

CONSTRUCTION LAW INTERNATIONAL

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

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jurisdiction across
jurisdictions**

**Termination of
construction
contracts**

**Cost uncertainty
in international
arbitration**



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INTERNATIONAL

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FROM THE EDITORS

Dear readers,

It is with great pleasure that we introduce to you the September 2021 edition of *Construction Law International (CLInt)*.

In this issue, we continue the ‘diversity and inclusion’ questionnaire with a contribution from David Anthony, a partner at Corrs Chambers Westgarth in Sydney. We are grateful to David for his insights and personal reflections on his career.

We have four country updates in this issue. The first is from Switzerland, where Christopher Boog and Katherine Bell review a recent Swiss Supreme Court decision on whether an arbitration agreement extends to a subcontractor based on involvement in the performance of the main contract. Moving to China, Jinlin Nan, Tianxiong Hu and Rongcheng Huang consider China’s recently published new Model Form of EPC Contract for Construction. From India, Gagan and Shivani Anand provide insight into methods for a sustainable recovery of the Indian construction sector from the pandemic. Lastly, Yasemin Cetinel and Gizem Bahadirli consider the much-traversed topic of liquidated damages versus penalties from the Turkish law perspective.

Moving to our feature articles, firstly, Janine Stewart, Rebecca Cook and Irene Kim look closely at the adjudication process in New Zealand, by comparison to Australia and the UK, in respect of an adjudicator’s jurisdiction.

Gracious Timothy Dunna offers his insight into the enforceability of FIDIC’s notice requirements under Indian law.

Woojae Kim, Hangil Lee and Hannah Kim provide practical guidance on employers’ and contractors’ claims under sub-clause 20 of FIDIC 2017 rules.

Sena Gbedemah and Mamas Stavrou offer a commercial perspective on the termination of construction contracts, highlighting the significant risks that arise from termination.

At the end of the dispute process there is always one final dispute over costs. Timothy Cargill examines the uncertainty of costs in international arbitration and proposes a framework for parties and tribunals to consider.

Lastly, Eugenio Zoppis considers social initiatives that may provide opportunities and new perspectives for large construction projects, particularly in developing countries.

We have one book review in this issue, by Joseph Moore, who takes a look at the *International Compendium of Construction Contracts*, edited by Phillip Greenham and the Society of Construction Law Australia.

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

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

Thomas Denehy
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FROM THE CO-CHAIRS

Greetings, International Construction Projects Committee (ICP) members!

As the year progresses, we see with satisfaction and renewed hope that the Covid-19 pandemic is slowly but steadily receding, and life is starting to return to normal across the world.

The ICP Committee continues to develop our virtual programme for this year with great success, while we make big plans for in-person meetings in 2022. After the initial networking event in March, and the first two Masterclass events in May – ‘Practical considerations for mediation of construction disputes’ and ‘Practical aspects of cross examination techniques’ – the ICP programme moved to explore the role of experts in construction disputes, also with a practical approach, during a successful webinar in July.

Our programme continues with the final two Masterclass events – ‘Fundamentals of project establishment’ and ‘Fundamentals of project delivery’ – both scheduled for this month; a webinar on sustainable project decommissioning scheduled for October; and, in what promises to be an excellent wrap-up for our tenure as Co-Chairs, a webinar looking beyond Covid-19 and focusing on lessons learned, changes, improvements and trends derived from the pandemic. Details on dates, times and speakers for upcoming events may be found on the ICP Committee page on the IBA website. All these events are free of charge for IBA members, and recordings will be available on the IBA website for those who cannot attend the live sessions.

We are also planning our annual members’ meeting, which shall be held virtually in December and will be followed by a social event. At this meeting, ICP Committee officers will report on their activities during 2021 and their plans for the upcoming year. It will also be an ideal occasion for members to interact with Committee leadership, suggest ideas for projects and topics for sessions, and network with fellow members. Details on the annual members’ meeting will be announced soon.

A new project has been announced by the Project Establishment Subcommittee and is currently under way: the survey on ‘10 tips for Project Establishment’ seeks to obtain – in a quick and straightforward way – recommendations on the necessary steps to set a construction project up for success. The data-gathering stage is complete, but if you are interested in helping with the analysis and review of the data collected, please contact Project Establishment Subcommittee leaders Júlio César Bueno (jbueno@pn.com.br), Sarah Sinclair (sarah.sinclair@minterellison.co.nz), Roberta Downey (roberta.downey@hoganlovells.com) and Joe Guarino (jguarino@vlmglaw.com).

Two other ICP projects have been in development for some time now: the ‘Supply Chain Insolvency Ready Reckoner’ project led by the Project Execution Subcommittee, and the ‘ADR in Construction Country Guides’, led by the Dispute Resolution Subcommittee. If you are interested in contributing to either of these projects, please check out our page on the IBA website for further details and contact information.

Our Diversity & Inclusion (D&I) team has also released its first set of interviews with senior construction and infrastructure professionals about their experiences of adopting and managing diversity policies in their workplaces. This material is available on our website too, and we encourage everyone to browse through it and to contribute ideas for further interviews and other D&I-related projects.

Finally, the ICP Committee has teamed up with Mauro Rubino-Sammartano (a former Chair) and the European Court of Arbitration to offer the Online Training Course on Construction Arbitration, which will take place between September and December 2021, and feature some of the ICP Committee’s most distinguished members as lecturers.

If you are interested in getting involved or have an idea or suggestion you would like to share, please do contact us or the relevant officers. Details of all officers are on the ICP pages of the IBA website: ibanet.org. Another opportunity to provide written content is through this publication, *Construction Law International*. If you are interested in contributing an article, please contact ICP Committee Editor Tom Denehy.

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

Shona Frame and Ricardo Barreiro-Deymonnaz

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DIVERSITY AND INCLUSION INITIATIVE



Credit: Robert Kneschke/Shutterstock

At CLInt, we are fortunate to have a diverse readership that spans continents, cultures, nationalities, genders and much more. Diversity and inclusion are of increasing importance for the legal profession. To recognise and appreciate those in our industry, we would like to propose a series of questions to promote diversity and inclusion.

Please send any contributions to CLInt.submissions@int-bar.org.

1. **What is your name and current job, role or title?**
2. **When starting out in your career, did you have any role models?**
3. **What advice did you receive which helped you progress in your career?**
4. **Do you think that diversity is improving in your particular professional area?**
5. **What positive steps have you seen organisations take to progress diversity and inclusion?**
6. **What aspects do you think are still ripe for improvement in organisations?**
7. **What are the indicators of when a reasonable diversity balance is reached?**
8. **What do diversity and inclusion mean to you and why are they important?**
9. **What impact has the Covid-19 pandemic had on diversity in your professional area?**



International Bar Association's Human Rights Institute

The International Bar Association's Human Rights Institute (IBAHRI), an autonomous and financially independent entity established in 1995, works to promote and protect human rights and the independence of the legal profession worldwide. The IBAHRI undertakes training for lawyers and judges, capacity-building programmes with bar associations and law societies, and conducts high-level fact-finding missions and trial observations. The IBAHRI liaises closely with international and regional human rights organisations, producing news releases and publications to highlight issues of concern to worldwide media.

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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.

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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.



DIVERSITY AND INCLUSION



Questionnaire

David Anthony

Partner, Corrs Chambers Westgarth

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

When I started my legal career, the only openly LGBTI+ role model I knew of in the legal profession was Justice Michael Kirby – he was and remains a great source of inspiration for me. After university, I worked for Justice Margaret White, who was the first woman to sit on the Queensland Supreme Court. The 12 months I spent in her chambers forever shaped my professional life. Her dedication to duty, generosity of time to those around her regardless of their position, commitment to justice, and willingness to take on voluntary community work was a great inspiration. I finished my associateship knowing that a true leader – whether they are a member of the LGBTI+ community or an ally – acts the same in public and in private because that's the person they genuinely are.

2. What advice helped you progress in your career?

In the early days of my career, I was told, 'no one will ever be as passionate about your career as you are'. To have a successful career in law, you need to be proactive, take opportunities and be prepared to put yourself forward.

3. Is diversity improving in your professional area?

Absolutely. Diversity and inclusion has improved for the better over the course of my career and the growth in the number of people who feel comfortable to be their full self in the workplace is fantastic. When I started my career, very few lawyers in firms were out and there were no active Pride groups. Change in this space has been phenomenal over the last 10-12 years; however, we cannot lose sight that there is still work to be done, particularly at the intersection of LGBTI+ and other diverse communities.

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

Encouraging people to bring their full identity to the workplace and creating an environment and culture where people feel safe to do so. The establishment of employee reference groups around LGBTI+, cultural diversity and accessibility have been at the forefront in creating this cultural change.

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

We need to ensure that diversity and inclusion is reflected in organisational leadership. Representation of women at leadership levels remains low. It is important that people are able to see diverse roles in positions of leadership and at all stages of their career.

6. What indicators point to a reasonable diversity balance?

When all groups in society who wish to be involved in an organisation are able to do so, the culture of the organisation fosters and encourages such participation and the leadership group reflects the diversity of both the organisation and broader society

7. What does diversity and inclusion mean to you and why is it important?

Diversity and inclusion is about giving everyone an opportunity to participate and achieve their full potential. By creating a culture of inclusion and allowing people to be themselves, people are productive, happier and bring their best to their work.

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

The pandemic has had both positives and negatives for diversity, but I want to focus on one positive. The mass experience of working from home has demonstrated that people can work flexibly and still be effective and productive. It has also demonstrated in a clear way the responsibilities that many people have outside the office, which need to be balanced with work, particularly those with caring responsibilities.



SWITZERLAND

Swiss Supreme Court: no extension of arbitration agreement to subcontractor

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Construction projects routinely involve a large number of actors, from the employer to the contractor, subcontractors, engineers and architects. As a result, major projects will regularly feature a number of interrelated contracts governing intertwined roles and responsibilities. It follows that disturbances in one contract will frequently have repercussions on other interlinked contracts. Despite – or because of – this interweaving of contractual relations, Swiss law recognises a strict principle of privity of contract. However, in the context of dispute resolution, Swiss case law allows for the extension of arbitration agreements to non-signatories in specific circumstances, such as by implied consent based on the non-signatory's involvement in the conclusion or performance of the contract containing the arbitration agreement.

Recently, the Swiss Supreme Court (the 'Court') rendered a noteworthy decision on this topic in a construction-related matter. In a leading case, the Court for the first time ruled on the issue of

extending an arbitration clause contained in the main contract to a subcontractor.¹

The underlying dispute arose in connection with the construction of a diesel power plant in Bangladesh. The South Korean contractor entered into a series of contracts with multiple employers incorporated in Singapore and Bangladesh. The contractor engaged a South Korean subcontractor under a separate contract for the supply of diesel engines.

Following installation, several technical problems related to the engines occurred. The employers later withheld the related payments to the contractor.

The contractor initiated an arbitration against the employers in accordance with the (identical) arbitration agreements contained in the respective contracts between the contractor and the employers, which provided for International Chamber of Commerce arbitration seated in Geneva. The employers submitted counterclaims and requested a third-party joinder of the subcontractor.

The Arbitral Tribunal (the 'Tribunal') rendered a partial award on jurisdiction, assuming jurisdiction over the subcontractor by extending the arbitration agreement to it. The Tribunal referred to the subcontractor's active involvement in the conclusion and execution of the main contracts and found that the subcontractor had thereby implicitly consented to be a party to the contracts, including to the arbitration agreement. The Tribunal referred to the following circumstances in support of its decision: (1) the subcontractor had participated in a number of meetings with the employers before and after the signing of the main contracts; (2) the subcontractor had provided essential technical documentation, in particular the specifications and test procedures for the engines, which were

appended to the main contracts; (3) during installation, the subcontractor was present on site to install and modify the engines; (4) the subcontractor had directly communicated with the employers regarding the technical problems related to the engines; (5) the contractor, after liaising with the subcontractor, had confirmed to the employers that it would guarantee the quality of the engines together with the subcontractor; and (6) the contractor and the subcontractor sent a joint letter to the employers communicating their willingness to rectify the engine-related defects.

The Tribunal found that these circumstances, considered separately, did not suffice to warrant an extension of the arbitration agreement to the subcontractor. However, seen as a whole, they led to the conclusion that the subcontractor participated in the conclusion and performance of the main contracts to an extent that the parties to the main contracts could assume in good faith that the subcontractor intended to be bound by the arbitration agreement.

The subcontractor motioned to set aside the partial award with the Court,² arguing that it had not consented to the arbitration agreement and that the Tribunal had therefore wrongly accepted jurisdiction.

The Court granted the motion and set aside the Tribunal's partial award on jurisdiction. It was not convinced that the subcontractor's involvement in the project was sufficient to constitute implied consent to be bound by the arbitration agreement contained in the main contracts.

The Court emphasised that the roles of the respective parties were contractually defined, with the main contracts expressly referring to the subcontractor as the diesel engine supplier. It was thus not surprising that the subcontractor, as the supplier of an essential

component of the plant, provided the related specifications and played a key role in the performance of the main contracts. The Court further considered that the subcontractor's efforts to resolve the problems related to the engines were made in light of its warranties and repair obligations under the subcontract. In this context, the Court found that the responsibilities of the contractor and subcontractor, respectively, had not become commingled, as the subcontractor's responsibilities were limited to the issues connected to the diesel engines. Therefore, the employers must have been aware that any contributions of the subcontractor to the performance of the main contracts were made exclusively in its function as subcontractor. These contributions could thus not have been reasonably understood by the employers and the contractor to mean that the subcontractor implicitly accepted becoming a party to the arbitration agreement contained in the main contracts.

The decision provides a welcome clarification on the topic of the extension of arbitration agreements to non-signatories in the context of construction disputes. Its key finding can be seen in that the officially communicated position of a party in a construction project, in this case as subcontractor, supersedes any actions of said party that might otherwise be considered sufficient to warrant an extension of an arbitration agreement to a non-signatory.

Although the present decision is fact-specific and arbitral tribunals and courts will continue to decide on the issue of implied consent on a case-by-case basis, it should provide a certain degree of comfort to subcontractors that they will, in principle, and in particular where their role in the project has been transparently communicated, not be pulled into dispute resolution proceedings under the main contract simply by virtue of having

performed their obligations under the subcontract.

Where parties to a main contract in a construction project wish to include subcontractors in potential future dispute resolution proceedings, they should contemplate this at the outset of the project and add provisions to that effect to the relevant contracts. Adding identical or compatible arbitration agreements to the main and subcontracts alone is unlikely to suffice under Swiss law, although it will be a condition precedent to allowing for such multi-contract/multi-party arbitration. Beyond that, parties will be well-advised to expressly record their consent to multi-party and multi-contract arbitration (such as in the form of joinder or consolidation) in the contracts to avoid doubts as to consent at a later stage.

