site area by the MOP and included the same clause 7.2 of the bidding terms, which requires the contractor to schedule the execution of the works according to the status and procedural status of the expropriations of the project. This also applied to the land occupied by the electricity poles.

The MOP agreed to three amendments to the contract in which it gave a time extension of over 300 days to Constructora Tara Compu Ltda. (Tara) but denied the contractor's request for additional costs. Tara's claim was rejected by the first-instance tribunal, which was confirmed on appeal.

The Supreme Court concluded that Tara's claim lacked merit as it was contrary to the parties' original agreement and was at odds with the practical way the parties performed the contract. In the Court's view, the parties originally agreed on the partial handing over of the land and this was the way in which the contract was executed, as was shown by the three amendments that adjusted the contractual timeframe. Tara's request for cassation was rejected.

Final remarks

In three out of the five cases, the Supreme Court construed the applicable rules within the usual boundaries of interpretation techniques. As a result, the Court construed the applicable provisions liberally, reaching equitable and commercially sound conclusions favourable to contractors.

In the other two cases, the literal wording of the applicable provisions led the Court to a more restrictive position, creating an assumption that the contractors had accepted the risks associated with the expropriation proceedings conducted by the state, thereby resulting in an outcome which is not reasonable from the view of the contractors' contractual expectations.

To conclude, if contractors consider their participation in public tenders in Chile, the following reflections are worth noting. First, the disputes arising out of those contracts will be submitted to ordinary courts, which statistically speaking tend to favour the state. Second, contractors should pay particular attention to the written terms of the bid documents. If certain risks have been allocated to them by way of these documents, it is unlikely that the courts would revise or reallocate such risks. Third, the public entities often tend to grant an extension of time for causes not attributable to contractors. However, they deny contractors' requests for additional costs, and insist that contractors waive their rights to claim cost and damages. Such types of waiver should be resisted by the contractors as, if formally accepted, they will render subsequent court actions unsuccessful.

Notes

1 This limitation derives from Arts 6 and 7 of the Chilean Political Constitution that establishes 'the legality principle', which means that state bodies can act strictly within the boundaries established by law.

2 Arts 36 and 36bis of the Decree with the Power of Law No 164 from 1991 (Public Works Concessions Law), which has been updated on various occasions being the Law No 20.410 of 2010 one of its most relevant modifications established a two-tier system. The first tier is mandatory, whereby the dispute is submitted to the Technical Panel entrusted with matters related to technical or economic discrepancies. The second tier includes a recourse to an ad hoc arbitration before the Arbitration Commission.

3 This conclusion is consistent with the general statistic that argues that the Council of Defence of the State wins between 70 and 90 per cent of all cases. José Miguel Aldunate, 'El Estado ante los tribunales', *Diario Financiero*, 6 September 2018, www.df.cl/opinion/columnistas/el-estado-ante-los-tribunales accessed 21 July 2022.

4 See the most relevant regulations: Supreme Decree No 75 of the MOP of 2004, which approves the 'Regulation for the construction of public works'. This document regulates a classical construction contract in which the design is provided by MOP. Supreme Decree No 108 of 2009 of the MOP, which uses the Design & Build delivery method. Also, the Ministry of Health, through its Undersecretariat of Health Care Networks, applies Resolution No 160 of 2015 for the construction of public hospitals, which also follows the Design & Build approach.

5 RCOP Art 138 provides: 'If the failure to deliver the land is not attributable to the contractor and causes him delays in relation to said programme, he shall be compensated for damages, based on the justified direct expenses incurred by the contractor and verified by the fiscal inspection, plus the percentage established in Article 105. Likewise, the term of the contract shall be increased in accordance with the delay caused by the indicated reason.' In turn, RCOP Art 105 provides: 'In the absence of agreement, in case of urgency, the execution of such works may be ordered, and the contractor shall be paid the proven direct costs, plus 30% of these values to compensate for general cost and overhead. Payment will be made upon approval by resolution of the details and justification of such expenses.'

6 RCOP Art 137 states: 'The schedule for delivery of the land and the layout with its various modalities shall be established in the bidding documents. If nothing is indicated therein, handover shall be made within 15 days following the date on which the contractor or its legal representative complies with the provisions of the preceding paragraph and subscribes to the background information indicated in Article 90.'

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Vevey, Switzerland. Credit: adou/Adobe Stock

China Irwin
Geneva
Thomas Denehy
Sydney

CONFERENCE REPORT ICP Working Weekend 2022

After a long wait due to Covid-related restrictions, ICP members gathered on 13–15 May 2022 for the much-anticipated Working Weekend in the idyllic setting of the Grand Hotel du Lac in Vevey, Switzerland.

The Weekend proved to be worth the wait, combining informative sessions led by the ICP subcommittees with memorable social events. In addition to the interesting and interactive sessions, delegates and their guests enjoyed poolside cocktails and a gourmet dinner, which opened the weekend on the Friday evening. They also enjoyed a memorable steamboat cruise on Saturday evening, viewing the neighbouring villages in France and Switzerland, picturesque vineyards, the imposing Chateau de Chillon and a perfect spring sunset over the lake.

Here's a brief recap of the Working Weekend sessions. Further insights into these topics, included in this issue of *CLInt* are: an article by Russell Thirgood on remote hearings; insights from Leendert van den Berg on liability for innovations; and the challenges of the Itu Headquarters Building case in Brazil by Ana Cândida de Mello Carvalho and Victoria Carolina Lima de Oliveira. Articles from other presenters at the Working Weekend will be included in the next edition of *CLInt*.

Session one

Lessons learnt from the impact of Covid-19 and the war in Ukraine presented by the Dispute Resolution Subcommittee

Sharon Vogel and Thomas Frad (Dispute Resolution Subcommittee Co-Chairs) Claus Lenz and Russell Thirgood

Following opening remarks from the Working Weekend Co-Chairs (Jean-Pierre van Eijck in the conference room and Joe Moore quarantining from his hotel room), the Dispute Resolution Subcommittee led the first session.

Dispute Resolution Subcommittee Co-Chairs Sharon Vogel and Thomas Frad chaired an interesting discussion in which Claus Lenz and Russell Thirgood gave an overview of the types of Covid-related claims made in practice and the types of contractual provisions parties rely on (including *force majeure*, change in law, emergency provisions, etc).

Sharon shared insights from recent Canadian construction cases addressing Covid-19 as well as the American Society of Civil Engineers (ASCE) new Standard 71-21 on Identifying, Quantifying, and Proving Loss of Productivity, published in May 2021. Claus shared his own experience of a dispute board being asked to consider Covid-based claims, noting the divide between common law and civil law perspectives on the issue of whether a contractor can choose between available remedies. Finally, Russell examined the rise of remote hearings as a result of the pandemic and considered some of the advantages and challenges of technology-assisted hearings. His views are set out in detail in the article 'Remote hearings: storm clouds and silver linings', included in this issue of *CLInt*.

Following the informative presentation, delegates were divided into break-out groups led by Sharon Vogel, Thomas Frad, Claus Lenz, Russell Thirgood, Janet Walker, and Sam Moss for an opportunity to exchange views and personal experiences with claims related to Covid-19 or the war in Ukraine. By way of example, one group considered the most common type of claims and whether they were capable of resolution using existing mechanisms within contracts. In this regard, we discussed that:

In Brazil, most claims fell within *force majeure* provisions, but in public law contracts there was a need to maintain the economic balance of contracts which added some complexity to the issue.

In Singapore, the legislature created Covid (Temporary Measures) Act in March 2020, an interventionist legislation that in effect cut across what parties may have agreed in the contract, such as banning calls on bank guarantees or prohibiting parties imposing liquidated damages for Covid-related delays.

Generally, there was a willingness between parties to cooperate and resolve issues, notwithstanding that most Covid-19 issues were associated with time and not cost events.

Session two

Supply chain disruption issues presented by the Project Establishment Subcommittee

Roberta Downey and Joe Guarino (Project Establishment Subcommittee Co-Chairs) Jarleth Henegan, Eric Franco, Carla Mills and Michael O'Connor

The second session was led by the Project Establishment Subcommittee. It focused on issues of supply chain disruption, including in particular supply chain disruptions resulting from the Covid-19 pandemic, such as increased freight costs, unavailability of containers, price increases and shortages. The panellists were Roberta Downey and Joe Guarino (the Project Establishment Subcommittee Co-Chairs), Jarleth Henegan, Eric Franco, Carla Mills and Michael O'Connor. They shared their experiences from the perspective of different jurisdictions and provided practical advice as to how to draft clauses that compensate for the impacts of delay and disruption but ensure the door is not opened to abuse by contractors seeking to use the pandemic as a 'get out of jail free' card.