Indeed, given the factual and contractual interrelationships between the parties involved in a large-scale project, and to avoid piecemeal dispute resolution, it might be expedient both in terms of efficiency and factual consistency for one and the same arbitral tribunal to decide on the arising dispute(s) in a unified process. Having said that, multi-party arbitration comes with its own challenges. For example, the parties' right to have an equal say in the nomination of the arbitrators is regularly irreconcilable with the obligation of two or more parties to jointly nominate an arbitrator. Further, dealing with various rounds of submissions from several parties, all given the opportunity to comment on the other parties' submissions, can be a burdensome and time-consuming process. The (perceived or actual) gain in efficiency and factual consistency of coordinated disputes must therefore be carefully weighed against the increased complexity, time and expense attached to the individual phases of the proceedings.

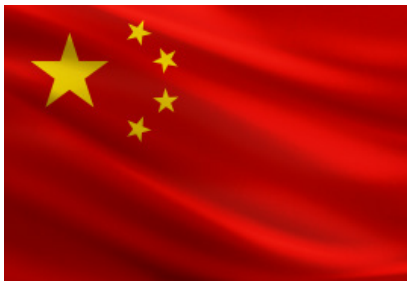
In related news from Switzerland, the Swiss Chambers Arbitration

Institution (SCAI) has become the Swiss Arbitration Center (SAC) and the revised Swiss Rules of International Arbitration 2021 (the 'Rules') entered into force on 1 June 2021. The Rules contain new provisions on multi-party and multi-contract arbitration: article 5 contains a gate-keeper provision for multi-contract arbitrations providing that the Arbitration Court will not let the arbitration proceed if claims are made under more than one arbitration agreement and these arbitration agreements are manifestly incompatible. Article 6 provides increased legal certainty to parties, while at the same time maintaining the necessary flexibility, in situations where a respondent raises claims against another co-respondent (cross-claims) or an additional party (joinder), or where an additional party seeks to participate in the proceedings by bringing claims against an existing party (intervention).

Notes

- 1 Decision 147 III 107 dated 13 November 2020.
- 2 Based on articles 190(3) and 190(2)(b) of the Swiss Private International Law Act (PILA).

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CHINA

China publishes new Model Form of EPC Contract for Construction

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Hu Tianxiong

Zhong Lun, Shanghai

Huang Rongcheng

Zhong Lun, Shanghai

Background

On 25 November 2020, the Ministry of Housing and Urban-Rural Development (MHURD) and the State Administration for Market Regulation of China published the Model Form of EPC Contract for Construction (GF0-2020-0216) (the '2020 Model Form'), effective from 1 January 2021. The 2020 Model Form is an update, with revisions made to the Model Form of EPC Contract for Construction Project (Pilot) (GF2011-0216) (the '2011 Model Form').

Style and layout of the 2020 Model Form

The style of the 2020 Model Form, including the composition and application of contract conditions and the layout of contract terms is basically consistent with the FIDIC contract conditions, MHURD 2017 Model Form of Construction Contract, and the 2011 Model Form.

According to the Specification of the 2020 Model Form, the Model Form consists of three parts: Contract Agreement, General Conditions and Particular Conditions.

There are 20 articles in the General Conditions, generally consistent with the style of FIDIC conditions of contract (Silver Book) 1999 edition (hereinafter the 'FIDIC Silver Book').

Engineer and the Employer's Representative

The Employer's Representative under FIDIC Silver Book

The FIDIC Silver Book only provides for the Employer's Representative, but not for the Engineer:

'3.1 The Employer's Representative, The Employer may appoint an Employer's Representative to act on his behalf under the Contract[...] Unless and until the Employer notifies the Contractor otherwise, the Employer's Representative shall be deemed to have the full authority of the Employer under the Contract.'

As it mainly applies to design, procurement and construction/turnkey projects, the FIDIC Silver Book does not specify an Engineer, but replaces the Engineer with the Employer's Representative. Therefore, under the EPC/Turnkey mode of the FIDIC Silver Book, the Employer does not exert much technical supervision on the works of the Contractor, but it has high requirements on the Contractor's performance and coordination in terms of design, construction, procurement and other aspects.

Engineer and the Employer's Representative under the 2020 Model Form

While in the 1999 FIDIC Silver Book there is only an 'Employer's Representative', the 2020 Model

Form not only provides for the Engineer, but also defines the 'Employer's Representative'.

Article 1.1.2.6 of the 2020 Model Form defines the Engineer as:

'the legal person or other organization specified in the Particular Conditions of Contract and entrusted by the Employer to carry out contract performance management and project supervision; such legal person or other organization shall employ a natural person with corresponding qualification and professional abilities as the Engineer's Representative, and grant him the right to act on behalf of the Engineer in accordance with the contract'.

Article 1.1.2.5 of the 2020 Model Form defines the Employer's Representative as *'the person appointed and dispatched by the Employer to exercise the rights and perform obligations of the employer within the scope of the Employer's authorization'*.

In the 2020 Model Form, by comparing the definitions of 'Engineer' and 'Employer's Representative', we find that the Engineer must be a legal person or other organisation engaged by the Employer. However, it cannot be an independent third party as defined in the FIDIC Yellow Book or FIDIC Red Book, whose main job involves technical supervision of the Contractor's performance in terms of quality, progress, quantity and price of works, and safety supervision during the performance, but not the Employer's performance of obligations under the contract. The Employer's Representative is usually a natural person at management level, whose job is not only to manage the Employer's performance, but also to provide feedback and make decisions on the questions, requests and other information raised by the Contractor and Engineer in the process of performance on behalf of the Employer.

Differences between the 2020 Model Form and FIDIC Silver Book

Based on the above, as the 2020 Model Form has not only an Engineer but also an Employer's Representative, the Employer is allowed to exert more supervision, even interference, on the construction and management by the Contractor than under the EPC/Turnkey mode of the FIDIC Silver Book. The supervision and interference, on the one hand, restricts the autonomy of the Contractor for the works and, on other hand, reduces the contractor's responsibilities for the risks of final results. This is quite different from the FIDIC Silver Book's arrangement. Therefore, when choosing the 2020 Model Form, both the contractor and the employer should pay attention to the division of work scope between the Engineer and Employer's Representative.

Contractor's General Obligations and risks allocation

Under the FIDIC Silver Book

The FIDIC Silver Book provides for Contractor's General Obligations in article 4.1:

'The Works shall include any work which is necessary to satisfy the Employer's Requirements, or is implied by the Contract, and all works which (although not mentioned in the Contract) are necessary for stability or for the completion, or safe and proper operation, of the Works.'

For unforeseeable risks, the FIDIC Silver Book provides in its article 4.12: '(a) the Contractor shall be deemed to have obtained all necessary information as to risks, contingencies and other circumstances which may influence or affect the Works; [...] and (c) the Contract Price shall not be adjusted to take account of any unforeseen difficulties or costs.'

Article 5.1 General Design Obligations of FIDIC Silver Book provides:

'The Contractor shall be deemed to have scrutinized, prior to the Base Date, the Employer's Requirements (including design criteria and calculations, if any). The Contractor shall be responsible for the design of the Works and for the accuracy of such Employer's Requirements (including design criteria and calculations), except as stated below[...]'

From the above provisions, it can be seen that in the FIDIC Silver Book, the General Obligations of the Contractor include the work required by the Employer and any work implied in the contract, making it easier to determine which party bears the risks of the EPC project. In terms of risks related to documents and on-site data provided by the Employer, except for the situations specified in article 5.1 of the contract, the Contractor shall be responsible for the adequacy, integrity and accuracy of on-site data. The increased costs and delays caused by unforeseeable difficulties shall be borne by the Contractor. As in EPC projects, Contractors are usually those with strong management and technical abilities, exerting comprehensive control over the overall project design, procurement and construction. The Contractors are required to bear the above risks, in line with the contract purpose of the EPC project.

Under the 2020 Model Form

The 2020 Model Form provides for the Contractor's General Obligations in article 4.1: '(2) undertake all the works and the defects liabilities and warranty obligations during defects liability period, rectify, perfect and repair any defects of the works, so as to meet the purpose agreed in the contract'

As for errors in the Employer's Requirements and documents provided by the Employer, article 1.12 of 2020 Model Form provides that:

'In the event of Contractor's increased costs and delays caused by the Employer's Requirements and fundamental documents provided by the Employer, the Employer shall be responsible for the increased costs and (or) delays, and pay reasonable profit due to the contractor.'

For unforeseen difficulties, the 2020 Model Form provides article 4.8:

'when encountering unforeseen difficulties, the Contractor shall take reasonable measures to overcome the unforeseen difficulties to continue the works, and promptly notify the engineer and send a copy to the Employer [...] The Employer shall be responsible for the increased costs and delays because of reasonable measures taken by the Contractor.'

In China's construction industry practice, it is generally believed that requiring the Contractor to undertake all the works implied in the contract and to bear the risks caused by wrong data provided by the Employer and by unforeseeable difficulties imposes too heavy a burden on the Contractor, and requiring the Contractor to undertake such duties is in conflict with the principle of fairness.

Therefore, the 2020 Model Form stipulates that the Contractor is required to complete only the works under the contract, and for the risks caused by errors in the Employer's Requirements and other documents provided by the Contractor, the Contractor is entitled to claim for the cost increases and delays to the Employer in accordance with the contract.

Differences between the 2020 Model Contract and the FIDIC Silver Book

In summary, there are a number of differences between Contractor's General Obligations and contract risk sharing under the 2020 Model Form compared to the FIDIC Silver Book.

Under the conditions of the 2020 Model Form, the Employer has more powers to participate in and manage the contract performance, and the Contractor bears relatively fewer risks. While under the conditions of the FIDIC Silver Book, the Employer participates less in the project management and the Contractor has more autonomy to undertake more duties, including the implied works and risks of unforeseeable difficulties.

International contractors and employers participating in projects in China, when choosing the 2020 Model Form, should be aware of the above differences and keep an eye on the interpretation and application of the terms and conditions in the 2020 Model Form.

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INDIA

The impact of Covid-19 on the Indian construction sector: challenges, revival and suggested methods for sustainable recovery

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‘We must accept finite disappointment, but we must never lose infinite hope’
– Martin Luther King Jr

While agriculture contributes to most of the Indian subcontinent’s GDP, the construction industry is worth INR 10.5 tn,¹ and is vital for the country’s growth as there are other industries dependent on construction activities. Credit also goes to the industry for employing over 35 million people² and helping the nation eradicate unemployment, especially prevalent among labourers. Following the economic crisis in 2008, the Indian government was determined to resuscitate the industry and spent close to INR 82.5 tn on infrastructure from 2008 to 2017.³

The worldwide spread of the coronavirus, which mandates social distancing, safety measures and smaller gatherings, has pulled the industry off the ladder to recovery. In *Construction Week Online*, S Vishwanathan argued that construction ‘was one of the sectors that had to bear the worst brunt of COVID-19, as it was already battling

a liquidity crunch as fallout of the non-banking financial institutions in the financial sector since more than a year’.⁴

Following India’s nationwide lockdown, many construction companies had to halt their businesses and hope for better days. Significant effort was made to heal the economy from the impact of the deadly virus, and many companies have recovered or are at least in the process of recovering from the vicious cycle of economic instability. With the second wave of Covid-19 catching the country off-guard, companies are struggling again, although this time they are prepared. A closer look at the challenges faced by the construction sector and its recovery story reveals the industry’s true strength and resilience.

Impact of Covid-19 on construction companies

The infrastructure and construction sector’s revival after the pandemic will be a slow and steady process. The sector’s segmented nature is likely to aggravate the effect of the pandemic. We witnessed a steady decrease in demand for construction projects after the nationwide lockdown in March 2020. Construction projects in every stage of development were affected and a huge impact on cost with respect to manpower, machinery, plant and materials was inevitable. The labour-intensive industry mainly thrives on migrant workers staying in labour camps and construction sites, but the pandemic caused the exodus of such informal sector workers amid bans on interstate travel, causing chaos. This took a toll on the supply chain, increasing operating costs.

KPMG India conducted a survey with 30 construction sector professionals to determine the impact of the ongoing pandemic on construction projects. The survey was conducted to understand the impact of Covid-19 on overall

construction sector costs and essential aspects such as manpower, plant and machinery and materials. It was observed that projects that belong to select sectors, including power generation, real estate and transport, could see a steep increase in overall project costs due to an increase in manpower and plant machinery costs, compared with other sector projects.⁵

The study revealed that the cost of manpower is expected to go up in all sectors, the cost of plant and machinery depends on the stage of construction in which the project was abruptly left, and the cost of raw material should decrease with decreased supply.

With the number of Covid-19 cases increasing every day, the supply chain was disrupted by government lockdowns and labour scarcity, for example. The impact of Covid-19 on construction companies can be consolidated into this exhaustive list:

1. **Labour scarcity:** the disease is caused by a viral infection, so workers are more likely to spread the disease when they come in contact with each other.⁶ Due to the nature of the crisis and lack of safety measures on construction sites, workers were unwilling to come to work.
2. **Supply chain disruption:** projects that were dependent on specialised construction equipment were delayed due to lockdowns, lack of mobility and affected every life that was economically dependent on the supply and operations of such specialized construction equipment.
3. **Financial crunch:** construction companies suffered huge losses, including suppliers providing essential materials. During complete lockdowns, companies were shut and factory-produced goods were abandoned in warehouses. This disabled the government from collecting taxes, affecting the GDP, in return influencing the national economy.

4. **Force majeure clauses:** contractual relationships were impacted as they lacked clauses covering a global pandemic such as Covid-19. The traditional force majeure clauses discharge the obligation of the parties until the event stops. Hence, labourers did not get paid, resulting in extreme financial hardship to a large number.

5. **Unemployment:** the violent backlash of unemployment became prevalent, not just in the construction sector but across various sectors of the economy.

The deserted construction sites, abandoned tolls and half-built buildings had to be replenished. As a result of restrictions imposed by the government to curb the crisis, steps had to be taken at a micro level to regain the economy.

Among many measures that were taken to recover the economy, a few steps actually helped companies re-establish their businesses. A safe environment had to be set up for the workers, ensuring their wellbeing and that of society. Social distancing, hygienic working conditions and increase in remuneration provided a secure atmosphere for workers' return. The eventual decrease in Covid-19 cases and the creation of vaccines gave a sense of hope, and the safety precautions became the new normal for everyone. There was a desperate need to get back to the usual course of business and help came from every direction.

The second wave of Covid-19 and its impact

The ongoing second wave of Covid-19 in India may cause disruptions to overall construction activity in the country, but the performance of most mid- and large-sized construction companies is not expected to be materially impacted.⁷

An assessment by the Investment Information and Credit Rating Agency (ICRA) reveals that most construction companies resuming

operations are focused on non-urban infrastructure projects pertaining to roads, railways, irrigation and so on. Such projects mainly operate in remote areas or away from metros, and are therefore outside of at-risk places. Projects scheduled to be undertaken in urban areas are likely to feel the impact of the second wave due to local restrictions and reverse migration of workers. Having said that, as the Indian government has ensured a nationwide lockdown will be avoided, reverse migration of labourers is on a very small scale, unlike the one caused by the first outbreak.

While the situation seems to be changing rapidly, the disruption in the construction sector is not expected to be severe. Before the second Covid-19 wave, the construction sector had started witnessing recovery and the pace of project execution had met pre-pandemic levels.⁸ The recent wave does increase the risk of restrictions on construction activities at a local level and the curtailing of labour availability at sites. However, these disruptions are predicted to be short-term and leave a ray of hope for lesser shock waves. The earlier recovery was driven by a healthy pace of project execution, supported by favourable policies from the government in terms of lowering the bank guarantee requirement, faster clearance of bills and speedier clearances.⁹ Unlike previous lockdowns, certain activities have been given exemptions. Although transportation of labourers is not permitted, construction activities shall be allowed when labourers are available.

As the industry has already faced such a predicament, most companies have improved their preparedness, both in terms of labour and raw materials. Real estate projects might be affected owing to their urban locations and dependencies. Nevertheless, the way construction companies have evaded the quagmire is noteworthy.

Recommendations and suggestions

The situation is worsening day by day and useful measures are needed to ensure the containment of the virus. Uncertainty has taken over the country as the second wave hits hard. Such situations call for innovative remedial measures to revive construction companies after the pandemic.

Safety equipment must be mandatory at all construction sites, wearing masks, gloves and personal protective equipment (PPE) should be routine, along with having sanitising stalls to ensure a clean working environment. Daily sanitation and cleaning are vital and must be strictly followed. It is necessary that all stakeholders combine their efforts in fighting this adversity. Definitive measures, such as increased remuneration to the skilled workforce for early completion, the safety of informal labourers, removal of liquidity crunch by financial institutions, reduction of interest rates and one-time financing for soon-to-be-complete structures, for example, would help the sector overcome these times of crisis.¹⁰

An increased focus on infrastructure spending was announced in the Indian Budget for 2021–2022. This will ensure funds for implementing the additional safety needs. Every construction site should be well-equipped with medical arrangements, thermal scanning, frequent oxygen tests and general check-ups.

The use of technology will redefine the industry in the days to come. Around 66 per cent of construction companies in India are prioritising digital transformation to ensure projects are completed on time and within budget.¹¹ The outbreak has led to a change in the way business is done and it is imperative that we adapt to the changing times. The Information Technology Act 2000

(the 'IT Act') provides legal recognition to electronic records wherein any document, which is mandated by law to be in written, typewritten or printed form, will be deemed to be lawful if it is available in electronic form and accessible in future.¹² Although there are exceptions to this law, it is definitely a step forward.

In order to provide for local demand, construction companies in India are learning best practices from developed markets that include technologies like building information modelling (BIM).

BIM is the process of creating and managing information to digitally reproduce an asset through its lifespan, from planning to construction and operation. The digital transformation of the Indian construction sector can be further enhanced by promoting the use of 3D-printing. The work-from-home culture has replaced the conventional office, but it is difficult to implement the same in the construction sector. However, social distancing is non-negotiable and working from home can be practised as much as possible. Meetings, digital signing of contracts, planning and so on can easily be achieved from home.

Unfortunately, the easing of restrictions has inadvertently led to a spike in cases; therefore, reintroduction of restrictions is inevitable. Moving forward, these restrictions are likely to continue until the situation gets better. In these difficult times, arming ourselves with all safety measures and adapting to the evolving trends will help tackle the relentless quandary.

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TURKEY

Liquidated damages versus penalties: Turkish law approach

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Disputes arising out of construction contracts are often heated, whether or not the penalty provisions are readily enforceable and/or liquidated damages relieve the requesting party of the burden of proof. The concepts are interfacing, so it is not always easy to establish clear division. To add to the problem, the approach is changing either radically or slightly in each applicable law jurisdiction.

We note as a general reference that according to the Anglo-Saxon tradition, liquidated damages are the sum agreed by the parties to the contract, authorising the party suffering from the other party's default to receive a predetermined indemnity, following a particular breach.¹

As co-authors, we are of continental law backgrounds and specifically of Turkish law background, so we intend to cover the Turkish law approach to this debate.

To start, under Turkish law we do not have a clear definition or explicit provision for liquidated damages as we do for contractual penalties. Indeed, Turkish legislation provides contractual penalty as a type of lump sum compensation in line with other civil law jurisdictions.

This article will accordingly attempt to evaluate the approach of Turkish law on liquidated damages and contractual penalties and then provide a compare and contrast conclusion.

Penalty

A creditor seeks ways to guarantee its receivables in case of a non-performance or poor performance by the debtor. It can use the means of guarantees or bail. Alternatively, the parties can agree on a pre-determined amount to be paid by the debtor in case of non-performance or unduly performance of the contract, which means the contractual penalty under Turkish law.²

Contractual penalty as a concept has been explicitly established by articles 179–182 of the Turkish Code of Obligations (TCO).

Article 179 reads:

'If a penalty has been determined in case of non-performance or unduly performance of the contract, the creditor is entitled to claim the performance of either the obligation or the penalty, unless otherwise agreed in the contract.

If the penalty has been agreed upon in cases where the obligation is unfulfilled by the determined time, or at the determined place, the creditor is, in principle, entitled to request non-performance of the penalty, together with the primary obligation, unless it has explicitly waived its right or has accepted the performance without any reservations.

The debtor's right to prove that it is entitled to terminate the contract by fulfilling the penalty is reserved.'

As can be seen in the second paragraph above, if the performance is accepted without any reservation, the right to request penalty shall be deemed forfeited. This issue shall be taken into consideration *ex officio* by the judge.³ It is worth mentioning

that a contractual provision removing this obligation to reservation, which allows the parties to exercise their right at any time, is acceptable under Turkish law.⁴

Article 180 of the TCO sets forth certain characteristics of the contractual penalty. Firstly, even though the debtor has not suffered any damages, it can still claim the penalty amount. Damage shall not be examined as a condition precedent by the courts upon the request for such a compensation.⁵ Secondly, if the creditor suffered damage and the amount of such damage exceeds the determined penalty, for the exceeding amount, the creditor will need to prove the debtor's fault and the excessive damage.

Article 182 of the TCO provides further details on a contractual penalty. The parties are accordingly free to determine the amount of the penalty. However, such amount may be decreased by the judge if deemed an excessive amount. It is also worth noting that the validity of the penalty depends on the validity of the contract from which it arises.

Generally, the provisions regarding the contractual penalty are not imperative provisions and parties can agree otherwise. The only exception is the provision related to the reduction of the amount of the penalty by the judge.⁶

Although the judge will determine when the amount of the penalty will be considered excessive and to what amount it will be reduced, while making this assessment, the judge will evaluate all the circumstances of the facts within the framework of justice and equity. In particular, the judge will consider the creditor's interest in obtaining the performance, the behaviour of the debtor and the economic situation of the parties. The fact that the penalty amount is more than the damage suffered by the creditor is not a reason for reduction in itself. The judge's power to reduce the penalty amount can never be used to completely remove the penalty condition.⁷

An exception to this provision is regulated under article 22 of the Turkish Commercial Code, which states that traders cannot request a deduction of the penalty. In practice, if the penalty, which was determined for the obligations of a trader, is so severe that it causes the economic collapse of the debtor, it can be deemed partially or completely void.⁸

Liquidated damages

A liquidated damages provision in a construction or engineering contract constitutes an express agreement that a sum of money, pre-defined or ascertainable in amount, and representing a genuine pre-estimate of probable loss or damage, is to be paid by one party to the other in the event of a breach of the contract.⁹ As stated previously, there is no provision under Turkish Law defining the liquidated damage or regulating the legal characteristics thereof. Accordingly, the differences between these two legal concepts cannot be observed in legislation. However, scholars, as well as jurisprudence, dealt with the concept extensively and accordingly a number of Turkish Supreme Court decisions tackled the issue.

It has been established mostly by scholars in practice that liquidated damages is a compensation in terms of its nature and therefore the rules of compensation law should be applied,¹⁰ as opposed to legislation on penalty clauses. Moreover, to determine whether a clause in a contract is a penalty or a liquidated damage, the qualification made by the parties would not suffice and it would be necessary to investigate the relevant circumstances, as well as the intention of the parties while preparing the contract (ie, as to the purpose of the very clause). Finally, it has been established that the purpose of liquidated damages is not to force the debtor as it is in the penalty provisions. Indeed, in case the work cannot be delivered on time, in order

for the contractor to pay a certain amount for each month of delay, liquidated damages should serve the purpose of predetermining the amount of possible damage to be repaired by the parties and thus prevent disputes that may arise between the parties regarding the amount of concrete damage. Forcing the debtor to perform by applying psychological pressure to ensure the fulfilment of the original debt must not occur.¹¹

On the other hand, when it comes to court practice, we can at least argue that the Turkish Supreme Court's view evolved in time and recently became more established as to the nature and content of the concept. In its earlier decisions, the Supreme Court considered the compensation that is determined in advance and which will be paid in case of a delay in completion of the construction project as liquidated damages. Decisions clearly stated that it is not a contractual penalty regulated under article 179/II of the TCO.¹²

In another decision, dated 2004, regarding a very similar clause related to the delay in completion of the

construction project – which mentions that if the relevant apartments may not be completed in time TRY 3,000,00 shall be paid monthly per each apartment and after six months the compensation amount will be TRY 6.000,00 per each apartment – the Supreme Court ruled that such provision shall be considered as penalty.¹³

Consequences of the difference between liquidated damages and penalty

As stated above, we can consider that there are certain criteria to be taken into account to decide whether a lump sum compensation clause is a contractual penalty or liquidated damage. The criteria is as follows: (1) reservation of the right prior to the acceptance of work; (2) reduction by the judge; (3) proof of the damage; and (4) excessive damages.

Below we provide a table comparing the two concepts taking into account the above criteria:¹⁴

Subject of evaluation	Penalty clause	Liquidated damage compensation
Aim	To ensure the fulfilment of the original debt by forcing the debtor to fulfil its performance, and to facilitate the claim of the creditor for damages by identifying the damage arising from the non-fulfilment of the debt in advance and with certainty.	To determine the amount of the actual damage to be settled by the parties in advance or as a lump sum; thus, to free the creditor from the burden of proof on the existence or amount of the damage and to determine the upper limit of the compensation to be paid. There is no intention of forcing the debtor to perform by exercising pressure on the debtor.
Reservation prior to the acceptance	The creditor who accepted the performance without reserving its right to claim penalty shall be deemed to have lost its right.	Even though the creditor did not reserve its right before accepting the performance, it can claim liquidated damages within the prescription period.
Reduction	Judge is obliged to reduce the high penalty if it will constitute an economic collapse.	The law does not provide any duty for the judge to reduce the liquidated damage compensation.

[continued...]

Subject of evaluation	Penalty clause	Liquidated damage compensation
Demonstration	It is sufficient that the provision of the penalty condition is included in the contract; thus the creditor is not obliged to prove its existence. The debtor may not oppose to the amount by claiming there is no loss.	The creditor does not have to prove the existence or amount of the damage. The burden of proof that there is no damage or less than liquidated damage compensation rests with the debtor and to the extent the debtor proves as such, it becomes relieved of the compensation obligation.
Right to request	It is sufficient to be included in the contract and it is not obligatory for the creditor to incur damages to demand the penalty. Even if the creditor does not suffer any damage, the debtor must pay the agreed penalty.	The creditor may only ask it when it actually incurs a loss.
Excessiveness	The penalty may be greater than the incurred loss.	Liquidated damage compensation cannot be more than the incurred loss.

We therefore conclude that a separate assessment should be carried out with regards to each case by reference to the following principles:

- (1) The debtor who accepted the work without having reserved its right to request penalty shall be deemed to have waived its right. This is not the case for liquidated damages, which can be requested at any time in the prescription period.
- (2) Under Turkish law, the judge reduces the high penalty if it is to constitute an economic collapse. However, there is no such provision for the liquidated damages.
- (3) As explained, the amount of a penalty can be higher than the amount of the damage. This is not applicable for liquidated damages.

Notes

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Adjudicator jurisdiction across jurisdictions

Introduction

The construction industry underpins economies worldwide. In New Zealand, the construction sector contributes 6.2 per cent to gross domestic product (GDP) as of March 2020, with GDP increasing by 52 per cent on a quarterly basis.¹ ‘Global Construction 2030’ forecasts that construction output will increase by 85 per cent to \$15.5tn

by 2030. The leading countries are expected to be China, the United States and India. The report predicts an average global construction growth of 3.9 per cent per annum to 2030, outpacing global GDP by over one percentage point.²

However, despite best project intentions, with construction projects often come construction project disputes. These have

the potential to derail projects, relationships, client budget and contractor margin. Given the significant potential impact of protracted disputes, the process of adjudication has been established in various jurisdictions for the fast-track resolution of disputes arising under a construction contract.³

Adjudication is a process in which an independent third party (known as the adjudicator) determines a dispute put forward by opposing parties. In most jurisdictions, adjudication is a process whereby disputes are largely determined on the papers, with no hearings. It is conducted within very tight timeframes for both submissions and determinations, with most disputes being resolved within six weeks.⁴

In New Zealand, adjudication was first introduced by the Construction Contracts Act 2002 (CCA) in April 2003 as a speedy dispute determination mechanism to facilitate cash flow. Under the CCA, the adjudicator holds jurisdiction for certain disputes arising under the construction contract and must observe the principles of natural justice. Adjudication has become known as a ‘short and sharp, rough and ready’ process, undoubtedly the preferred dispute resolution forum for contractors or subcontractors.

Adjudication has gained momentum globally, arguably due to the significant growth in construction and the Covid-19 environment, increasing the volume of construction disputes requiring resolution. The Covid-19 pandemic has negatively affected construction projects through issues in global supply chains and difficulties in delivering projects on time. Unsurprisingly, the United Kingdom Construction Leadership Council has noted that the level of notifications and claims under construction contracts has increased due to Covid-19.⁵ A recent Royal Institution of Chartered Surveyors survey also found that over 40 per cent of professionals reported an increase in disputes since the onset of the pandemic.⁶

However, while adjudication has been a useful tool in dispute determination, the increase in its use has highlighted constraints in the process and caused parties to question whether the scope of adjudicators’ jurisdiction is broad enough to achieve its purpose.

This article focuses on adjudicators’ jurisdiction across key commonwealth jurisdictions (including Australia, New Zealand

and the UK) and whether the breadth of that jurisdiction means that adjudication is fit for purpose in the current construction environment. It also addresses the level of court intervention in the adjudication process across jurisdictions. The increase in alleged jurisdictional issues (perceived or actual) is becoming increasingly common and – importantly – can result in delays to the otherwise short statutory timeframes, prevent parties from relying on otherwise legitimate legal arguments falling outside the strict realms of contract, and ultimately render any determination unenforceable and/or unfit for purpose (although the willingness of the courts to interfere at this juncture varies).