In particular, Eric considered the issue from the Latin American perspective, noting the differences between pre- and post-Covid contracts, with post-Covid contracts providing more options for addressing similar situations. Michael spoke about the UK's approach, noting the proliferation of specific definitions of pandemics in post-Covid contracts. Carla

offered the Australian perspective, explaining the evolution of employer–contractor relationships in light of Covid-19 and the increasingly common requirement for contractors to account for Covid risks. Jarleth spoke about the situation in Ireland, where contracts are now being drafted to exclude the consequences of Covid-19, as well as the war in Ukraine.

Keynote presentation: an inside look at the Matterhorn Glacier Ride cable car project

Following the morning sessions, delegates enjoyed an inside look at an impressive construction project in Switzerland – the Matterhorn Glacier Ride cable car project (see Figure 1). The presentation was given by Markus Sigrist, General Manager of Leitner Schweiz AG and Project Manager for the Matterhorn Glacier Ride I and II project.

As explained by Markus, this cross-border project involved alpine construction at altitudes of almost 4,000 metres; it presented unique logistical challenges of working in extreme conditions and working around the ski season to transport materials. The first part of this impressive project was completed in 2018 and the second part is expected to be completed in 2023, allowing passengers to travel from the Cervinia ski resort in Italy to Zermatt, Switzerland.

Session three

The legal and practical risks of innovation in construction projects examined by the Project Execution Subcommittee

Doug Oles and Leendert van den Berg (Project Execution Subcommittee Co-Chairs)
Sarah Biser, Ana Cândida de Mello Carvalho, Andreas J Roquette

As discussed during this session, employers often encourage or require contractors to implement innovative designs, methods and/or materials on a construction project. Yet if those innovations prove impractical, or at least substantially more expensive and/or time-consuming than expected, it is not always clear which party bears the resulting liability.

The panellists for this session were Doug Oles and Leendert van den Berg (the Project Execution Subcommittee Co-Chairs), Sarah Biser, Ana Cândida de Mello Carvalho and Andreas J Roquette. They examined the risks of innovative building technologies and the ways various contracting parties can seek to limit their liability when using them, speaking from both a civil law and a common law perspective.

Sarah examined the available data pointing to the construction industry's resistance to innovation, while noting that the eventual use of augmented reality (AR) in the industry

Figure 1: the Highest Alpine crossing by ropeway on Klein Matterhorn[1]

is inevitable. To facilitate the discussion, Sarah identified five technologies which are having increasing impact on projects:

- Augmented reality in construction, including –
  - Project planning: by generating 3D models directly onto a 2D plan, combined with Building Information Modelling (BIM), construction companies can produce detailed, interactive models of projects from the outset.
  - Automated measurements: AR equipment can measure height, width and depth of space. Construction companies incorporate this data into existing models which provides a total view of how the project will look.
  - Project modification: AR has the ability to make changes to building models directly at the site. For example, engineers are able to virtually remove or relocate structural components and modify a building's layout with just a few taps on the AR device.
  - On-site project information: AR combines all digital information and documentation with one's physical view. This way, field workers can view information in layers and toggle between layers to help monitor a project against its building plan.
  - Team collaboration: AR allows users to share notes and videos of errors or design issues in real time, reducing the cost and time it takes to resolve problems.
  - Safety training: AR can simulate hazard scenarios and equipment to better educate workers.
- Robotics may take the form of drones, which could be used for site mapping, surveying, site planning, building inspection, structural inspection or progress monitoring. Sarah considered that a combination of reduced supply of labour, increased cost of labour, safety issues, and a desire for increased productivity is driving an increase in market share of robotics on projects.
- 3D printing to bring efficiencies to projects by increasing the speed by which materials are fabricated, reducing human error, and reducing waste in the production process.
- Cybersecurity, in the context that the construction industry was the third most common industry to experience ransomware attacks in 2021.
- Blockchain, by way of the technology streamlining how participants track, manage, record, interpret, and exchange the vast amounts of information and data that is produced on a construction project.

Andreas considered the example of innovation in the Elbphilharmonie project in Hamburg, Germany, where innovation led to enormous cost overruns and delays, raising interesting legal questions with respect to the standard for determining a defect when implementing a 'one-of-a-kind' design. The project had a number of innovative designs, in particular a glass curtain wall façade covering a surface area of 21,800 square metres and the longest escalator tube in Western Europe, running for 82 metres with a seamless surface devoid of any expansion joints. The discussion considered the extent to which defects can exist in designs that go beyond tried and tested technologies, and if so, is it the architect or contractor that is best placed to manage the risk.

Ana considered the example of a public project in Brazil, where the contract scope was expanded to include LEED (Leadership in Energy and Environmental Design) certification, leading to a lengthy legal battle concerning public procurement law. LEED certification is an international green building certification system which is recognised as a benchmark for industry excellence in sustainability. Ana facilitated a discussion by reference to the Paço Municipal de Itu, a municipal building near Sao Paulo, Brazil. Although the contract in respect of the building was signed in 2010, the State Court of Audits, which inspects state public contracts, declared the contract illegal. The basis of the State Court's declaration was the lack of evidence proffered by the parties that services and materials referred to or were needed for the LEED Certification. The State Court found that the basic engineering design was not properly performed. This case study served as an example of the importance of design integration and planning, and the extent to which technologies can assist parties to public construction contracts.

Leendert considered the fate of Proderma artificial wood panelling, an innovative Spanish material that engendered many legal disputes when introduced in the rougher climate of the Netherlands.

Lastly, Doug led a lively discussion among the delegates as to the various liability regimes under different jurisdictions and how these regimes deal with the issue of 'innovation gone wrong'.

We would like to extend our thanks to Sam Moss (Vice-Chair of Dispute Resolution Subcommittee) and his colleagues at LALIVE for their organisation of the Working Weekend, as well as to the ICP Co-Chairs Joe Moore and Jean-Pierre van Eijck for their leadership for the first major in-person ICP event since the start of the pandemic.

Note

1 Leitner, www.leitner.com/en/company/news/detail/the-highest-alpine-crossing-by-ropeway-on-klein-matterhorn, accessed 1 July 2022.

Credit: JackF/Adobe Stock

Remote hearings: storm clouds and silver linings

Russell Thirgood
Brisbane, Queensland

Background: the use of technology in substantive hearings

The substantive hearing, which may include the examination of witnesses and oral argument on substantive, as opposed to procedural, issues (merits hearing) is an important feature of many arbitral proceedings. It typically follows a process whereby the parties have held a number of case management conferences (generally via videoconference), exchanged their statements of case, delivered witness statements and expert reports and produced requested documents. Natural justice is an important feature of this pre-hearing process. Parties, witnesses and experts are afforded the opportunity of responding to each other's positions in writing in a sequential and substantive way. This sequential exchange ensures that issues are raised, identified, responded to and, perhaps, narrowed. A focus of the process is to ensure that differences between positions are highlighted and properly understood prior to the hearing commencing.

The value of a focused merits hearing is that it provides the parties and witnesses with an opportunity towards the end of the arbitral process to exchange views simultaneously and respond to questions from counsel and the arbitral tribunal. Accordingly, the essence of a hearing is that it is an exchange of argument and/or evidence that takes place in real time. A prepared arbitral tribunal can use the hearing to ensure its understanding of the nuances of each parties' positions. A hearing can take place in a physical or a wholly remote format, whereby all participants are not physically located together.[1] It can also proceed through a hybrid process whereby some participants are geographically co-located while others (such as expert witnesses

who may reside interstate or overseas) appear through the use of technology. There are many combinations and permutations of a hybrid process.

The use of technology in the dispute resolution world is not new. Prior to the Covid-19 pandemic, many arbitration practitioners, responding to the demand to reduce cost and increase efficiency, typically conducted case management conferences and other procedural and interlocutory hearings remotely, rather than in person. The arbitral community also had experience with the use of technology in merits hearings. For example, in 2019, the International Centre for Settlement of Investment Disputes (ICSID) announced that the majority of its hearings were held by videoconference.[2]

The pandemic ensured that vast populations across the world were unable to travel and physical isolation to varying degrees was commonplace. The business community responded to these restrictions through escalating the use of technology which allowed many employees to work from home so as not to be exposed to the virus while vaccines were being developed. While business continued to operate, disputes inevitably continued to arise.

36 per cent of users had participated in fully virtual hearings in the first quarter of the year and that percentage had increased to 71 per cent in the final quarter of the same year

In many respects the pandemic ensured that the dispute resolution community (like others) had no choice but to shift its operations to online platforms so that the interests of the parties, and the broader community, were catered for by having fair and efficient processes for the resolution of disputes. Arbitration practitioners' experience with remote hearings, including for the merits hearings, increased quite dramatically in a relatively short period of time. An International Chamber of Commerce (ICC) 2020 survey reported that 36 per cent of users had participated in fully virtual hearings in the first quarter of the year and that percentage had increased to 71 per cent in the final quarter of the same year.