Despite best project intentions, with construction projects often come construction project disputes

We explore these issues more specifically by discussing the following:

1. how jurisdiction is determined;
2. how jurisdiction can be challenged;
3. jurisdictional issues that may arise;
4. why jurisdiction matters; and
5. whether the scope should be expanded.

How is jurisdiction determined?

We examine below the setting of jurisdiction in New Zealand, Australia and the UK. Overall, an adjudicator’s jurisdiction is widest in the UK, allowing ‘any’ dispute arising under the construction contract to be adjudicated. New Zealand follows closely behind, allowing disputes regarding payment and rights/obligations to be adjudicated. In Australia, jurisdiction is limited to payment disputes only. Most jurisdictions, excluding the UK, provide that parties cannot contract out of the relevant legislation.

New Zealand

In New Zealand, the jurisdiction of an adjudicator is set by the CCA. Adjudicators have jurisdiction to determine disputes regarding payment and the rights/obligations of a party under a construction contract.⁷ Originally, New Zealand more closely followed Australia in that only disputes regarding payment were subject to adjudication. However, this was broadened to include rights and obligations by the

Construction Contracts Amendment Act 2015. A construction contract is defined as a contract for carrying out construction work including any variations to the construction contract.⁸ If the adjudicator determines that a party is liable to make payment, the adjudicator must also determine the amount of payment, date of payment and any other conditions. The parties may extend the adjudicator's jurisdiction by written agreement.⁹

Australia

In Australia, the legislation governing adjudication differs between states. The legislation in New South Wales,¹⁰ Victoria,¹¹ and Queensland¹² are largely similar. Unlike New Zealand, jurisdiction is limited in scope to disputes over payment claims (it does not extend to rights and obligations) and can only be invoked by a person who performs construction work and claims to be entitled to a progress payment.¹³ An adjudicator has jurisdiction to determine the amount of a progress payment, the date the amount becomes payable and the rate of interest payable. The legislation does not reference extending jurisdiction by agreement as in New Zealand.

In Western Australia¹⁴ and the Northern Territory,¹⁵ the adjudicator has jurisdiction to determine matters related to a construction contract regarding payment disputes.

UK

In the UK, the jurisdiction of an adjudicator is set by the Housing Grants, Construction and Regeneration Act 1996. An adjudicator's jurisdiction is largely determined by the contract. Unless otherwise stated, the adjudicator has jurisdiction to determine a dispute arising under the contract.¹⁶ If a contract does not provide for adjudication, the Scheme for Construction Contracts (England and Wales) Regulations 1998 provides that an adjudicator shall decide the matters in dispute, including payment disputes. Unlike Australia, UK legislation allows adjudication to be invoked by any party to a construction contract at any time to resolve any dispute arising under the contract.¹⁷ The right to adjudication cannot be narrowed in scope or contracted out of.¹⁸ This is a broader approach than both jurisdictions discussed previously, but most resembles the New Zealand jurisdiction.

Overall

All jurisdictions have similar themes underpinning adjudication – to facilitate timely payments and efficient cash flow between parties to a construction contract. The scope of jurisdiction in the UK appears to be the broadest, with New Zealand close behind. The New Zealand and Northern Territory of Australia jurisdictions further purport to provide speedy dispute resolution solutions. The New Zealand and UK legislation allows the adjudicator jurisdiction over payment disputes and any other disputes arising from the construction contract. This is broader in scope than the Australian legislation, which only allows payment disputes in relation to progress payments. This is likely attributable to the fact that the Australian legislation specifically relates to security of payment while the New Zealand and UK legislation cover construction contracts in general.

How is jurisdiction challenged?

There are two key junctures at which parties may challenge the jurisdiction of an adjudicator: (1) at the outset of the adjudication; or (2) once the determination has been issued and is being enforced. Jurisdictions differ in relation to the level of court intervention, but courts are generally reluctant to intervene in an adjudicator's determination.

Overall, New Zealand and the UK have similar approaches by allowing review of an adjudicator's decision only in the case of jurisdictional errors or an extreme breach of natural justice. Australia has specific review processes set out in the legislation, such as internal review. Most jurisdictions allow adjudicators to determine their own jurisdiction. The courts in all jurisdictions tend to be reluctant to intervene and overturn adjudicators' determinations.

New Zealand

In New Zealand, if the jurisdictional issue is raised prior to the adjudicator's determination or during the adjudication, the adjudicator may rule on their own jurisdictional matters. However, if the dispute has already been determined, a party who is required to pay as a result may apply for judicial review of the adjudicator's determination. This is only in

the case of jurisdictional errors that breach natural justice. The courts are vigilant to ensure that judicial review of adjudicators' determinations do not cut across the scheme of the legislation and undermine its objectives.¹⁹ The Court of Appeal in New Zealand has warned against the courts allowing judicial review proceedings that interfere with the 'pay now, argue later' doctrine.²⁰ This is largely due to an adjudicator's determination being interim in nature,²¹ and the parties' right to subsequently determine the dispute in arbitration or litigation.²²

Australia

In Australia, the procedure for review of the adjudicator's determination is clearly set out and is overall more limited. However, the legislation does not provide for situations of challenging jurisdiction prior to the determination of a dispute.

After the determination of a dispute, the Victorian legislation allows the respondent to apply for a review of the adjudicator's determination only if the respondent provided a payment schedule to the claimant within the time specified, and on the grounds that the adjudicated amount included an excluded amount. The respondent must identify the excluded amount and have paid the claimant the adjudicated amount other than the alleged excluded amounts.²³

In Queensland, a review must first be applied as an internal review, and then a review of the original determination to the registrar.²⁴ The registrar may confirm, amend or substitute the original determination.

In Western Australia, a person who is aggrieved by a determination may apply for a review. The determination may be set aside, and the adjudicator must make a determination on the issue.²⁵

Following the New Zealand and UK positions, the courts in Australia are also unlikely to intervene in an adjudicator's determination.

UK

In the UK, the Technology and Construction Court (TCC) determines disputes about buildings, engineering and surveying. Prior to the final decision, a party can challenge the jurisdiction of an adjudicator by: agreeing

to widen the adjudicator's jurisdiction; referring the jurisdictional dispute to another adjudicator; referring the jurisdictional dispute to the courts; or refusing to participate.²⁶ After the determination, a party may challenge the adjudicator's decision by either opposing enforcement of the determination in court or arbitration proceedings, or by itself commencing court or arbitration proceedings to seek a declaration that the adjudicator's determination is unenforceable.²⁷ Lack of jurisdiction is a ground for judicial review of an adjudicator's determination. Other grounds, such as errors of procedure, fact or law, are unlikely to be valid.²⁸ The courts will rarely interfere with the adjudicator's determination.²⁹ If a party doubts the jurisdiction of an adjudicator but wishes to proceed with the adjudication in the interim, it should proceed with the adjudication while reserving the right to challenge the adjudicator's determination on the grounds of jurisdiction in later proceedings.³⁰

Unlike the UK and certain jurisdictions in Australia, New Zealand does not have a designated construction court. This means that High Court judges may have less specialisation regarding construction matters than an adjudicator. The courts should rightly be reluctant to interfere in adjudication processes. If the purpose of adjudication is to provide a speedy resolution for construction disputes, with the further option of utilising arbitration or litigation, review of adjudicators' determinations goes directly against this purpose. The courts should only interfere in exceptional circumstances and this is more so in New Zealand since adjudicators are specialised in their area. A potential option is to have a more vigilant appointment processes to ensure adjudicators have the expertise required to make the determination.

What jurisdictional issues may arise?

At the two key junctures in which parties may challenge the adjudicator's jurisdiction, jurisdictional issues may arise as to whether the adjudicator has jurisdiction to determine the dispute at the outset and/or whether the adjudicator has remained within their jurisdiction in making their determination. Some common examples of jurisdictional issues are briefly explored below for illustration purposes.³¹

Whether there is a dispute will depend on the definition of dispute under the applicable legislation and contract

Notice of adjudication relates to matters not yet in dispute

Parties to a construction contract have the right to refer a 'dispute' to adjudication. New Zealand legislation defines dispute as 'a dispute or difference that arises under a construction contract';³² UK legislation also refers to 'a dispute arising under the contract' and clarifies that dispute includes 'any difference';³³ and Australian legislation does not define 'dispute'. The construction contract may further define what constitutes a dispute.

Parties may seek to argue that there is no dispute (therefore no right to refer a matter to adjudication for which the adjudicator may determine) where the claim has not been rejected, where the claim cannot be admitted or rejected based on the information available, or because the contractual claims process has not been followed. This is commonly referred to as there being no 'crystallised' dispute, and is common across all commonwealth jurisdictions.

Whether there is a dispute will depend on the definition of dispute under the applicable legislation and contract. In *Amec Civil Engineering Ltd v The Secretary of State for Transport*,³⁴ the UK House of Lords set out seven propositions regarding what does and does not constitute a dispute: in essence, a dispute will not arise unless or until it emerges that the claim is not admitted, which may be established in a number of ways (expressly or by inference, with the duration of the action or inaction being informative), but not necessarily by reason only of a claim being submitted.³⁵ In New Zealand, although the contractual claims and dispute resolution process may indicate whether a dispute has arisen, it is not a prerequisite given the wide definition of a dispute and the prohibition on contracting out of applicable legislation.³⁶

Notice of adjudication relates to multiple disputes

Again, parties to a construction contract have the right to refer 'a' dispute (singular, not plural) to adjudication. Parties may seek

to argue that multiple disputes have been referred to a single adjudication, and in the absence of consolidation and/or extension of the adjudicator's jurisdiction by agreement, the adjudicator does not have jurisdiction to determine more than one dispute.

Whether the dispute involves multiple disputes will depend on the wording of the applicable legislation and the relevant facts. The courts will generally take a broad approach. In the UK case *Fastrack Contractors Ltd v Morrison Construction Ltd*,³⁷ it was said that the question involves a careful characterisation of the dispute, which will not necessarily be determined solely by the wording of the notice of adjudication but must be construed against the underlying factual background from which it arose and which is known to both parties. In Western Australia, the courts have gone further – in *Clough Projects Australia Pty Ltd v Floreani*,³⁸ it was held that an adjudicator may adjudicate more than one payment dispute, without the consent of the parties, where the adjudicator is satisfied that doing so will not adversely affect their ability to adjudicate fairly and as quickly, informally and inexpensively as possible.

Notice of adjudication relates to matter previously determined by another adjudicator

A party to a construction contract may seek to refer a dispute that has already been determined in another adjudication. In New Zealand, estoppel may be raised as a defence to any claim where the same subject matter has already been determined so as to prevent a party from commencing multiple adjudications in relation to the same subject matter.³⁹ The purpose of the relevant legislation in seeking to provide speedy resolution of disputes is a determining factor, as re-adjudicating the same subject matter goes against this purpose. In the UK, it has been held that the adjudicator is required to resign if a party attempts to re-adjudicate the same matter,⁴⁰ and it has also been suggested that a party may have an obligation to refer the adjudicator to a determination of a previous adjudicator of the same dispute.⁴¹ In practice, if a party raises the issue, an adjudicator may seek submissions from the parties and determine their jurisdiction to avoid the issue undermining the determination.

The question of whether the subject matter is the same or substantially similar to the one previously determined may not be clear cut and will depend on the facts of the case. In *Benfield Construction Ltd v Trudson (Hatton) Ltd*,⁴² it was said that a dispute will generally be the same or substantially the same if there are no material differences in the facts or the same documents will be relied upon. If an adjudicator's determination is made on the same dispute, the later decision will not be enforceable, and the earlier decision will be binding until the dispute is finally resolved by arbitration, litigation or agreement between the parties.⁴³

Determination falls outside scope of notice of adjudication

The jurisdiction of an adjudicator is defined by the terms of the dispute that has been referred.⁴⁴ New Zealand legislation requires an adjudication to be initiated by a notice of adjudication, which must state the nature and a brief description of the dispute and of the parties involved.⁴⁵ Once the adjudicator has been appointed, the claimant must refer the dispute in writing by an adjudication claim specifying the nature or the grounds of the dispute.⁴⁶ In *Alaska Construction and Interiors Auckland Ltd v LaHatte and Lovich Floors Ltd*,⁴⁷ it was confirmed that the grounds of the dispute set out in the notice of adjudication may be superseded by the adjudication claim – with the notice of adjudication having no more relevance or significance than initiating the adjudication process.

Comparatively, in the UK, a notice of adjudication primarily defines the dispute,⁴⁸ although the respondent may enlarge the adjudicator's jurisdiction by introducing new matters not identified in the notice of adjudication.⁴⁹ The notice of adjudication cannot be used to limit the adjudicator's jurisdiction to consider valid defences.⁵⁰ It may be considered a breach of natural justice if the adjudicator disregards a potentially valid defence by taking a restrictive view on its jurisdiction.⁵¹

The New Zealand legislation is more procedurally prescriptive than the UK legislation because of the requirement to state 'the nature and a brief description of the dispute'⁵² (as opposed to the 'notice of intention to refer a dispute to adjudication'⁵³), as well as the requirement for the adjudication claim to set out the nature or grounds of the dispute.⁵⁴

Determination relates to claims, defences and/or relief outside the construction contract

As above, the parties have a right to refer a dispute arising under a construction contract to adjudication. The reference to 'arising under' arguably prevents the adjudicator from considering matters falling outside the scope of the construction contract itself – that is, beyond matters relating to contractual entitlement, such as statutory and equitable claims and/or relief.

In the UK case *Premium Nafta Products Ltd v Fili Shipping Co*,⁵⁵ the House of Lords considered the difference between 'arising under' and 'arising out of' the construction contract in the context of an arbitration clause, preferring a pragmatic and

The jurisdiction of an adjudicator is defined by the terms of the dispute that has been referred

commercial approach to interpretation to allow a wide range of disputes to fall under the category of disputes able to be referred to arbitration for resolution.⁵⁶ The same principles are seen to apply to adjudication.

In *Haskell Construction Ltd v Ashcroft*,⁵⁷ the New Zealand High Court rejected the argument that the adjudicator could only determine amounts payable under the contract and therefore could not award damages that exist separately and not under the contract. The Court considered the purpose of the relevant legislation and held that the adjudicator's jurisdiction extends to include compensation for loss or damages under a relevant statutory remedy.

In an adjudication context, an adjudicator will ordinarily have jurisdiction to decide upon rectification of the contract,⁵⁸ but not matters regarding pre-contractual misrepresentations or settlement agreements.⁵⁹

Discussion: why does jurisdiction matter?

The adjudicator's jurisdiction is of critical importance given that limitations can severely impact a party's ability to best present its case, and lead to allegations that the adjudicator has (or will) act outside their jurisdiction. This can undermine the purpose of the process to provide a cost-effective and efficient dispute resolution process.

Jurisdiction issues in practice

In practice, jurisdictional issues have become part of the ‘lawyers toolbox’ – used to extend the statutory timeframes; leverage the inclusion of counterclaims with opposing counsel; prevent the opposition from raising otherwise valid claims/defences; limit the other party’s efforts in reply/rejoinder by detracting resources elsewhere; and to set the foundation for later challenging any unfavourable determination.

As matters stand, it is therefore critical to understand when jurisdictional challenges are valid or simply strategic – or both – and how to deal with such issues when they arise. But, is it satisfactory to simply ‘deal’ with such issues when they arise, or is more fundamental change required to avoid jurisdictional issues interfering with the legislative purpose of adjudication?

Evolution of disputes referred to adjudication

In the authors’ opinion, the overall objective of adjudication remains the same globally: parties to construction contracts require speedy and cost-effective resolution of disputes as a means of facilitating cash flow in the sector, particularly as the sector experiences increasing growth and demand.

What has changed is the utility of adjudication (ie, how it is being used by parties to a construction contract); the nature of the disputes now being referred to adjudication (increasing in complexity and significance, often requiring extensive expert and factual evidence); and the environment in which disputes are arising (increasing in pressure as a result of Covid-19 and sector demand/resource strain). In some instances, what has also changed is the parties’ objectives when engaging in the adjudication process – not always intended to resolve a single dispute for which a party believes it has a genuine entitlement in respect of, but rather used to seek an independent opinion on the dispute to guide commercial resolution and/or as a strategic tool, for example, to leverage a commercial project reset or settlement under threat of multiple time-consuming and expensive adjudications detracting resources from project completion.

Impact of jurisdictional issues in an evolving environment

The impact of jurisdictional issues arising in this evolving environment can be significant and differs between jurisdictions, affecting the extent to which adjudication may be considered no longer fit for purpose across jurisdictions. By way of example:

1. The efficiency of adjudication may be compromised because of timetable extensions granted – or agreed, under threat of jurisdictional issues being relied on to avoid any unfavourable determination – because of jurisdictional issues being raised at the outset. This is a greater issue in Australia and the UK, where there is no ability for the adjudicator to extend the applicable timeframes in the absence of agreement, unlike in New Zealand where the adjudicator has a wide discretion to grant an extension to the timeframe for the respondent’s response.
2. The cost of adjudication may significantly increase because of time spent by counsel and the adjudicator in raising or responding to jurisdictional challenges, enforcing or avoiding the enforcement of a determination that falls outside the scope of the adjudicator’s jurisdiction, or any judicial review on grounds related to jurisdiction. Of course, the reluctance of the courts across all jurisdictions to intervene and overturn adjudicators’ determinations does reduce the chances of jurisdictional issues being escalated and increasing costs, assuming the parties appreciate this prior to submitting any application for judicial review. The costs of resolving the dispute may be further exacerbated in the event either party refers the dispute to a substantive hearing (court or arbitration) for a final decision.
3. The ability to obtain a sufficiently robust interim decision that the parties ‘can live with’ pending any final decision or commercial resolution may be threatened due to the restrictions on extending the statutory timeframes (affecting the parties’ ability to put forward their best position); the inability to re-adjudicate matters already determined (increasing the importance of determinations given the ‘precedent’ value); and access to suitably qualified adjudicators. The latter is a particular issue in New Zealand for a

variety of reasons (including population and litigation appetite compared with Australia and the UK) and can result in the inability to appoint the parties' preferred adjudicator and in some instances an adjudicator appointed to determine a dispute that is outside their experience or skillset.

Concluding comments: should the scope be expanded?

In conclusion, there is a clear place and continued need for adjudication – if anything, the need is now greater as the construction sector grows and faces its own set of challenges because of Covid-19 and widespread constraints on resources and supplies. Unfortunately, the existence of jurisdictional issues (perceived or actual) is likely to continue to be used in practice as a method for slowing down the process or avoiding unfavourable determinations, particularly as the adjudication framework struggles to adapt to the evolving environment and utility of adjudication.

In the authors' opinion, there is scope to increase the breadth of adjudicator's jurisdiction across all jurisdictions to fully enable parties to put forward their best position and receive a robust determination that reflects a reasonable outcome. It is suggested that this may be achieved by increasing the ambit of matters able to be determined (for example, to all disputes arising out of or in relation to a construction contract, including statutory and equitable claims) and providing adjudicators in Australia and the UK with the ability to extend the statutory timeframes where circumstances permit (for example, where the dispute is particularly complex and involves voluminous materials).

However, there are downsides to this approach, which cannot all be canvassed within this article, for example, the fact that adjudication is meant to be an interim measure, and extending jurisdiction will potentially result in determinations becoming the final step for parties.

For adjudication to become/remain a credible dispute forum for parties, particularly where breadth of jurisdiction is more extensive (and may be increased), measures are necessary to increase scrutiny over the experience and expertise of

adjudicators and the robustness with which adjudicators are appointed – this necessarily also requires an increased supply of suitably qualified adjudicators.

Notes

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- 2 Graham Robinson, 'Global construction market to grow \$8 trillion by 2030: driven by China, US and India' (Global Construction Perspectives and Oxford Economics) www.ice.org.uk/ICEDevelopmentWebPortal/media/Documents/News/ICE%20News/Global-Construction-press-release.pdf accessed 6 July 2021.
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- 4 Building Disputes Tribunal, 'What is adjudication?' www.buildingdisputetribunal.co.nz/what-is-adjudication accessed 6 July 2021.
- 5 Construction Leadership Council, 'CLC Covid-19 Claims and Disputes in Construction' (11 January 2021) www.constructionleadershipcouncil.co.uk/wp-content/uploads/2021/01/21.01.11-CLC-COVID-19-Claims-and-Disputes-in-Construction-V1.0-FINAL.pdf accessed 6 July 2021.
- 6 World Built Environment Forum, 'More common, more costly: Is COVID-19 causing conflict in the construction sector?' (24 February 2021) www.rics.org/oceania/wbef/megatrends/markets-geopolitics/more-common-more-costly-is-covid-19-causing-conflict-in-the-construction-sector accessed 6 July 2021.
- 7 Construction Contracts Act 2002, s 25(2).
- 8 Construction Contracts Act 2002, s 5.
- 9 Construction Contracts Act 2002, s 38.
- 10 Building and Construction Industry Security of Payment Act 1999 (NSW).
- 11 Building and Construction Industry Security of Payment Act 2002 (Vic).
- 12 Building and Construction Industry Payments Act 2004 (Qld).
- 13 Julian Bailey, *Construction Law* (2ns ed, Informa Law from Routledge 2016) at 24.03.
- 14 Construction Contracts Act 2004 (WA).
- 15 Construction Contracts (Security of Payments) Act 2004 (NT).
- 16 Housing Grants, Construction and Regeneration Act 1996 (UK), s 108.
- 17 See n 13, above.
- 18 Although this is not expressly stated in the legislation, 108 has been interpreted as being unavoidable. See n 13, above, at 24.04.

- 19 *Haskell Construction Limited v Ashcroft* (2020) NZHC 772.
- 20 *Rees v Firth* (2011) NZCA 668.
- 21 *Carillion Construction Ltd v Devonport Royal Dockyard* (2006) BLR 15.
- 22 John Ren, 'Judicial review of construction contract adjudicators', (2005) NZLJ 461.
- 23 Building and Construction Industry Security of Payment Act 2002 (Vic), s 28B.
- 24 Building and Construction Industry Payments Act 2004 (Qld), s 92.
- 25 Construction Contracts Act 2004 (WA), s 46.
- 26 Nicholas Gould, Jeremy Glover et al, 'Guidance note: Jurisdiction of the UK Construction Adjudicator' (Fenwick Elliott, 2011) at 4.1 www.fenwickelliott.com/sites/default/files/guidance_note_-_jurisdiction_of_the_uk_construction_adjudicator-1.pdf accessed 6 July 2021.
- 27 See n 13, above, at 24.95.
- 28 *Carillion Construction v Devonport Royal Dockyard Ltd* (2005) BLR 310.
- 29 *Twintec Limited v Volkerfitzpatrick Limited* (2014) EWHC 10 (TCC).
- 30 *Fastrack Contractors Ltd v Morrison Construction Ltd* (2000) EWHC 177 (TCC).
- 31 Other examples include (without limitation) allegations that the adjudication relates to a contract that is not a construction contract; the adjudication notice not valid or validly served; the claim or response was served out of time; the adjudicator does not have jurisdiction to determine their own jurisdiction; the determination is based on arguments not presented by either party; the claimant's reply is not strictly in reply; the respondent's rejoinder is not strictly in rejoinder, etc.
- 32 Construction Contracts Act 2002, s 5.
- 33 Housing Grants, Construction and Regeneration Act 1996 (UK), s 108.
- 34 (2004) EWHC 2339 (TCC). Subsequently approved by the Court of Appeal.
- 35 Similar conclusions were reached in *Fastrack Contractors Limited v Morrison Construction Limited* (2000) EWHC 177, where it was said that in order for a dispute to have crystallised, 'the subject matter of the claim, issue or other matter [must have] been brought to the attention of the opposing party and that party [must have had] an opportunity of considering and admitting, modifying or rejecting the claim or assertion'; and *Witney Town Council v Beam Construction (Cheltenham) Limited* (2011) EWHC 2332 (TCC), where it was said that a dispute arises generally when and in circumstances in which a claim or assertion is made by one party and expressly or implicitly challenged or not accepted.
- 36 See *DHC Asserts v Toon* (2015) NZHC 140 and *Body Corporate 200012 v Keene QC* (2017) NZHC 2953.
- 37 (2000) BLR 168.
- 38 (2018) WASC 10.
- 39 *Haskell Construction Ltd v Ashcroft* (2020) NZHC 772.
- 40 *HG Construction Ltd v Ashwell Homes (East Anglia) Ltd* (2007) BLR 175.
- 41 *Arcadis UK Ltd v May and Baker Ltd* (2013) BLR 352.
- 42 *Benfield Construction Ltd v Trudson (Hatton) Ltd* (2008) EWHC 2333 (TCC).
- 43 *Quietfield Ltd v Vascoft Construction Ltd* (2006) BLR 67.
- 44 *Horizon Investments v Parker Construction Management* HC Wellington CIV 2007-485-332.
- 45 Construction Contracts Act 2002, s 28.
- 46 Construction Contracts Act 2002, s 36.
- 47 (2002) NZHC 1056.
- 48 *KNS Industrial Services (Birmingham) Ltd v Sindall Ltd* (2000) 75 Con LR 71.
- 49 *Pilon Ltd v Breyer Group Plc* (2010) BLR 631.
- 50 *Kitt v Laundry Building Ltd* (2015) BLR 170.
- 51 *Thermal Energy Construction Ltd v AE&E Lentjes UK Ltd* (2009) EWHC 408 (TCC).
- 52 Construction Contracts Act 2002, s 28(2) (b).
- 53 Housing Grants, Construction and Regeneration Act 1996 (UK), s 108
- 54 Construction Contracts Act 2002, s 36(2) (a).
- 55 (2007) UKHL 40.
- 56 See n 13, above, at (24.21).
- 57 See n 38, above; see also *M Van Der Wal Builders & Contractors Ltd v Walker* HC Auckland CIV-2011-004-83, 26 August 2011, which confirmed that liability to pay damages for breach of contract was a determination of rights and obligations.
- 58 *Christiani & Neilson v The Lowry Centre Development Co Ltd* unreported 28 June 2000.
- 59 *Shepherd Construction Ltd v Mecright Ltd* (2000) BLR 489.

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Revisiting the enforceability of FIDIC's notice requirement under Indian law: contractors cautioned

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Introduction

Notice requirements have a general restrictive nature that imposes upon a party the duty to give timely notice, and this is considered to be for a good reason. A noticee must be notified of any event's change or impact and be afforded a reasonable opportunity to assess the issue contemporaneously and manage associated risks. Risk allocation, after all, is a priority in construction contracts. Hence, the notifier is contractually made to bear an obligation to give notice within a stipulated time period to avoid the noticee being prejudiced by late notification.

Construction contracts often impose such a notice requirement on the contractor to give timely notification regarding claims for extension of time (EOT) and cost, among others. It is, therefore, not surprising that this issue – whether a timely notification is provided or not – is frequently confronted by parties. Whenever there is a dispute between a contractor and the employer, the latter attempts to dismiss any claim on the grounds of failure to meet the notice requirement, while the former attempt to either pass the muster or consider other remedies.

Contractual clauses like FIDIC's notice requirement for contractor's claims have

long been perceived to be unenforceable under Indian law, being hit by section 28(b) of the Indian Contract Act 1872 (the 'Contract Act'). However, a deeper understanding of this is needed, which requires examining the historical development of section 28(b) and the surrounding judicial precedents. It also requires a consideration of whether the FIDIC notice requirements fall outside the scope of section 28(b) of the Contract Act. This issue has yet to be finally determined by the Supreme Court of India.

I submit that such notice requirements are valid and enforceable under Indian law (restricting the inquiry only to FIDIC's Red Book, particularly the 1999 edition, with occasional references to the 2017 edition).¹ Hence, this article cautions contractors to be prompt and punctual about their obligation to notify the employer because it is better to be an hour too soon than a minute too late.

Section 28(b) of the Contract Act: development and scope

Section 28 in its unamended form

In its original form, Section 28 of the Contract Act essentially made void any agreement that relinquished a remedy by legal proceedings in the courts or tribunals. The provision, in its original form, reads as follows:

'28. Agreements in restraint of legal proceeding, void. – Every agreement, by which any party thereto is *restricted absolutely from enforcing his rights under or in respect of any contract*, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.' (emphasis added)

The Law Commission of India (the 'Law Commission') first examined this provision in its 13th Report, but it was ultimately decided that amendments were unnecessary.² It reported an accepted distinction between agreements providing for the relinquishment of rights and remedies (considered valid) as against agreements for relinquishing

remedies only (considered void under the unamended section 28).³

After that, section 28 was re-examined by the Law Commission in its 97th Report, wherein it was stated that 'the present legal position is open to serious objection from the common man's point of view', since he does not realise the possible adverse impact of such prescriptive clauses.⁴ Further, the Law Commission reported that 'such clauses introduce an element of uncertainty in transactions which are entered into daily by hundreds of persons'.⁵

Accordingly, the 97th Report recommended that section 28 be suitably amended, calling it 'illogical' and 'too subtle [for] application in practice', so as to 'render invalid contractual clauses which purport to extinguish, on the expiry of a specified term, rights accruing from the contract'.⁶

Section 28 in its amended form

More than a decade after the Law Commission's 97th Report, section 28 was amended by the Indian Parliament in 1997. In the Contract (Amendment) Bill of 1996, the statement of objects and reasons (constituting the legislative history) states:

'1. [...] A distinction is assumed to exist between remedy and right and this distinction is the basis of the present position under which a clause barring a remedy is void, but a clause extinguishing the rights is valid. *This approach is sound in theory but, in practice, it causes serious hardship and might even be abused.*

2. It is felt that Section 28 [...] should be amended *as it harms the interests of the consumer dealing with big corporations and causes serious hardship to those who are economically disadvantaged.*' (emphasis added)

While the Law Commission's recommendation in the 97th Report was the starting point to drafting section 28(b), Parliament enacted section 28(b) with some key differences that are conspicuous when juxtaposing the two. In the table below, the underlined words are the original section 28. The left column shows the Law Commission's recommendation, and the right column shows Section 28's amendments (with the mark-ups corresponding to the Law Commission's recommendation):

It is better to be an hour too soon than a minute too late

Law Commission's recommendation	Section 28 of Indian Contract Act
<p>'28. Agreements in restraint of legal proceeding, void. Every agreement—</p> <p>(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or</p> <p>(b) which limits the time within which he may thus enforce his rights, or</p> <p>(c) which extinguishes the rights of any party thereto under or in respect of any contract on the expiry of a specified period or on failure to make a claim or to institute a suit or other legal proceeding within a specific period, or</p> <p>(d) which discharges any party thereto from any liability under or in respect of any contract in the circumstances specific in clause (c), is void to that extent.'</p>	<p>'28. Agreements in restraint of legal proceeding, void. Every agreement—</p> <p>(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or</p> <p>(b) which limits the time within which he may thus enforce his rights, or</p> <p>(c) which extinguishes the rights of any party thereto, under or in respect of any contract on the expiry of a specified period or on failure to make a claim or to institute a suit or other legal proceeding within a specific period, or (d) which or discharges any party thereto, from any liability, under or in respect of any contract in the circumstances specific in clause (c), is void to that extent on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.'</p>

Interpretation of the amendments

The following interpretive considerations are of determinative importance to understand the scope and application of section 28(b), particularly in light of the juxtaposition shown above.