This article explores the implications of conducting merits hearings remotely. It outlines some of the advantages and challenges of technology-assisted hearings. Arbitration does not exist in a vacuum. It takes place under the supervision of many different national courts which have their own experience of conducting cases online. Courts have also received applications to determine whether or not arbitral hearings can proceed remotely. Accordingly, the voices of various national judges have been recorded in judgments, and added to those of arbitration practitioners and academics, as to the issues arising from remote hearings.

This article recognises that all cases are different. Arbitral tribunals may need to be flexible and adapt to the needs of a particular case and the parties appearing before it. Rather than take a simplistic view as to whether or not remote hearings are a 'good thing', this article sets out some guiding principles that counsel and arbitrators should bear in mind when considering whether or not (and the extent to which) technology is deployed during the merits hearing. Finally, it includes some potential future implications of the use of remote hearings. It may just be that the necessity of embracing technology during the pandemic will be a silver lining to what has indeed been some dark storm clouds for many individuals and communities.

Benefits

In 2018 (before the pandemic), the Queen Mary Survey found that 89 per cent of those users of arbitration services who were surveyed were of the view that videoconferencing should be used more often in arbitration.[3] Commercial arbitration is an entirely voluntary process that exists to serve the business needs of those who use it. There are also flow-on benefits for the broader community when businesses use private arbitration, including reducing the burden of national courts and the taxpayer who funds them. In this private and commercial environment, one would imagine that the voices of the users ought to carry considerable weight.

The wide-ranging benefits of the remote hearing are listed below.

- Avoiding the cost of travel – particularly for witnesses and experts who may live in far-away places and who may only be required for a short and uncertain period of time during the substantive hearing; a remote hearing can amount to substantive cost-savings for the parties. Some witnesses

may eventually not be required at all (with counsel reserving their position on this issue until potentially sometime during the hearing itself).

- Flexibility – remote hearings allow parties to require only (all or some) witnesses and experts to be on standby during the relevant stage of the hearing rather than have them leave their homes and workplaces for significant periods of time waiting around at a hearing venue. Decision-makers of the parties (such as major shareholders, chief executive officers or government officials) may have greater opportunity to observe parts of the hearing from the comfort of their own offices rather than set aside periods of valuable time. Counsel and arbitral tribunals similarly may find it easier to juggle all of the moving parts of a particular case, and other aspects of private practice, from their own chambers.
- Neutral hearing venue – parties in a dispute often do not wish to concede any perceived 'hometown' advantage by having a hearing take place in the city or office of their opponent. The remote hearing can minimise or remove these perceptions. It is obviously important that the entire arbitral process is not only neutral and fair but also that the parties subjectively perceive that to be the case.
- Greater accessibility – in-demand counsel, arbitrators and expert witnesses may be more accessible to parties should the travel (and related time) element be removed or reduced.
- Reduced toll on the environment – less time in planes and cars is inherently a good thing for the environment and consistent with the movement to reduce the amount of paper that is used in arbitration proceedings with sophisticated databases and online platforms.

A survey conducted by the Chartered Institute of Arbitrators in 2022 found that those surveyed ranked the benefits of remote hearings in the following order (from highest to lowest priority): geographic flexibility, convenience, cost reduction, reduce travel, time saving, environmentally friendly.

The users of arbitration have mostly had their own experiences of conducting their businesses with the benefit of technology. In particular, the record-keeping of large construction, infrastructure and energy-related projects takes place with assistance of highly sophisticated technology. It is rare for physical paper records to be kept given the tremendous volume of correspondence and records. Lever arch files can rarely accommodate the sheer volume of data that large projects produce. Accordingly, complicated and high value construction disputes are potentially more suited to be resolved with the use of high-powered electronic bundles (with helpful search functions) and presented with the assistance of a technology officer at a remote hearing. In many respects, the transition of disputes to online and remote formats is simply a mirror of what has previously occurred in the project management world.

Challenges and potential solutions

It is rare for a transition or change process to take place without the need to overcome challenges. Remote hearings may present their own peculiar challenges that may be surmountable with the goodwill of the parties and careful discernment of arbitral tribunals. Those challenges and potential solutions are listed below.

- Potential inability to observe a witness's demeanour and credibility – it is often cited that a significant advantage of the physical hearing is the ability to see the witness respond to questioning 'in the flesh'. It may be that such an advantage is overstated. First, the high quality of many videoconferencing features can magnify the witness's face on the screens of the arbitral tribunal such that, in many cases, there is a greater ability to scrutinise a witness' demeanour than at an in-person hearing. Second, there are inherent dangers of relying on witness demeanour as a sound basis for decision-making. Courts have acknowledged the danger in misinterpreting 'body language' such as taking nervousness for uncertainty or insincerity, and shyness and hesitation for doubt.[4] Studies have also been undertaken that have revealed the fallibility of human memory;[5]
- Risk that a witness is 'coached' – a witness who appears in a physical hearing room could not get away with having someone sit in the room with them and assist with answering questions, as has occurred for remote hearings over the last two years. There are steps that the arbitral tribunal and parties can take to reduce this risk, including by having neutral observers in the room with the witness or insisting that 360-degree video footage be taken of the

room in which the witness is located to ensure that there is no coaching.

- Technology problems – like human beings, technology is fallible. Remote hearings are susceptible to technology glitches and rely on stable Wi-Fi connections which may not be present in all potential remote locations. This risk may be best managed by ensuring that the parties and tribunal undertake some live testing of the proposed technology platform before the hearing.
- Privacy and security concerns – arbitration generally takes place in a private and confidential setting. It may be an easier exercise to protect that privacy when the hearing is to take place in a secure physical location with less risk of cyber-attacks. Arbitral institutions have helpfully produced a range of protocols to assist in managing this cyber risk.

Common sense, communication and consultation can go a long way with dealing with challenges that arise

- Different times zones and other logistical challenges – while the difficulty associated with travel can be reduced through remote or hybrid hearings, it may be that another challenge is created whereby participants are operating on different time zones. Arbitrators must ensure that parties are treated equally and fairly. Each case is different and practical measures can be taken to ensure that witnesses, experts, counsel and arbitrators are operating in an environment that is not unreasonably burdensome for them – including from a physical and mental fatigue viewpoint.
- Gravitas of the courtroom – it may be that some arbitration hearings take place in rooms which resemble courtrooms and that provides a feeling of gravitas or solemnity that may assist with 'truth telling'. A contrary view may be that arbitration ought to distinguish itself from litigation by taking place in a more commercial setting. Separately, it may be that the geographical barrier that is created with a remote hearing provides helpful distance between the arbitral tribunal and the parties. For example, if the arbitrators are not in the same physical location as witnesses and counsel, the risk of an arbitrator inadvertently and awkwardly being in an elevator or room with one party or one witness is reduced.
- Unsuitable cases – some cases such as those that may involve fraud allegations may not be suited to an online hearing. Some courts have found that serious allegations such as those involving fraud need to be dealt with in person.
- Evidence presentation – some arbitration practitioners have articulated that they find it easier to perform their role in a face-to-face, rather than a virtual environment. It may be that advocates and arbitral tribunals are in fact required to develop additional skillsets to serve those parties who pay for their services.

A survey conducted by the Chartered Institute of Arbitrators in 2022 found that those surveyed ranked the challenges of remote hearings in the following order (from most to least challenging): evidence presentation, witness management, familiarity with platforms, coordination between parties, technical support, and transcript management.

Key stakeholders such as arbitral institutions have been committed to ensuring the success of remote hearings and have responded to the challenges by introducing a range of measures. There are a plethora of examples of these efforts to strengthen remote hearings including the Hong Kong International Arbitration Centre's virtual hearing centre; the American Arbitration Association model directions and guidelines for virtual hearings; and the International Chamber of Commerce Report on Information Technology in International Arbitration which addresses confidentiality and data integrity issues.