Firstly, that any extinguishment of rights or discharge of liability must be ‘so as to restrict any party from enforcing his rights’ – if so, it is void to that extent. This means the contractual provision must not only extinguish the rights or discharge liability, but it must also go on to restrict a party from enforcing their rights or restrain legal proceedings.⁷ Further, where there is no restriction on a party from enforcing a right (which has been extinguished or liability discharged) by legal proceedings in a court or tribunal, such a clause should not be considered covered by section 28(b).⁸

Secondly, the exclusion of the phrase ‘a failure to make a claim [...] within a specific period’ indicates Parliament’s specific intention that the assertion of right within a time period was not brought within the purview of section 28(b).⁹

Finally, that section 28(b) does not prescribe contractual condition precedents. Therefore, where the institution of legal proceedings is made dependent on any condition precedent to the accrual of a cause of action, then such condition precedent that does not restrain legal proceedings should be valid and not covered by section 28(b).¹⁰

The nature, scheme and purpose of FIDIC’s notice requirement

The FIDIC Red Book is a standard form of contract, which includes conditions of contract

for construction of building and engineering works. Both the 1999 and 2017 editions of the FIDIC Red Book provide specific notice requirements in relation to claims (in addition, the 2017 edition imposes such obligations on the employer as well). Since both editions are essentially the same in relation to notice requirements, we will concentrate on the 1999 edition (unless a specific reference to the 2017 edition is necessary for the relevant context).

Nature

The relevant provisions of the two recent editions of the FIDIC Red Book are sub-clause 20.1 of the FIDIC Red Book 1999 and sub-clause 20.2.1 of the FIDIC Red Book 2017. Under the 1999 edition, a contractor may, on various grounds within the contract, make a claim for additional payment when it incurs ‘cost’¹¹ during the course of the works; for example, for delayed drawings or instruction (sub-clause 1.9), late access to site (sub-clause 2.1), extra works due to unforeseen physical conditions (sub-clause 4.12), and any other entitlement.¹² Similarly, a contractor may also claim an extension of time (with/without cost) under sub-clause 8.4. Once a claim is made for additional payment and/or extension of time, sub-clause 3.5 requires that the engineer either agree or determine the claim. This way, the engineer fulfils its role. The contractor may agree with or dispute the engineer’s decision. If the contractor disputes the engineer’s decision, the contractor may escalate the dispute to the dispute adjudication board (DAB) and, subsequently, to an arbitral tribunal.

For our analysis, it’s crucial to recognise that claims for additional payment under the FIDIC Red Book 1999 or 2017 editions do not arise out of a breach of contract

(by the employer) for damages under section 73 of the Contract Act. Hence, the general rules concerning the measure of damages, including the principles of remoteness, mitigation and proof, are relevant.¹³

In contrast, a contractor claiming additional payment for delay costs must prove that it incurred the additional costs – that is, costs that it otherwise would not have incurred – as a consequence of the relevant delaying event. The additional costs of a contractor may include the increased costs directly associated with performing the particular activity that was delayed,¹⁴ and any indirect cost (like site overheads) incurred, provided that the delay to the affected activity impacted the overall cost of the other site activities.¹⁵

The contract provides a mechanism for payment for works done and/or expenditure incurred sought by the contractor against the employer, which the contractor seeks to enforce against the employer – first before the engineer, then escalating it before the DAB

If the contractor disputes the engineer's decision, the contractor may escalate the dispute to the DAB and, subsequently, to an arbitral tribunal

and, subsequently, to an arbitral tribunal. These 'claims [for additional payment] are nothing more than the crystallisation of an anticipated, not yet specified, part of the Contract Price'.¹⁶ In other words, additional payment is any payment that is added to the sum that the parties originally agreed for the works when the contract was signed and that has been added or reduced by the time the claim arises.¹⁷

For example, where a contractual provision entitles a contractor to be compensated for additional 'cost' incurred because of some delay, such entitlement does not usually extend to permit the contractor to recover loss or damages that do not represent cost incurred, for example, loss of profit.¹⁸

This is a subtle distinction. Further, in this context, it also cannot be said that the employer 'breached' the contract when the contractor's claims were unfavourably determined, because the contract provides the necessary mechanism to escalate the claim if the contractor is unsatisfied with the employer/engineer's determination.

Under the 1999 edition, in case of a breach of contract, where the employer has rejected

the contractor's demand for damages (also constituting a dispute), the contractor would have a direct remedy of going before the DAB, and, subsequently, to an arbitral tribunal for damages. Accordingly, the 28-day period does not find any application in case of a contractor's demand for damages. See sub-clauses 20.4 to 20.6 of the 1999 edition:

20.4 Obtaining Dispute Board's Decision

If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, *including* any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause. [...]

20.5 Amicable Settlement

Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day after the day on which a notice of dissatisfaction and intention to commence arbitration was given, even if no attempt at amicable settlement has been made.

20.6 Arbitration

Unless settled amicably, any dispute in respect of which the DB's decision (if any) has not become final and binding shall be finally settled by international arbitration. [...] (emphasis added)

Evidently, the 1999 edition does not impose a time bar when it comes to a claim for damages/legal entitlements under the Contract Act.

As for the 2017 edition, the provisions have been restructured to channel a claim for damages to the engineer before it can be called a dispute for further reference to the DAB/arbitral tribunal.¹⁹ In the 2017 edition, this distinction between a claim for EOT/additional payment and a claim for 'other' entitlement/relief (which would include damages relief)²⁰ is spelled

out unequivocally in sub-clause 20.1, wherein only a claim for EOT/additional payment undergoes separate procedures under sub-clause 20.2, including the 28-day notice requirement. And where a claim is for other entitlement/relief (which would include damages relief), the 28-day notice requirement has no application.

What becomes evident from both editions of the FIDIC Red Book is that a contractor has two broad categories of claims under the contract:

- (1) a claim for additional payment and/or EOT under the terms of the contract; or
- (2) a claim for damages or compensation when the employer has breached the contract.

Hence, a dispute arising out of a difference between the parties on a claim for EOT/additional payment is distinct from a dispute/claim for breach of contract (by the employer) for which the contractor would be entitled to damages relief/legal entitlements under the Contract Act. Claims for EOT/additional payment are purely a contractual mechanism to manage unanticipated events that are inherent in construction projects that result in an increase in cost, time or both.

There is also a characteristic difference with EOT/additional payment claims, which is that the contractor must keep contemporary records to substantiate the claim. For additional payment, for example, the contractor must keep contemporary records of expenditures incurred and demonstrate the agreed allocation of risk. However, for the purposes of a claim for damages, the contractor would have to discharge its burden of proof in law; that is, demonstrate that there was an obligation upon the employer, that such obligation was breached, and that the breach resulted in an actual loss (despite mitigation).

Scheme

Under the 1999 edition, to claim additional payment, the contractor must give notice of claim – assert its right – to the engineer as soon as practicable, or no later than 28 days after the contractor became aware or should have become aware of the event or circumstance. However, where there is a claim for damages, it will not be subject to sub-clause 20.1, or the 28-day notice period,

and maybe raised independently, which if denied would result in a dispute that would be subject to a reference to DAB/arbitration.

Under the 2017 edition, a claim for damages follows the procedure in paragraph 3 of sub-clause 20.1. A party must first request relief against the other party, which the other party or the engineer may disagree with. There are no formal requirements other than following the basic requirement of communication and no specific time period to comply with. Once the disagreement is established, the claiming party need only serve a simple notice with details of the case and the disagreement to refer the matter to the engineer. Again, there is no specific time bar provision, or periodic update requirement, and so on. Disputes in this regard can then be referred to the DAB/arbitral tribunal under clause 21.

Under both editions, for a claim for additional payment, failure to give notice will relieve the employer of any contractual liability from making any additional payment on the basis that the contractor has waived its

Failure to give notice will relieve the employer of any contractual liability from making any additional payment

contractual right to claim additional payment for the expenditure incurred. The same applies to claims for EOT. Hence, notice under sub-clause 20.1 functions as a condition precedent to a claim for additional payment.²¹ This means that a failure to give notice does not give rise to a right in the first place, by which a contractor can claim EOT/additional payment.

Purpose

The purpose behind FIDIC's scheme set out above is simple. For the employer, notices are an essential means of managing finances and budget. Notices assist the employer with making informed decisions about whether, for instance, to proceed with a variation, a course of action that may cause delay or disruption, or a different course of action to mitigate such effects. Notices afford the employer more time to react to problems and enable efficient and proper project planning.²² And, as emphasised by the courts, contemporary

records are necessary to substantiate claims, without which there is a likelihood that an arbitral award may be set aside under Section 34 of the Arbitration Act.²³

Summary

Thus, where a contractor fails to assert its claim for EOT/additional payment within the 28-day period, the following consequences play out.

Firstly, failing to assert its contractual right (condition precedent) to claim EOT/additional payment within 28 days, the contractor shall not be entitled to claim EOT/additional payment due to waiver, and the employer shall be discharged from all liability in connection with the EOT or the additional payments (that ultimately concerns Contract Price). But, most importantly, no sub-clause under FIDIC Red Book, either in the 1999 or 2017 edition, restricts the contractor from enforcing its rights to make any claim – neither in the case of EOT/additional payment nor in the case of damages for breach of contract. Hence, the 28-day period or the time bar has nothing to do with the right to claim damages.

Secondly, where a dispute has arisen in relation to any claim, the contractor has the remedy to refer the dispute to DAB/arbitration, seeking determination despite failing to comply with the condition precedent; that is, the notice requirement of 28 days.

Finally, if a dispute is referred to DAB/arbitration, it would be for the DAB or arbitral tribunal to hold the validity of such claims – whether there was a waiver by the contractor or whether the employer's liability had been discharged. Once such a dispute is referred to DAB/arbitration, it is imperative for the DAB or arbitral tribunal to take into account the terms of the contract (mandated by section 28 of the Arbitration Act, in case of arbitration). But the DAB or arbitral tribunal would also need to consider whether the employer was reasonable in rejecting the contractor's claim; say, in a case where there was a delay of only one day (ie, the contractor gave the notice on the 29th day).²⁴

Conclusion

FIDIC's notice requirement for claims falls outside the ambit of section 28(b) for the fundamental reason that:

- (1) it operates as a condition precedent; and
- (2) it ultimately does not restrict any party from enforcing its rights.

These reasons are underpinned by the fact that the notice requirement (within the 28-day period) concerns a contractually agreed mechanism relating to contract price and not damages for any breach of contract.

Hence, failing to assert a claim within the stipulated time period should result in a waiver of a claim for EOT/additional payment by the contractor and a discharge of the employer's liability in that regard. And this happens without putting any restraint on enforcement or legal proceedings.

In case of a dispute in this regard, it is thereafter for the contractor to refer its claim to the DAB and, subsequently, to arbitration. If a contractor believes that it is entitled to a claim, it takes a risk when it delays giving notice beyond the prescribed 28-day period. Failing to assert a claim does prejudice the contractor: it cannot then expect a real-time determination of its claim for additional payment for the cost incurred, ultimately waiving its right to claim for any EOT/additional payment. Hence, contractors should be punctual about their obligation to notify the employer before the ship sails – time and tide wait for none.