Conducting an arbitration process, including the remote hearing, can be a pragmatic exercise whereby common sense, communication and consultation can go a long way with dealing with challenges that arise. In that sense, practitioners can be well served by taking practical steps including preparation, organising practice runs, using good and proven technology, considering sitting hours, having a moderator in charge of documents, deploying guidelines or ground rules for advocacy and courtesy, undertaking a 360-degree view of remote rooms, having ways for counsel to communicate with their own teams, adopting protocols for the conduct of the online hearing, and retaining technical support.[6]

Jurisprudence

Australian courts have considered the merits of remote hearings, including in the context of adjournment applications, and have reached different views, including:

- In *Capic v Ford Motor Company of Australia Ltd*,[7] the Court declined an adjournment application (thereby allowing an online hearing to proceed) citing that technology difficulties could be overcome and that the interests of justice would be served by proceeding with an online hearing as it was not known how long the pandemic would last;
- In *David Quince v Annabelle Quince and Anor*,[8] the Court allowed an adjournment application (preventing an online hearing taking place) on the basis that it would be unfair to both parties for the hearing to proceed by way of video-link where there were allegations of fraud;[9]
- In *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd*,[10] the Court refused to set aside an award notwithstanding that the applicant had alleged that the online hearing was beset with technological issues;[11]
- Generally, the Federal Court of Australia (which has jurisdiction under the *International Arbitration Act 1974* (Cth) to hear applications to set aside or enforce arbitral awards) is a leader when it comes to conducting hearings with the use of technology and has issued a guide to online hearings.

Jurisdictions around the world have now had experience of remote hearings. Direct court challenges to remote hearings have taken place in England,[12] the US[13] and Europe,[14] with courts giving cautious support for virtual hearings. In the US decision of *Legaspy v FINR* it was held that remote hearings do not prevent parties from presenting claims and defences and they do not favour one part over the other.[15] It may be that in many jurisdictions a broad consensus is emerging that, save for exceptional circumstances, there is no right to an in-person hearing.

In *Larsen and Toubro Ltd v NTPC Ltd*,[16] the Delhi High Court received an application to remove a co-arbitrator (appointed by the respondent) who refused to participate in a remote hearing. The respondent (curiously) argued that he had discussions with his arbitrator to persuade him to participate remotely. The co-arbitrator appointed by the respondent informed the Court that he wanted to wait a few more months (in 2020) to see whether the pandemic would end. The Court criticised the co-arbitrator who refused to embrace technology but noted that the case had been going on for seven years, and in that context did not find that a further delay would warrant the removal of the co-arbitrator. It does not appear from the judgment that the Court, or the claimant, were troubled by the private discussions that were taking place between respondent and arbitrator. The Court requested the co-arbitrator to 'rise to the occasion by utilising the time […] to acclimatize himself with the system of video-conferencing […] [and] endeavour to capitalise on these benefits as also the flexibility offered by electronic technology.'[17]

There may no longer be a default position that a substantive hearing will take place in person

Guiding principles

As we come out of the pandemic, and face-to-face hearings become possible, it may be that arbitral tribunals (and supervising courts) are called on more often to decide how a hearing is to take place. Most practitioners have had experience with remote hearings and it is likely that some parties will want to continue using them, or parts of them, in future – just as the business community will continue to use remote meetings to conduct its affairs. Equally, some parties may prefer a face-to-face hearing. Accordingly, more consideration may be given by parties as to whether or not, and to what extent, hearings will be remote. That is, there may no longer be a default position that a substantive hearing will take place in person, as may have existed for many practitioners before the pandemic.

Party autonomy remains the touchstone and guiding principle in arbitration. The choice as to how a hearing is to be conducted (remote or otherwise) may be expressed prior to dispute (in the arbitration agreement) or during the dispute resolution process (such as the first or subsequent case management conferences). The arbitral tribunal (of course) must respect party autonomy and put aside its own preferences when it comes to proceeding with a face-to-face, remote or hybrid substantive hearing. Neutrality will be key, along with competency to adapt if called upon.

When parties cannot agree, the tribunal will need to be guided by the relevant laws that pertain to the arbitration procedure together with what may be set out in the arbitration agreement or any agreed rules. Most rules either specifically permit remote hearings or leave the tribunal with a broad procedural discretion to exercise. For example, Article 26(1) ICC 2021 Arbitration Rules provides:

> 'The arbitral tribunal may decide, after consulting the parties, and on the basis of relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication.'

There are no arbitration rules that the author is aware of which prohibit a remote hearing. If there is a contest as to how a hearing is to take place, the tribunal will simply need to receive submissions and apply facts to law to make a considered and reasoned ruling. Issues to be considered and balanced will include treating parties equally, providing the parties with a fair hearing, conducting the process efficiently so as to minimise cost and time wastage, and ensure that the outcome of the process is an enforceable award or awards. What this analysis results in will be different for each case.

If there is a contest as to how a hearing is to take place, the tribunal will simply need to receive submissions and apply facts to law to make a considered and reasoned ruling

In cases where the parties do not agree as to how a hearing will take place, the question of whether a party has the onus of proof arises. Some decisions of national courts have suggested that the party wanting a remote hearing has the onus of proof as it is trying to depart from the ordinary course of a physical hearing.[18] Other cases take the opposite approach, allowing remote hearings in the absence of considerable impediments.[19] There is an intermediate solution, which may be more suited to an international commercial arbitration, adopted by other courts (such as those in Canada and Singapore) whereby neither side is burdened with the onus of proof and the tribunal simply receives submissions and then balances the various factors in order to make a decision that suits the particular case.[20]

Arguments about the difficulties of remote hearings may be more difficult to make out in a post-pandemic world where many practitioners and arbitrators have had perfectly good experiences and challenges have been overcome. As set out above:

- It may be possible to take steps to avoid witness coaching;[21]
- Witness can be seen up close to monitor their reaction to cross-examination;
- The manner of a witness, including appearances, may not be important for many witnesses;
- Counsel have developed and added to their advocacy skills through the effective and persuasive use of technology as a communication-enhancer;
- Security and confidentiality concerns have been addressed by the plethora of guidelines that have been written by institutions;[22]
- So many service providers provide exceptional online services at reasonable costs, with many of these services being required regardless of the format of the hearing in order to manage the documentation which is wholly online;
- Practical experience shows that having some test runs before the hearing with counsel and witnesses reduces problems.

An experienced arbitral tribunal will understand the grounds on which the enforceability of its award can be attacked and accordingly will ensure that it provides the parties with a right to be heard and treats them equally. There are no reported cases that the author is aware of where an award was set aside or refused enforcement due to the hearing taking place remotely. Gary Born has stated that

> 'where national courts conduct full remote hearings in domestic litigations, it is very difficult to regard similar hearings as denying parties to an international arbitration an opportunity to be heard.'[23]

There are also decisions of courts that have found that the absence of any hearing does not violate the parties right to be heard.[24]

Finally, a good arbitrator or tribunal will be proactive in engaging the parties in discussion about how to best conduct the substantive hearing, and will always listen to advice provided by counsel as to how efficiency and fairness can be achieved.

Future implications

There are many future implications for users, and arbitration stakeholders, from the more prominent use of remote substantive hearings, including:

Choice

Party autonomy is assisted by choice. Users of arbitration have more options, and many combinations and permutations, of how a merits hearing can take place to suit their conveniences and business imperatives. This service element is something that distinguishes arbitration from litigation. Arbitrators are chosen by the parties to provide a service and help them resolve disputes; whereas courts have a different function and exercise the coercive power of the state in order to uphold the rule of law. It is not necessarily the role of courts to meet the conveniences of those who appear before them. Courts are not in the business of providing services.

Selection of seat

Perhaps there was a tendency for parties to choose a seat based on geographical considerations in the pre-pandemic world. For example, Singapore or Hong Kong may have been chosen as seats in cases where the parties are from the US and Europe, or in cases between parties located in Australia and the UK. Geography may now be less important. Rather, the track record of the potential supervising court may become the defining characteristic when parties choose a seat. Consideration may also be had to the experience that courts in the potential seat have had in conducting their own remote hearings. Courts who have vast (positive) experience with remote hearings may be less receptive to arguments that remote hearings do not work.

Diversity

Remote substantive hearings may open the market of experienced and available arbitrators. Geography may not be as defining during the selection and nomination of arbitrators although consideration may need to be given as to how best to manage time zones to ensure fairness to parties and witnesses (and that the arbitral tribunal is not fatigued when performing its function at the hearing).

Conclusion

For all the challenges associated with a rapid transition to fully and hybrid remote hearings, an inflexion point seems to have been reached (perhaps by force rather than universal will) whereby the use of technology may be embraced as a 'new normal'. This has profound potential consequences for the resolution of commercial disputes. Remote hearings are probably cheaper, more efficient and environmentally friendly than in-person hearings. Stakeholders (such as arbitral institutions) have found ways of dealing with most challenges, such that the remote substantive hearing could be here to stay (in some form) for many years to come for many disputes. In time, we may regard this development for commercial arbitration as representing a silver lining to the Covid-19 storm cloud.

Notes

1 Maxi Shearer, 'Remote Hearings in International Arbitration: An Analytical Framework', (2020) 37 (4) Journal of International Arbitration 4.

2 *Ibid*.