Notes

- * The author would like to thank Jatan Rodrigues LLM for his assistance in the preparation of this article.
- 1 The author prefers the 1999 edition of the FIDIC Red Book, since it is more prevalent in India, and given his professional experience and anecdotal evidence of the issues surrounding this edition.
 - 2 Law Commission of India, Report No 13, para 57.
 - 3 *Ibid.*
 - 4 Law Commission of India, Report No 97, para 5.1.
 - 5 *Ibid.*
 - 6 *Ibid.*, at para 5.2.
 - 7 Bryan A Garner and Henry Campbell, *Black's Law Dictionary* 608 (Thomson Reuters West 2019): (enforce means 'To give force or effect to (a law, etc.); to compel obedience to. Loosely, to compel a person to pay damages for not complying with (a contract)' and enforcement means 'The act or process of compelling

- compliance with a law, mandate, command, decree, or agreement.’).
- 8 See eg, *National Insurance Co Ltd v Sujir Ganesh Nayak & Co* (1997) 4 SCC 366 (‘21. The clause says that if the claim is not pressed within twelve months from the happening of any loss or damage, then the Insurance Company shall cease to be liable.’ No prohibition on enforcement was found.).
 - 9 See eg, *Food Corporation of India v New India Assurance Co Ltd* (1994) 3 SCC 324 (‘8. The High Court erroneously construed it as giving up the right of enforceability of its claim after six months. Since the period is provided under the agreement the appellant had to move within this period asserting its right and apprising the company of the breach [...] It does not curtail the period of limitation nor does it anywhere [...] preclude from filing suit after expiry of six months [...] Assertion of right is one thing than enforcing it in a court of law.’).
 - 10 See *Union of India & Anr v Indusind Bank Ltd* (2016) 9 SCC 720, para 30; *Food Corporation of India v New India Assurance Co Ltd* (1994) 3 SCC 324 (‘8. It does not directly or indirectly curtail the period of limitation nor does it anywhere provide that the Corporation shall be precluded from filing suit after expiry of six months. It can utmost be construed as a condition precedent for filing of the suit that the appellant should have exercised the right within the stipulated period’). For UK case law, see *Merton LBC v Stanley Hugh Leach Ltd* (1985) 32 BLR 51, in which the Court held that clause 23 of the JCT Standard Form of Building Contract 1963 operated as a condition precedent; *Seria Ltd v Sigma Wireless Communications Ltd* (2007) EWHC 3454 (TCC) in which the Court held that the right to extension of time was conditional on the notice and that an express warning as to the consequences of non-compliance was not necessary for the service of a written notice to be a condition precedent; *Education 4 Ayrshire Ltd v South Ayrshire Council* (2009) CSOH 146, where the Scottish Court took a strict approach to complying with a notice clause’s requirements as a condition precedent to making a claim); *Glen Water Ltd v Northern Ireland Water Ltd* (2017) NIQB 20, where the Court held that the notice provisions in the contract constituted a condition precedent for relief, leaving the Court to decide whether a letter from a project company to a public authority constituted notice of a compensation event under the agreement); and *Adyard Abu Dhabi v SD Marine Services* (2011) EWHC 848 (Comm), in which the Court reviewed a series of Technology and Construction Court authorities and concluded that any claim for an extension of time – referred to as a ‘Permissible Delay’ – failed because of the lack of a contractual notice).
 - 11 See FIDIC Red Book, sub-clause 1.1.19: “‘Cost’ means all expenditure reasonably incurred (or to be incurred) by the Contractor in performing the Contract, whether on or off the Site, including taxes, overheads and similar charges, but does not include profit. Where the Contractor is entitled under a Sub-Clause of these Conditions to payment of Cost, it shall be added to the Contract Price.’
 - 12 See 1999 FIDIC Red Book, sub-clause 20.1: ‘[...] any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract.’ The underlined phrase operates more like a catch-all provision that covers any entitlement that is not ‘additional’ in nature. Eg, a claim payment of a payment certificate that the Employer has failed to pay.
 - 13 See, eg, *Stepanoski v Aslan (No 3)*, (2019) NSWSC 1445, at 50–51 (that is for the contractor to adduce evidence of its loss or damage caused by a delaying event or events and that the absence of evidence will be fatal to the claim).
 - 14 See, eg, *Lucas Earthmovers Pty Ltd v Anglogold Ashanti Australia Ltd* (2019) FCA 1049, at 397–398.
 - 15 See, eg, *Costain Ltd v Charles Haswell & Partners Ltd* (2009) EWHC B25 (TCC), at 183; *Fluor Ltd v Shangahi Zhenhau Heavy Industry Co Ltd* (2018) EWHC 490 (TCC) at 13–33.
 - 16 See Axel-Volkmar Jaeger and Goetz-Sebastian Hoek, *FIDIC – A Guide for Practitioners* (Springer 2010), 365 . See also, Nael Bunni, *The FIDIC Forms of Contract* (Wiley-Blackwell 294–95 2005) – ‘a claim is generally taken in practice to be an assertion for additional monies due to a party’ and that otherwise, claims would include contractors’ payment applications for the original scope of works; International Chamber of Commerce Final Award 19581 (Aug 2014) – While considering whether a claim for the return of a Retention Money BG required notice, the tribunal held that BG ‘does not constitute a consideration given in exchange of the works performed by Claimant or another form of “additional payment”.’
 - 17 See 1999 FIDIC Red Book, sub-clause 14.1: ‘(a) the Contract Price shall be agreed or determined under Sub-Clause 12.3 [Evaluation] and be subject to adjustments in accordance with the Contract’. See also, 2017 FIDIC Red Book, sub-clause 14.1: ‘(a) the Contract Price shall be the value of the Works in accordance with Sub-Clause 12.3 [Valuation of the Works] and be subject to adjustments, additions (including Cost or Cost Plus Profit to which the Contractor is entitled under these Conditions) and/or deductions in accordance with the Contract’.
 - 18 See *Thiess Watkins White Constructions Ltd v Cth* (1992) 14 BCL 61, at 77; *CAN 060 559 971 Pty Ltd v O’Brien* (2007) QSC 91, at 55; *Tresedar Pty Ltd v Property Builders (Construction) Pty Ltd* (2014) NSWSC 382, at 101, 110 and 119.
 - 19 See 2017 FIDIC Red Book, sub-clause 20.1: ‘A Claim may arise: (a) if the Employer considers that the Employer is entitled to any additional payment [...]; (b) if the Contractor considers that the Contractor

is entitled to any additional payment [...] and/or to EOT; or (c) if either Party considers that he/she is entitled to another entitlement or relief against the other Party.’

20 Other entitlements/reliefs may include, eg, a contractor’s request for a declaration that the engineer issue a Taking Over Certificate. This is not strictly about time and money, but a declaratory relief. The Guidance of the 2017 edition confirms this.

21 See *NH International (Caribbean) Ltd v National Insurance Property Development Company Ltd (Trinidad and Tobago)* (2015) UKPC 37 – the Privy Council held that the words ‘as soon as practicable’ were just as much a condition precedent as the Contractor’s 28-day time limit); *Bremer Handelgesellschaft mbH v Vanden Avenne Izegem nv* (1978) 2 Lloyd’s Rep 113 – that notice provision should be construed as a condition precedent; *Multiplex Construction v Honeywell Control Systems* (2007) EWHC 447 (TCC).

22 See, eg, *National Insurance Co Ltd v Sujir Ganesh Nayak & Co* (1997) 4 SCC 366 (‘21. [...] It is precisely to avoid such delay and to discourage such belated claims that such insurance policies contain [such clauses]. That is for the reason that if the claims are preferred with promptitude they can be easily verified and settled but if it is the other way round, we do not think it would be possible for the insurer to verify the same since evidence may not be fully and completely available and memories may have faded.’). See also, *Multiplex Construction v Honeywell Control Systems* (2007) EWHC 447 (TCC) (‘Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent.’) See also, *Steria Ltd v Sigma Wireless Communications Ltd* (2008) CILL 2544; *Education 4 Ayrshire Ltd v South Ayrshire Council* (2009) CSOH 146.

23 See *State of West Bengal v Afcons Pauling (India) Ltd*, (2013) SCC OnLine Cal 16533, internal p 10-11 (‘In the instant case, there were no contemporaneous records before the Arbitral Tribunal. The Arbitral Tribunal has not referred to contemporaneous records in its purportedly “reasoned” award. In a sense, the award was based on no evidence. When the contract provided for the manner of adjudicating admissibility of claims, it was not open to the Arbitral Tribunal to adopt a different procedure, upon reference to provisions of the contract which could not, upon any reasonable construction, be held to authorize such procedure.’); *Attorney General for the Falkland Islands v Gordon Forbes Construction (Falklands) Limited (No2)* Falkland Islands Supreme Court, 14 March 2003, WL 21729237 (Holding that the arbitrator cannot receive a witness statement in substitution for a contemporary record. The purpose is to ensure contemporary recording that might be inspected by the engineer. A contractor who fails to comply with the contract cannot be allowed later to produce non-contemporaneous records to support claims. An arbitrator can only take into account a witness statement that sought to show how and when a document came into being. In the absence of contemporary records to support a claim, the relevant claim would fail. The arbitrator might, however, uphold parts of a claim that were supported by contemporary documents or draw inferences from existing documents that establish an otherwise unsupported part of the claim).

24 See, eg, *Obrascon Huarte Lain SA v Her Majesty’s Attorney General for Gibraltar* (2015) EWHC 3074 (TCC) (holding that there is no reason why the ‘28-day’ period should be exactly and strictly construed against the contractor, given the serious effect on what could otherwise be a good claim).

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Employer's and Contractor's claims under sub-clause 20 of the FIDIC Conditions 2017

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Introduction

In 2017, FIDIC launched the second edition of the Red, Yellow and Silver Books at its annual International Conference in London, after discussing revisions for over a decade. FIDIC set out on an ambitious journey to revise the 1999 edition, guided by a new set of key aims. These included, among others, reducing risks of disagreements over interpretation, introducing procedural mechanisms, such as dispute avoidance and project management, and improving clarity on the expectations of the Employer, Contractor and Engineer/Employer's Representative during the performance of the contract through more prescriptive provisions.¹

To facilitate these key aims, particularly in the context of claims and dispute resolution, FIDIC introduced new and additional definitions (sub-clause 1.1); broadened the concept of communication through 'Notices' (sub-clause 1.3); expanded the role of the Engineer/Employer's Representative so that it now plays a more active role in decision-making and dispute avoidance (particularly in the early stages of a claim (sub-clause 3.7)); sought to balance the parties obligations and rights by subjecting them to the same claim procedure (sub-clause 20.1); created a distinction between a 'claim' (sub-clause 1.1.3) and a 'dispute' (sub-clause 1.1.26) to reduce the escalation of party conflicts; and bifurcated

the 1999 FIDIC sub-clause 20 into two separate provisions – sub-clause 20 (Employer and Contractor’s Claims) and sub-clause 21 (Disputes and Arbitration). These can be described as the key features of the 2017 edition.

While we are yet to see the true impact of the 2017 revisions in construction practice and whether the overarching objectives of fairer risk allocation, dispute avoidance, better clarity, transparency and certainty have been achieved, this short article seeks to provide a summary of sub-clauses 20.1 and 20.2, which deal with ‘Employer’s and Contractor’s Claims’, as understood four years on from the revisions. The article also touches on various issues and provides practical guidelines for users.

Sub-clause 20.1 – Claims

Summary of terms

Under sub-clause 20.1, a claim may arise in three instances, namely: (a) if the Employer considers that it is entitled to any additional payment from the Contractor (or reduction in the Contract Price) and/or to an extension of the defects notification period (DNP); (b) if the Contractor considers that it is entitled to any additional payment from the Employer and/or to an extension of time (EOT); or (c) if either party considers that it is entitled to another entitlement or relief against the other party. Such other entitlement or relief ‘may be of any kind whatsoever’.

Claims under category (a) or (b) must follow the claim procedure under sub-clause 20.2, which demands compliance with strict requirements such as time bars, while the claim procedure for category (c) is less onerous. The main implication of the two separate procedures is that, as explained in further detail below,² proper characterisation of a claim as either a category (a), (b) or (c) claim is crucial to ensuring that the right to the claim is not lost, that the appropriate remedies are available, and that time and costs are saved.

Claims under sub-clause 20.1 (a) and (b)

Category (a) or (b) claims concern additional payment, reduction in the Contract Price, extension of the defects notification period and extension of time.

Under sub-clause 20.2, the claiming party – that is, either the Employer or Contractor – must first give a Notice of Claim to the Engineer/Employer’s Representative ‘as soon as practicable and no later than 28 days after the claiming Party became aware or should have become aware of the event or circumstance’ giving rise to the cost, loss, delay or extension (sub-clause 20.2.1). The other party will submit an ‘initial response’ within 14 days after receiving the Notice of Claim to dispute that the Notice of Claim was not served in time (sub-clause 20.2.2). Within 84 days from when the claiming party became aware or should have become aware of the event or circumstances giving rise to the claim (or as otherwise agreed), the claiming party will also be required to submit a fully detailed claim to the Engineer/Employer’s Representative (sub-clause 20.2.4), without which the Notice of Claim will be deemed to have lapsed and no longer be valid.

Within 42 days of the fully detailed claim, the Engineer/Employer’s Representative will consult with the Parties and issue either a ‘Notice of Parties’ Agreement’ or, in the event that agreement cannot be reached, proceed to determine the matter within the following 42 days under sub-clause 3.7.2³ (sub-clause 20.2.5). In such a case, the Engineer/Employer’s Representative will make a fair determination and submit its determination in detail with reasons and detailed supporting particulars in a ‘Notice of the Engineer/Employer’s Representative’s Determination’ (sub-clause 3.7.2). In the event that either party is dissatisfied with the Employer’s Determination, within 28 days the dissatisfied party will submit a ‘Notice of Dissatisfaction with the Employer’s Representative’s Determination’ setting out its reasons, and thereafter proceed to obtain a Dispute Avoidance/Adjudication Board (DAB) decision under sub-clause 21.4 (sub-clause 3.7.5).⁴ Further, in the event that either party is dissatisfied with the DAAB’s decision, either party may be entitled to commence arbitration provided that a ‘Notice of Dissatisfaction’ has been given with respect to the DAAB’s decision (sub-clause 21.4.4).

Claims under sub-clause 20.1(c)

Category (c) is broad in its coverage and may concern ‘entitlement or relief [...] of any kind whatsoever (including in connection with any certificate, determination, instruction, Notice,

opinion or valuation of the Employer)', as long as it falls outside the scope of claims under categories (a) and (b). Category (c) claims do not follow the claim procedure under sub-clause 20.2.

For category (c) claims, only if the other party disagrees with the claiming party's requested entitlement or relief, or is deemed to have disagreed because they have not responded 'within a reasonable time', may the claiming party submit a Notice to the Engineer/Employer's Representative, who will then proceed to agree or determine the matter under sub-clause 3.7.⁵ Such a Notice need only comply with sub-clause 1.3, and there is no extraordinary formality. However, the Notice must still be given 'as soon as practicable' after the claiming party becomes aware of the disagreement (or deemed disagreement) and shall include details of the claiming party's case and the other party's disagreement (or deemed disagreement) (sub-clause 20.1, final paragraph).

Issues and guidelines

Reading the contract as a whole

Whether the claims procedure under sub-clause 20.2 applies to a claim relating to additional payment or time may also be affected by provisions throughout the contract that either expressly refer to sub-clause 20.2, or expressly or implicitly exclude sub-clause 20.2. For instance, while sub-clause 11.3 'Extension of Defects Notification Period' expressly refers to sub-clause 20.2, sub-clause 13.3 'Variation Procedure' expressly provides that the Contractor's entitlement to an extension of time and/or adjustments to the Contract Price resulting from a variation need not comply with sub-clause 20.2 after a sub-clause 3.7⁶ agreement or determination is issued. In the case of sub-clause 15.3 'Valuation after Termination for Contractor's Default', there is no express exclusion of sub-clause 20.2, but its exclusion may be inferred by the fact that sub-clause 15.3 provides for sub-clause 3.7 to be followed. Where there is no express reference to or exclusion of sub-clause 20.2, it appears that the rule of thumb is that the claim procedure under sub-clause 20.2 need not be followed if the Engineer/Employer's Representative would have already dealt with the same matters through a different process, such as that under sub-clause 3.7.⁷ It is thus recommended that, as to whether sub-clause

20.2 applies, the contract should be read as a whole, taking into consideration references to or exclusions of sub-clause 20.2 (express or implied).

Characterising the claim

While a claim may be excluded from the claim procedure either expressly or implicitly, it will be captured by the broad definition of 'Claim', which is now defined in the 2017 edition as '[...] a request or assertion by one Party to the other Party for an entitlement or relief under any Sub-Clause of these Conditions or otherwise in connection with, or arising out of, the Contract or the execution of the Works'. Thus, if a claim does not fall into either category (a) or (b), it will fall under category (c), which was designed to operate as a 'catch-all provision'. For example, a Contractor's request that the Engineer issue a Taking-Over Certificate is not strictly about time and money. Such a claim may therefore fall under category (c).