3 The Queen Mary, University of London 2018 International Arbitration Survey; Mohamed Hafez, 'The Challenges Raised by Covid-19, its impact on the arbitral process and the rise of video conferencing', (2021) 1 International Business Law Journal, 85.

4 *Pack All Manufacturing Inc v Triad Plastics Inc* [2021] O I, No 5882, para 6 (Ontario Superior Court of Justice).

5 See ICC Commission Report, *The Accuracy of Fact Witness Memory in International Arbitration*.

6 See Hafez, n 3 above.

7 [2020] FCA 486.

8 [2020] NSWSC 326.

9 See also Federal Court of Australia decisions in *Rooney v AGL Energy Ltd* (No 2) [2020] FCA 942 and *Tetley v Goldmate Group Pty Ltd* [2020] FCA 913; and Hong Kong decision in *Yeung, Abraham v Sun King Kai* [2021] HKCFI 2224.

10 [2016] FCA 1131.

11 See n 1 above, 15.

12 *Hanaro Shipping v Cofftea Trading* [2015] EWHC 4293; *Re Blackfriars Ltd* [2020] EWHC 845; *SC (A Child) v University Hospital Southampton NHS Foundation Trust* [2020] EWHC 1445; *Bilta (UK) Ltd (In liquidation) v SVS Securities PLC* [2021] EWHC 36.

13 *Legaspy v Fin Indus Regulatory Auth Inc* No 20 C 4700, 2020 WL 4696818 (N D Ill 13 Aug 2020).

14 Supreme Court in Austria in *Docket 18 ONc 3/20s.*

15 *Legaspy v Fin Indus Regulatory Auth Inc* No 20 C 4700, 2020 WL 4696818 (N D Ill 13 Aug 2020); See also *Eaton Partners, LLC v Azimuth Capital Mgmt IV Ltd,* 2019 WL 5294934 at 4 (S D N Y 18 Oct 2019) citing *Bisnoff v King, 154 Supp2d* 630, 639 (S D N Y 2001).

16 19 Aug 2020, High Court of Delhi at New Delhi.

17 *Larsen and Toubro Ltd v NTPC Ltd* 19 Aug 2020, High Court of Delhi at New Delhi, para [9].

18 See n 1 above, 15.

19 *Ibid.*

20 *Ibid.*

21 See n 1 above, 10.

22 See eg, the Africa Arbitration Academy Protocol on Virtual Hearings in Africa; the AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties; the CIArb Guidance Note on Remote Dispute Resolution Proceedings; the Delos Checklist on Holding Arbitration and Mediation Hearings in Times of Covid-19; the ICC Guidance Note on mitigating the impacts of COVID-19; the HKIAC Guidelines for Virtual Hearings; the International Council for Online Dispute Resolution (ICODR) Guidelines for Video Arbitration; and the Seoul Protocol on Video Conferencing in International Arbitration.

23 Chapter 15: 'Procedures in International Arbitration', in Gary B Born, *International Commercial Arbitration,* (3rd edn, Kluwer Law International, 2020), p2342.

24 See eg, *O'Donoghue v Enterprise Inns plc* [2008] EWHC 2273 (Ch) para 43; *Kenworth Engineering v Nishimatsu Construction Co Ltd* [2004] H K C U 593; *Ca It Re v Ed S r l* (Naples Court of Appeal, First Section, 3 Apr 2009); n 1 above, 14 and fn 156.

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The eyeWitness mobile app; seeking justice for the worst international crimes

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

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

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

The eyeWitness to Atrocities app is available to download for free on Android smartphones. For more information, visit **www.eyewitnessproject.org**, follow **@eyewitnessorg** on Twitter or **Facebook**, or watch the eyeWitness **YouTube channel**.

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Municipality of Itu Headquarters Building. Credit: Prefeitura de Itu/Divulgação

Innovation challenges in public construction contracts in Brazil: *Municipality of Itu Headquarters Building* case

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The paradox of innovation in public construction contracts

Although historically seen as antagonists, efforts are currently in place to establish a truce between innovation and legal certainty and to create new systems without profoundly compromising stability, enabling novelty and safety to coexist. In order to achieve this goal, mechanisms that can offer paths to foresee consequences and evaluate new models' gains and losses are increasingly being devised.

The aversion to the new, out of fear of creating instability in the actual order, contributes massively to inflexibility, in which anything that deviates from the conventional or the obvious way is viewed with suspicion, and those who attempt to innovate receive censure. As a result, opportunities for evolution through the implementation of new technologies can be suppressed by concerns about the risks that originality might bring.

From this premise, which is present in the vast majority of social exchanges, a scenario of rigidity has set in, especially in the scope of public law, known for its inflexible rites and statutory regimes.

Consequently, public managers are constrained to stick to traditional contracts in which intelligent and effective solutions are sometimes avoided as unprecedented and new to the public administration, which could cause significant losses in terms of development and effectiveness.

In public law, the very rigid structure of the administration, based on fundamental principles and mandatory rules applicable to the performance of managers at all administrative levels, can be explained by the need to create a structure which is sound enough to prevent fraud and not collapse when there are changes in governing authority personnel. However, this structure seems incompatible with the idea of innovation. Very often administrations which try to introduce new models to contracts are censored, despite criticism from legislative, executive and judiciary powers, along with law scholars, and such censure poses a risk to the progress of society.

Consequently, certifications such as LEED assume great importance in encouraging the adoption of green and sustainable construction methods

Society is constantly changing, as is technology. In the name of progress, it is necessary for doors to be opened to innovation even, or especially, in the administrative context. The challenge faced by agents working in the sphere of administrative law, which ranges from public servants to private agents, is to find a compromise in which legal certainty facilitates innovation, by allowing the predictability of consequences, so that innovation benefits as many people as possible.

Another point that has been discussed within the scope of public law is the commitment to consensus between public entities and private agents. Until recently, the dominant doctrine provided that relations with the public administration were vertical and the public interest prevailing in any discussion was supreme. It would therefore not be possible to find an environment conducive to consensual and efficient dialogue between parties engaged in public contracts.

Case study: Municipality of Itu Headquarters Building

In this symbolic case, in the debate of innovation versus legal stability and the need for collaboration between private and public officials in Brazil, the construction of the Municipality of Itu Headquarters Building (*Paço Municipal de Itu*) demonstrated the potential harm that results when there is a lack of dialogue when contracting and developing projects. It also demonstrates the clear paradox between the need for technology and intelligent solutions in public buildings versus the rigidity imposed by the public procurement and public contract rules, which limit the performance of public administrators and undermines efforts in achieving innovation within government.

As the first public building of its kind in Latin America, the construction sought to obtain LEED certification, which is awarded to innovative green buildings that meet pre-established sustainable construction standards that help reduce water and energy consumption, CO_2 emissions and the generation of waste. This certification is becoming increasingly relevant, as alternatives are being sought to curb carbon emissions and slow climate change.

According to the Global Alliance for Buildings and Construction's 2020 Global Situation Report for Buildings and Construction, which was the last report containing data prior to the Covid-19 pandemic,[1] emissions from the construction sector accounted for 38 per cent of total energy-related global CO_2 emissions,[2] the highest level on record. This data is important in understanding how costly construction can be from an environmental perspective and how essential it is to find alternatives to reduce costs.

In developing countries such as Brazil, unfortunately there is a lack of regulation and/or building codes which are effective enough to control the use of resources in building construction and maintenance. Consequently, certifications such as LEED assume great importance in encouraging the adoption of green and sustainable construction methods and consequently, encouraging water conservation, energy efficiency, waste management and balanced use of materials during construction.[3]

In the case of the Itu Headquarters Building, data published by the Environmental Agenda Programme in Public Administration (A3P),[4]

from the Ministry of the Environment and the UN Environment Programme, showed positive sustainability results. These included a reduction in: electricity consumption by 30 per cent; water consumption by 50 per cent; carbon emissions by 35 per cent; and generation of waste by 60 per cent.

However, although the project appeared to be a success from a sustainability perspective, putting Itu at the forefront of the green building certification in Latin America, irregularities in the contract were found by the São Paulo Court of Audits, which inspects the legality of public expenditure in respect of contracts executed by the State of São Paulo and its municipalities.

The Contract 129/2010, signed on 31 August 2010, has been amended on four occasions: (1) 20 October 2010 – adding new clauses to the contract; (2) 30 November 2010 – promoting changes to basic engineering design; (3) 5 December 2011 – extending the contract term and increasing the original price by approximately 50 per cent; (4) 4 April 2012 – expanding the contract's scope to fulfil LEED certification conditions. In June 2012, the building was inaugurated, but the contractual scope was only formally accepted by the Municipality almost a year later, when the LEED certification was effectively issued, in March 2013.

The contractual amendments were perceived by the São Paulo State Court of Audits as a sign of poor planning and deficiency in the original basic engineering project. This meant that the changes required were not due to the need to update the project in view of technological changes (therefore aiming at qualitative improvement), but due to the need to carry out studies and hire services that should have been in place to support the engineering basic project and its tendering from the start.[5] Moreover, the Court of Audits found the increase in the final contract price excessive and against Brazil's Public Procurement Law, which only permits scope expansion equivalent to a maximum of 25 per cent of the original contract price.

The parties to the contract argued that, although the project had been conceived as a sustainable building from the start, it was only when it was amended a fourth time that they decided to incorporate services and materials required for LEED certification. They also indicated that the Green Building Council was new in Brazil, so lack of experience from all parties involved (the certifying authority, the municipality preparing the project and the contractor) had resulted in the additional costs.

Nevertheless, according to the Court of Audits, there was insufficient evidence that additional services and materials directly related to the LEED certification or to promote qualitative improvements. Consequently, on 7 May 2019, the Court declared the contract illegal.[6] Furthermore, the former mayor who was responsible for executing the contract is currently being investigated and may be held personally liable for the illegality of the contract.

Lessons learnt, and the attempt of the Brazil's new Public Procurement Law to address incorporating innovation into projects

The Municipality of Itu Headquarters Building case teaches us important lessons. Even though the importance of international sustainability certification is broadly recognised, in countries such as Brazil, challenges to innovation result from very strict public procurement and government contract rules and the lack of knowledge and/or effective training of the public officials involved.

Challenges to innovation result from very strict public procurement and government contract rules

Another important lesson is the need for greater collaboration between the private and public parties in fully understanding the challenges of implementing new technologies and of incorporating innovation in public works.

Conscious of all these issues, the new Public Procurement and Public Contracts' Law (Law No 14,133/2021), enacted on 1 April 2021 (and to come fully into effect by 1 April 2023), introduces some changes which try to overcome issues relating to innovation.

One such issue is integrated contracting, based on which the public administration, when contracting for works, is able to include in the scope of the same contract: (1) preparation of basic and detailed engineering projects; (2) supply of materials; (3) effective construction; and (4) commissioning the building up to its full operational stage. The previous law only allowed construction projects to be procured and/or contracted on the existence of a basic engineering project,

which had to be attached to the request for proposals.

Another change which may benefit innovation is the introduction of the competitive dialogue as a new form of procurement for works, services and acquisitions, particularly aimed at projects which include technological and/or technical innovation. The new law provides for conversations or negotiations between the public administration and bidders according to objective criteria. Its aim is to develop at least one alternative capable of meeting the administration's needs, with bidders having to submit a final proposal after the dialogue stage has closed. In doing so, the procurement proceeding acquires the valued contribution of several market specialists, with meetings duly recorded and, when concluded, allows the selection of a project which best meets the needs of the contracting public entity.

The new law also provides for a clearer rule for the submission of unsolicited proposals by private companies (which, in Portuguese, are known as Expression of Interest Procedure or 'PMI'). This creates room for effective collaboration between private and public sectors, with market agents being able to propose projects and carry out studies, investigations and surveys, proposing innovative solutions that contribute to solve issues of public relevance or interest.

In the case of the Itu Headquarters Building, such tools would have been useful to allow the project to be better designed and achieve the intended sustainability-oriented results and certification without the need for various amendments to the contract. This also would potentially have led to less challenges about its results and legality.

The recently enacted law also allows changes to the basic engineering project in cases in which innovation proposed by the contractor achieves cost reduction and/or increases in quality, and the contractor takes full responsibility for the risks associated with changing the basic engineering design. Such a provision, in the specific case of the Itu Headquarters Building, would have facilitated encompassing the intended improvements with sustainable technological developments, cutting maintenance costs throughout the lifetime of the building.

The new legislation may not solve every issue, but it certainly better equips public administration to take on and develop innovative projects.

Motivated by cases such as the Itu Headquarters Building, the legislative improvements provide all parties with better instruments for dealing with innovative and unprecedented projects, therefore avoiding the censure of public officials who are leading innovation and creating a safer environment for such contracts to be executed and performed. By implementing these new instruments, we may reduce – or even eliminate – current tensions between innovation and public construction contracts, allowing innovation and legal certainty to cooperate in working towards a better and more sustainable future.

Notes

1 The Covid-19 pandemic has redefined world parameters of production and consumption. Lockdowns and slowdown of economies played an important part in decreasing levels of emissions.
2 UN Environment Programme Global Alliance for Buildings and Construction, 'Global Status Report for Buildings and Construction', https://globalabc.org/news/launched-2020-global-status-report-buildings-and-construction, accessed 21 July 2022.
3 Evidence and lessons from Latin America. Policy brief: Green Building in Latin America, https://assets.publishing.service.gov.uk/media/57a08a07e5274a31e00003aa/131106_ENV_TheGreEco_BRIEF1.pdf, accessed 21 July 2022.
4 A3P '*Construção do novo Paço Municipal em Itu*', https://a3p.eco.br/produto/construcao-do-novo-paco-municipal-em-itu accessed 21 July 2022.
5 Administrative Proceeding No TC-001215/009/10.
6 TCE-SP XVII TCESP Legal Week, lecture by Floriano Azevedo Marques Neto, 14 August 2019 www.youtube.com/watch?v=6WkqUCm_m3Q, accessed 21 July 2022.

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FEATURE ARTICLE

Architecture in Rotterdam, The Netherlands. Credit: SeanPavonePhoto/Adobe Stock

Liability for innovation: the *Prodema* case in the Netherlands

Leendert van den Berg
The Hague

In this rapidly changing world, society's demands escalate. Innovation is key to keeping up with these demands. The construction industry is no exception to this trend. Building methods change in order to build better and more rapidly. Building materials change to allow more daring designs or faster or cheaper construction. Design methods change to allow for a more integrated and foolproof process. This leads to ever-increasing possibilities. At the same time, this leads to ever-increasing challenges, both from a factual and from a legal perspective. The main legal question is, who bears the responsibility for the implementation of innovative methods, materials and designs?

The answer will be heavily influenced by all relevant circumstances. Primarily, the contractual provisions will be relevant. What did the contracting parties agree on when concluding their agreement? Then the applicable legal system will be of relevance. Were the parties allowed to allocate the risks as they did? Last but indeed not least, the factual circumstances will be relevant. Who chose the innovative product or innovative construction method? Did the other party have a choice of methods and/or materials? If an innovation leads to damage, was such damage the result of the innovation itself or of faulty work (or design) when implementing that innovation? And finally, when defects

manifest themselves, is there any recourse against the contractor or other parties involved in the construction, or is it the owner who bears all the risks?

As it seems impossible to give general answers to these questions, a case study concerning an innovative product used in a series of construction projects in the Netherlands almost two decades ago may provide some guidance.

Prodema SA[1] was a Spanish company which decided to break into the Dutch market in 1995. Its flagship product was a type of cladding panel that was marketed to be all weather resistant and maintenance-free. The product was said to come with a ten-year insured warranty. It was particularly appealing to architects as it featured a natural wood look. The combination of outdoor durability and aesthetics proved irresistible to architects and the product was widely used in many projects across the Netherlands. The use of the panels was stipulated by architects in technical descriptions and project developers ordered construction according to those descriptions. The panels were used in many housing projects and the houses were sold to buyers.

Then, after some time, the Dutch weather proved to be too harsh for the Spanish panels. The wooden veneer in the panels turned to grey and the panels delaminated. Some panels became hazardous, others turned aesthetically unacceptable. All panels had to be replaced.

One of the larger Dutch project developers had the panelling installed in three different housing projects which were built in 1998 and 1999. In all three projects, the panelling became defective. For these projects, the standard Dutch forms for housing construction were used, which provide for an overall six-year guarantee and contain a very accessible and effective arbitration mechanism. The buyers made use of both the guarantee and the arbitration clause. As the panels were clearly defective and as a guarantee had indeed been provided, these cases were all settled in 2006. The result was an obligation for the project developer to replace the panelling at its own costs. These costs ran into millions, so of course the project developer sought to recover them from other project participants.

This is where the problem of the use of an innovative material occurred. The contractors had merely used the materials that were chosen and prescribed by the architects (and therefore by the project developer). Under their contractual terms, such choice of materials by the project developer shifted the responsibility for defectiveness to the project developer. Consequently, the project developer had no recourse. At the time of construction, there was no general knowledge available about potential defects, so the contractors were under no obligation to warn the project developer about the use of these materials.

As for the architects, they had researched the material. As the panelling was innovative, the only information available at the time was the product information provided by Prodema itself. Furthermore, Prodema had claimed that it could provide a ten-year insured warranty. The architects had acted according to the ordinary standards of care. Again, there was no recourse for the project developer (also, under the Dutch standard forms of contract for architects, recourse is regularly rather limited).

A final option for the project developer was to seek recourse against Prodema itself. Of course, the project developer had not purchased any goods from Prodema as the panels were procured by the contractors (and their subcontractors). This could be remedied by a transfer of rights by the (sub) contractors to the project developer. However, under Dutch law, a limitation period of two years applies in relation to non-conformity of purchased goods. Moreover, an overall limitation period of five years after the delivery of such goods applies. Apparently, direct recourse on Prodema through a transfer of rights from the (sub) contractors to the project developer proved not to be possible. The published verdicts do not indicate why. Given the factual circumstances of the matter it seems reasonable to assume that the limitations periods were at the root of said impossibility.

Then there was the insured warranty. Prodema had sold the panels with a warranty, so the most promising way of recourse would be to call on the insurers. However, it then transpired that Prodema had indeed contracted insurance for its panelling but had since changed the structure of its panels – after all, it was an innovative product which was still under development. The insurance policy related to the former structure of the panelling and did not apply to the panelling which had actually been delivered for the litigious projects. As a result, no payment was obtained from insurers.

In a final attempt to seek compensation, the project developer sued Prodema. It did so on the grounds of false advertising. In its sales information, Prodema had suggested that the panelling was weatherproof and that this was backed up by relevant research. Although research had indeed been performed, the research reports available to Prodema at the time did not cover all aspects of the claims made in the sales information. These proceedings took over 12 years before a verdict was rendered by the Dutch Supreme Court in 2019.[2]

From the proceedings before the Supreme Court, it follows that an expert witness established that the panelling was indeed unsuitable for the more harsh Dutch weather. The Court of Appeals established that the advertising was indeed false, as the claims for weatherproofness were not suitably backed up by research. Then the Court of Appeals heard all the designers and architects involved in the projects in order to establish whether the false advertising had influenced on their decision to use the panelling. These hearings showed that the designers were indeed influenced by the false advertising, which led to the use of the panelling. As a result, the Court of Appeals decided that Prodema was liable for the false advertising and that that false advertising had indeed led to the use of defective panelling and consequently to damage. This was not a final verdict, as the Court of Appeals then decided that the project developer should substantiate which damages were a direct result of the false advertising. The Supreme Court upheld the verdict of the Court of Appeals.

Whether the project developer ever obtained any compensation in these proceedings remains unclear as there are no further published rulings on this case. Whether the company formerly known as Prodema survived is equally unclear.

What this case shows is that the use of innovative materials can be a risky affair and that if defects manifest themselves, it may be too late to intervene and to seek compensation. This calls for sufficient front-end legal reasoning about how to manage these risks, or as to which party will absorb such risks. Solutions may be found through adequate insured warranties and financial guarantees. From a factual point of view, starting with small-scale applications of innovative products whilst doing extensive research may be a better solution. However, given the number of innovations taking place, and given the need to innovate, this factual solution may not always be feasible.

Notes

1 It should be noted that this company later changed its name, and the brand name Prodema remained in use by a different company. This article addresses the problems with the panelling that were experienced in the past and do not in any way concern the panelling currently produced under the brand name Prodema.

2 Dutch Supreme Court decision, 29 March 2019, ECLI:NL:HR:2019:444.

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BOOK REVIEWS

FIDIC 2017: A Definitive Guide to Claims and Disputes

by Nicholas Alexander Brown

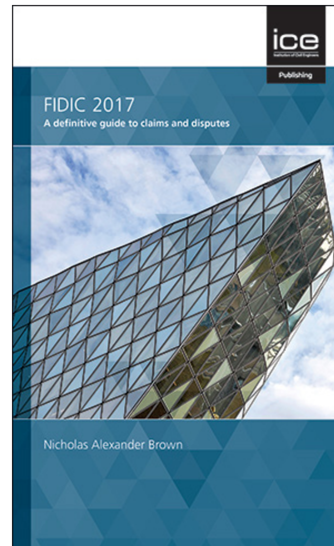
Published by: ICE Publishing, Thomas Telford Ltd 2022

ISBN: 978-0-7277-6531-4

486 pages, £100

Publication date: 15 November 2021

Reviewed by Thayananthan Baskaran and Clement Ling



FIDIC 2017: A Definitive Guide to Claims and Disputes is certainly a welcome addition to the existing texts on the FIDIC Second Edition. The book is brilliantly crafted with a clear objective – to provide a detailed and procedurally focused account of the FIDIC 2017 dispute avoidance and resolution process.

Focused primarily on the FIDIC 2017 Red, Yellow and Silver forms, the book offers a step-by-step explanation of the multi-tiered process concerning claims and disputes, coupled with flowcharts and diagrams to facilitate the understanding of complex topics.

The book comprises 14 chapters. Each chapter begins with a brief abstract and an introduction, followed by concise headings and subheadings which effectively encapsulate the ensuing subject matter. Each paragraph is numbered sequentially through the chapters to enable the reader to locate and extract relevant information quickly. As the author helpfully points out in the Preface, the entirety of the texts may be viewed in seven parts, each dealing with a distinct, yet interconnected topic, presented in a meaningful and logical order.

Chapter 1 introduces the dispute avoidance and adjudication board (DAAB), a FIDIC-prescribed, neutral dispute board comprising an individual or three individuals, as the case may be, of diverse backgrounds and expertise that the parties may appoint to suit their contractual and commercial needs. The overriding purpose of the DAAB is, as its name suggests, to independently, impartially and expertly assist the parties in the avoidance of disputes and in the resolution of those that do arise.

The author explains the concept of a 'standing DAAB', one that is constituted at the outset of the contract and remains for the duration of the contract. In addition to its adjudicative role, the standing and peremptory features of the DAAB entail 'real-time' assistance to the parties in resolving issues before they become disputes. A contrast is also drawn between a standing DAAB and an ad-hoc dispute adjudication board (DAB). The latter comes into being as and when a dispute arises, and disbands when it gives its decision on that dispute.

Chapters 2 and 3 explore the concept and potential sources of a 'claim', generally and under the FIDIC Second Edition specifically. Due consideration is also given to the sub-concepts of 'entitlement' and 'relief', with reference to pertinent sub-clauses of the contract. The chapters comprehensively and lucidly explain how a claim is procedurally initiated, notified and sustained, followed by the consequences of a failure to adhere to such procedure.

A claim is often the main contractual avenue through which potential pecuniary or non-pecuniary entitlements and remedies may arise. The contract specifically prescribes four types of claims, namely: (1) additional payment (or reduction in the contract price); (2) an extension of the defects notification period for the employer; (3) an extension of time for the contractor; and (4) a catch-all category of any entitlement or relief for either party. Type 1 to type 3 claims are

subject to a slightly different set of procedure and requirements from that applicable to type 4 claims, insofar as the roles of the engineer or the employer's representative, and the details to be included in the claim are concerned. This is all clearly explained by the author in a manner that is readily understood and practical.

Chapter 4 examines the attempt that must be made by the parties at an amicable settlement of the claim by way of consultation and agreement. This is followed by a notice of the parties' agreement, given by the engineer or employer's representative if the parties manage to achieve an amicable resolution of the claim. Subsequently, Chapter 5 considers the procedure for the recognition and enforcement of a binding settlement agreement between the parties resulting from consultation, and discusses the remedies for non-compliance with such an agreement.

Chapters 6 and 7 account for the next steps that must be taken by the engineer or employer's representative to determine notified claims in the absence of the parties' amicable settlement, and subsequently, the various ways in which to enforce that determination, be it provisionally binding or final and binding. The absence of an amicable settlement can stem from the parties failing to reach an agreement by consultation within the time prescribed by the contract, or from the parties notifying the engineer or employer's representative that no agreement can be achieved. If either party is dissatisfied with the aforesaid determination, that party may give a notice of dissatisfaction (NOD) of the determination in accordance with the form and timing set out in the contract.

The remaining chapters of the book centre around the process by which a dispute may be resolved by way of an interim yet binding decision of the DAAB. Subsequently and similarly, a dissatisfied party may, by giving a NOD of the DAAB's decision, take the dispute to arbitration pursuant to the ICC Arbitration Rules for a final determination of the dispute. The chapters also comprise a detailed explanation on the procedural and substantive rules applicable to the DAAB and arbitral proceedings, drawing on a vast number of illustrative cases and materials from various legal systems and jurisdictions. Perhaps, most significantly, the author affords the reader a definitive account of the possible routes and procedures through which a DAAB decision and an arbitral award may be enforced.

The contents of this book are thoughtfully put together and are indeed a definitive guide and of practical assistance to anyone contemplating making a claim and navigating the requisite procedures under the FIDIC 2017 forms, a process now made more readily comprehensible by the advent of this insightful work.

Contracts for Infrastructure Projects: An International Guide to Application

by Philip Loots and Donald Charrett

Published by: Routledge, 2022
ISBN: 9781032074290
848 pages, £200
Publication date: 19 May 2022

Reviewed by Tjaart van der Walt SC, Sandton, South Africa

After more than 35 years in legal practice I have become somewhat desensitised by the proliferation of new publications, particularly in the field of construction law. Many are what my friends in academia refer to as carrying dead bones from one grave to another.

But, having read *Construction Contracts for Infrastructure Projects* from cover to cover, I am entirely resensitised.

The learned authors Philip Loots and Dr Donald Charrett need no introduction to anyone with an interest in the law and practice of construction. Their impressive biographies are contained on pages xvi and xvii of the publication. Their joint and separate experience and insight drawn from decades of global inter-disciplinary exposure, theoretically and practically, shine brightly throughout this scholarly treatise. It constitutes an impressive compilation of the legal principles and practical considerations governing the relationships between parties from different jurisdictions in the modern-day world of international infrastructure projects. It addresses the challenges facing the role players and those advising and representing them, and the confluence between common law and civil law jurisdictions. It displays a diligent, committed analysis of the complexities of the law and practice relevant to construction projects globally. It does so in a manner within the reach of a broad spectrum of readers. The publication bears testimony to the authors' intellectual discipline and deep understanding of the law and practice relevant to all aspects of construction contracts.

This publication is bound, over the years to come, to earn a special place in my library among a few select, dog-eared, iconic stalwart textbooks.

The publication comprises over 800 pages of meticulously researched text in plain language. More than 1,200 judgments from around the globe are referred to. It includes relevant portions of legislation from more than 50 international jurisdictions, all contained in a neatly laid out and user-friendly publication, supplemented by useful case studies, tables, illustrations and schedules.

The book deals with the following well-considered and logically sequenced topics in 29 chapters:

- an introduction
- contract law
- construction contracts
- *lex constructionis*
- entry into a contract
- general provisions
- the employer
- the engineer
- the contractor
- subcontracting
- design
- staff and labour
- plant
- materials and workmanship, commencement, delays and suspension
- planning and programming

- tests on and after completion
- employer's taking-over
- defects after taking-over
- measurement and valuation
- variations and adjustments
- contract price and payment
- termination by the employer
- suspension and termination by the contractor
- care of the works and indemnities
- exceptional events
- insurance
- employer's and contractor's claims
- dispute avoidance and resolution
- the impact of ICT on construction contracts.

There is an alphabetically tabulated 50-page glossary of terms which guides the reader to the term, its meaning and in which section it is defined.

There are three appendices dealing with matters for consideration when drafting a construction contract, risk factors in the construction of infrastructure projects, and global claims.

The following quotation from the foreword written by the Honourable Wayne Martin AC QC is appropriate:

> 'This book responds to the need created by the globalisation of the construction industry. Lawyers advising participants in that industry can no longer rely upon domestic texts which deal only with the laws of a particular jurisdiction. In this seminal work they will find a truly cosmopolitan compilation of the sources of law which govern the rights and obligations in transnational construction projects.
>
> 'The authors comprehensively develop the thesis earlier propounded by others to the effect that it can now be said that there is a coherent body of international law applicable to construction which can be regarded as a division of the *lex mercatoria* (international merchant law) and described as *lex constructionis.*'

I am of the view that *Contracts for Infrastructure Projects* is an indispensable addition to the library of everyone involved with construction contracts, whether as a lawyer, employer, contractor, engineer, claims consultant or dispute avoidance or resolution practitioner. It will undoubtedly be an invaluable resource for construction law students.

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The International Bar Association's Human Rights Institute (IBAHRI), an autonomous and financially independent entity, works with the global legal community to promote and protect human rights and the independence of the legal profession worldwide.

We provide human rights training and technical assistance to legal practitioners and institutions, building their capacity to promote and protect human rights effectively under a just rule of law.

A leading institution in international fact-finding, we produce expert reports with key recommendations, delivering timely and reliable information on human rights and the legal profession.

We support lawyers and judges who are arbitrarily harassed, intimidated or arrested through advocacy and trial monitoring.

A focus on pertinent human rights issues, including equality and non-discrimination, poverty and human rights, and the independence of the legal profession, forms the basis of targeted capacity building and advocacy projects based on thematic areas.

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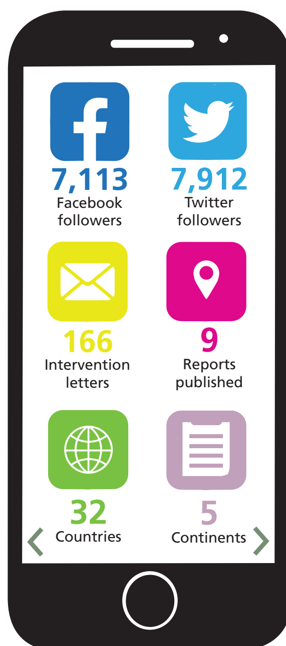

3 Trial hearings observed

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2 Mission rapporteur

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Construction Law International

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Articles should be submitted to **clint.submissions@int-bar.org**.

Articles/features should normally fall in the range of 3,000 and 4,000 words.

The author's name will appear with title but without post-nominal letters etc. Please provide a very short description (<20 words), which should include the author's name, firm or organisation, city and email. For example: '[name] is a [role] at [firm] in [city] and can be contacted at [email].'

As this publication is aimed at busy lawyers, please provide a 50- to 100-word summary, which would serve as the 'standfirst' (or introductory paragraph). This summary could be written in the form of a question or could state a problem that the article then deals with, or could take the form of some bullet points. Article titles should be 5–10 words long.

Endnotes are to be used for citations only. Footnotes are not used in this publication.

We welcome any graphs or other visual illustrations, including photographs that enhance the article.

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Updates can be up to 1,500 words, and should address a recent (from the past six months) court decision or change in local law of relevance to construction projects.

Terms and conditions

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Construction Law International

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

SEPTEMBER 2022 Vol 17 Issue 3
ISSN 1819-1371
Citation (2022) 17(3) *CLInt*

The views expressed in this magazine are those of the contributors, and not necessarily those of the International Bar Association or the Editorial Board.

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International Bar Association

EVENTS 2022

CONFERENCES

26th Annual Competition Conference
9 – 10 September
St Regis, Florence, Florence, Italy

9th World Women Lawyers' Conference: Women in leadership
11 – 13 September, Denmark

3rd European Automotive and Mobility Services Conference
14 – 15 September, Munich

4th IBA French Spanish Day
15 September,
Maison du Barreau, Paris, France

The New Era of Taxation
15 – 16 September, Barcelona, Spain

7th Annual Corporate Governance Conference
19 – 20 September, Frankfurt, Germany

5th IBA European Startup Conference
28 September Dublin, Ireland

Private Equity Transactions Symposium
29 – 30 September
The Biltmore Mayfair, London, England

Fundamentals of International Legal Business Practice: IBA Young Lawyers' Training Course Miami
29 October, University of Miami,
Coral Gables, USA

Globalising your practice
30 October, Miami Beach Convention Center, USA

Arb40 Symposium – Unfolding the future of international arbitration: substantive challenges and the rise of a new model
30 October, Miami Beach Convention Center, Miami Beach, USA

IBA Academic Forum 2022
4 November, Florida International University College of Law, Miami, USA

IBA Rule of Law Symposium
4 November, Miami Beach Convention Center, Miami, USA

WEBINARS

Decarbonising oil and gas operations – let's look at the contracts
13 September, 1300 – 1400 BST

Professional ethics in online dispute resolution systems
14 September, 1400 – 1500 BST

Art in a time of war: The sanctions landscape
20 September, 1300 – 1400 BST

The legal landscape of the metaverse, NFTs and digital assets: what lawyers need to know
22 September, 1230 – 1345 BST

Managing a law firm in Africa: future-proofing your law firm
23 September, 1300 – 1430 BST

Drivers of change in legal profession and legal education
27 September, 1600 – 1700 BST

Continuing legal education for judges: An indispensable tool in the administration of justice
30 September, 1300 -–1400 BST

Should I stay or should I go now: Navigating global sanctions on Russia
4 October, 1400 – 1500 BST

Art disputes and mediation
12 October, 1200 – 1330 BST

The Revised 2020 IBA Rules of Evidence and its Commentary: Compliance with an Order to Produce an Adverse Inference
29 November, 0830 – 1000 GMT

Full and further information on upcoming IBA events canbe found at:

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