Category (c) ... was designed to operate as a 'catch-all provision'

As aforementioned, the procedure for such category (c) claims is less certain, as there are no time bar provisions. However, in their place are other rather ambiguous requirements, such as 'within a reasonable time' and 'as soon as practicable'. Explanations for the meaning of these phrases are scant. However, it is safe to assume that claims under category (c) are subject to a less burdensome procedure in terms of time and cost. Therefore, it is worthwhile assessing at an early stage whether a claim can be characterised as a category (c) claim even if it relates to time or money. It is recommended that such assessment of the relevant procedure to be followed is carried out with caution, with full appreciation of the fact that adopting the wrong claim procedure may lead to the loss of an entitlement or the right to claim altogether.

Sub-clause 20.2 – Claims for payment and/or Extension of Time (EOT)

Sub-clause 20.2 generally sets out the aforementioned claim procedure for category (a) and (b) claims under sub-clause 20.1 (see Figure 1).

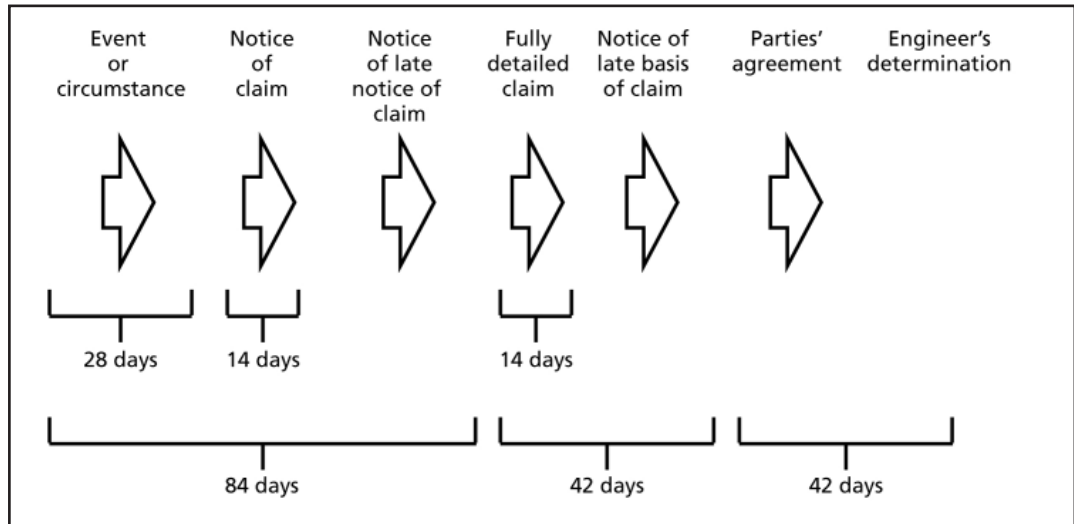


Figure 1 – Sub-clause 20.2 Procedure⁸

Sub-clause 20.2.1 – Notice of Claim

Summary of terms

The first step of the sub-clause 20.2 claim procedure is for the claiming party to serve on the Engineer/Employer’s Representative a Notice of Claim under sub-clause 20.2.1, describing ‘the event or circumstances giving rise to the cost, loss, delay or extension of the Defects Notification Period (‘DNP’) for which the claim is made as soon as practicable and no later than 28 days after the claiming Party became aware, or should have become aware of the event or circumstance’. If a claiming party fails to give a Notice of Claim within the 28-day period, the claiming party will not be entitled to relief, and ‘the other Party shall be discharged from any liability in connection with the event or circumstance giving rise to the Claim’.

Issues and guidelines

Adequate Notice of Claim

A Notice of Claim should identify itself as a ‘Notice’. This would seem to make it impossible for a description found in a meeting minute or a progress report to serve as a Notice.⁹ A Notice of Claim should also be recognisable as a Notice on its substance and include an adequate description of the event or circumstance giving rise to the claim and the entitlement sought. To ensure that the link is clearly made out, it is recommended that references to the sub-clauses being invoked and relied upon are, as far as possible, included.

The link should also be obvious to an objective third-party reading the Notice of Claim.

Enforceability of the condition precedent

Whether a timely Notice of Claim, which was intended to be a condition precedent to entitlement, is, in fact, effective has been subject to much debate. The general consensus is that it is not, given that the applicable law on condition precedents may differ, but also because the FIDIC framework allows the submission of late Notices provided that arguments justifying a late submission are provided in a fully detailed claim under sub-clause 20.2.4. This is explained in further detail below.¹⁰ Thus, if the parties wish that the Notice of Claim strictly operates as a condition precedent, it is recommended that parties ensure that: (1) the contract is governed by the law of a jurisdiction where the sub-clause 20.2 would be recognised as a condition precedent; and (2) the parties agree to contract out of the relevant portion in the sub-clause so that the Engineer/Employer’s Representative will not hear arguments on late submissions (sub-clause 20.2.4, penultimate paragraph).

Sub-clause 20.2.2 – Initial response

Summary of terms

The 2017 edition introduces a formal step-by-step procedure to address the question of a late Notice of Claim, and the first step is the

initial response under sub-clause 20.2.2. If the other party considers the Notice of Claim to be out of time, the other party must duly notify the claiming party within 14 days of receiving the Notice with reasons, as an ‘initial response’ in the form of a Notice, or the Notice of Claim will be deemed valid. If the claiming party disagrees with the other party or considers that there are justifiable circumstances for the late submission of the Notice of Claim, the claiming party shall include such reasons in its fully detailed claim (under sub-clause 20.2.4).

Issues and guidelines

Slight variations exist in the 2017 edition. In the 2017 Red and Yellow Books, where the Engineer sends the initial response, the ‘deemed’ acceptance is only provisional, as the other party has the chance to respond with a Notice of disagreement. No such issue arises under the 2017 Silver Book; it is the other party who sends the initial response and causes the deemed acceptance. Thus, a more careful management of the initial response is required under the 2017 Silver Book.

Overall, under the 2017 edition, sub-clause 20.2.2 allows both parties to raise time-bar issues of the Notice of Claim at the earliest opportunity. Both the Contractor and Employer should bear in mind that the lack of an initial response within 14 days from the Notice of Claim can lead to a Notice of Claim being deemed valid, ultimately resulting in a waiver of any argument on time-bar issues.

Sub-clause 20.2.3 – Contemporary records

Summary of terms

The claiming party is required to maintain ‘contemporary records’, meaning ‘records that are prepared or generated at the same time, or immediately after, the event or circumstance giving rise to the Claim’ as defined under sub-clause 20.2.3, which may be necessary to substantiate the claim.

Issues and guidelines

The 2017 edition provides clarity by defining the term ‘contemporary records’. While there is room for interpretation as to the meaning

of ‘same time’ and ‘immediately after’, a reasonableness standard should apply to the concept of contemporary records, taking into account the record-keeping systems and types of records the applicable contract contemplates.

Unlike the 1999 edition, the 2017 edition also obliges the Employer to maintain contemporary records. However, the extent to which such records should be kept and monitored differs between the Contractor and Employer. Firstly, if the claiming party is the Contractor, sub-clause 1.8 requires that the records be kept at all times on the site.¹¹ However, no equivalent obligation is levied on the Employer. Secondly, it is only the Employer who is authorised to monitor and inspect the Contractor’s contemporary records; the Contractor has no equivalent access to the Employer’s records.

Sub-clause 20.2.4 – Fully detailed claim

Summary of terms

The fully detailed claim is the main submission in which the claiming party sets out its case in detail. The 2017 edition expressly sets out four items that should be included in the fully detailed claim under sub-clause 20.2.4:

- a) a detailed description of the event or circumstance giving rise to the claim;
- b) a statement of the contractual and/or legal basis of the claim;
- c) all contemporary records relied on; and
- d) detailed supporting particulars of the amount of the entitlement(s) or relief(s) claimed.

The claiming party must submit to the Engineer/Employer’s Representative a fully detailed claim within 84 days after the claiming party becomes aware (or should have become aware) of the event or circumstances giving rise to the claim. Alternatively, the 84-day period may be amended by agreement between the claiming party and the Engineer/Employer’s Representative as stipulated under sub-clause 20.2.4. Failure to submit the requirement under paragraph (b) will lead to a lapse of the Notice of Claim.

The Engineer/Employer’s Representative must notify the claiming party in the form of a Notice if it considers that the claim is time-barred within 14 days after the expiry of the 84-day time period, or the Notice of Claim shall be deemed to be a valid Notice.

The other party may still dispute the validity of the deemed Notice of Claim by giving a Notice including the details of the disagreement to the Engineer/Employer's Representative. The Engineer/Employer's Representative shall review this as part of its subsequent determination of the claim under sub-clause 20.2.5. If the claiming party receives such a Notice from the other party, the claiming party may include details of the disagreement or justification for the late submission of statement under subparagraph (b) in the fully detailed claim.

Issues and guidelines

As explained above, both the Employer and Contractor are now subject to the same time limits and time-bars for claims under Clause 20, and the 84-day time limit for the submission of a fully detailed claim is one of those. This 84-day period runs

The time period for the Engineer's response on the contractual/legal basis of the claim starts with the submission of the fully detailed claim

concurrently with the initial 28-day period under sub-clause 20.2.1.

Sub-clause 20.2.4 expressly sets out the required contents of the 'fully detailed Claim'. Among the four requirements for a fully detailed claim, one can expect that the most disputed item is likely to be 'a statement of the contractual and/or other legal basis of the Claim' (sub-clause 20.2.4(b)). An accurate initial legal assessment of a claim becomes more critical in this regard. That said, it remains debatable whether it is appropriate to require a 'fully detailed Claim' at this stage, given that the details or basis of a claim are often amended and supplemented even during an arbitration. The complexity of recent construction claims (especially concerning engineering, procurement and construction projects) makes this requirement even more unsatisfying. Parties are therefore encouraged to make appropriate amendments to this provision during the contract negotiation phase (or even thereafter) to reflect the overall circumstances of the project.

Sub-clause 20.2.5 – Agreement or determination of the claim

Summary of terms

Sub-clause 20.2.5 assists the more substantive sub-clause 3.7 (sub-clause 3.5 in the Silver Book) in providing a procedure by which the Engineer/Employer's Representative is to agree or determine a claim.¹²

In short, in the 2017 edition, after receipt of a fully detailed claim, whether individual, interim or final, the Engineer/Employer's Representative shall proceed under sub-clause 3.7 (sub-clause 3.5 in the Silver Book) to agree or determine the entitlement(s) claimed.¹³ This procedure must conclude with an agreement or determination even if a Notice of late submission of a Notice of Claim or fully detailed claim has been given.¹⁴ Naturally, insofar as there is no agreement reached on the claim, the determination made by the Engineer/Employer's Representative should include its decision on the Parties' disagreement on whether the applicable time limits were met for the Notice of Claim and the fully detailed claim. Here, in relation to whether a late submission is justified, the following circumstances may be taken into account (but shall not be binding): (1) that the other party would not be prejudiced by the tardiness of the submission; and (2) that the other party had prior knowledge of the event or circumstance giving rise to the claim, or of the contractual or legal basis of the claim.

Next, under sub-clause 20.2.5's third paragraph, an Engineer/Employer's Representative in receipt of a fully detailed claim may request additional particulars from the claiming party. Such a request should be limited to requesting particulars in respect of remedy (ie, additional time and money but *not* the contractual or other basis of the claim) and will delay the start date of the time-limit for the Engineer to consult with the parties to reach an agreement to when the Engineer receives the additional particulars. That said, even in this scenario, the time period for the Engineer's response on the contractual/legal basis of the claim starts with the submission of the fully detailed claim (not the additional particulars).

Issues and guidelines

Several issues arise from sub-clause 20.2.5.

The first is whether the parties can reach a sub-clause 3.7¹⁵ agreement notwithstanding a Notice of late submission (on either the Notice of Claim or the fully detailed claim). The better view is that they should not.¹⁶ A sub-clause 3.7¹⁷ agreement should resolve both the merits and procedural issues of a claim. Thus, to avoid any ambiguity on this issue, if the other Party wishes to maintain an objection for late submission, a sub-clause 3.7¹⁸ agreement should not be reached.

The second issue is whether it is enough for the agreement or determination pursuant to sub-clause 3.7¹⁹ to cover the validity question (ie, the time-limit question) without entering into the merits. Yes, and preferably so. Once the Engineer/Employer's Representative decides that, despite any arguments to the contrary, the Notice of Claim and/or fully detailed claim are unjustifiably late, the other party is discharged from liability and the claiming party loses its entitlements. Any accompanying decision on the merits would not be binding because the claim itself shall be treated as invalid.²⁰

The third issue is what the parties can do when faced with an unsatisfactory Engineer/Employer Representative's response on the contractual basis of the claim that pre-dates an agreement or Engineer/Employer Representative's determination. The better view appears to be that the parties will have to wait until the Engineer/Employer's Representative issues the determination before serving a Notice of Dissatisfaction that describes the party's dissatisfaction with the Engineer/Employer Representative's response.²¹ This is because, under sub-clause 3.7.5,²² parties may only serve Notices of Dissatisfaction (a condition precedent to the DAAB) in respect of an Engineer/Employer Representative's *determination*, not a *response*.²³

Finally, it should be noted that, regarding prejudice caused by a late submission, the second paragraph of sub-clause 20.2.5 asks whether the other party *would* be prejudiced. Thus, alleging a theoretical possibility is not enough.²⁴ As to prior knowledge of the event or circumstance that gave rise to the claim, or of the contractual or legal basis of the claim, it is sufficient to show that the other party had to have known, regardless of the medium by which knowledge is acquired.²⁵

Sub-clause 20.2.6 – Claims of continuing effect

Sub-clause 20.2.6 sets out a special procedure for when the event or circumstance giving rise to a claim has a continuing effect. In such cases, sub-clause 20.2.6 allows interim fully detailed claims to be submitted, followed by monthly submissions of subsequent interim fully detailed claims until the last one. The final fully detailed claim is filed 28 days (this may be extended) after the end of the continued effect. The Engineer/Employer's Representative is obliged under sub-clause 20.2.6 to provide a response on the contractual/legal basis of the claim within 42 days of receiving the first interim fully detailed claim and to proceed with agreement or determination once it receives the final fully detailed claim.

Sub-clause 20.2.7 – General requirements

Summary of terms

Sub-clause 20.2.7 provides:

- (1) that the Employer must include any amounts of the claim that the claiming party has 'reasonably substantiated as due' in each payment Certificate issued in the time between a Notice of Claim and its agreement or determination (first paragraph);
- (2) that the Employer will only be allowed to claim payments from the Contractor and extend the Defect Notification Period, set off amounts claimed against it or make any deduction from amounts due to the Contractor if it has followed the sub-clause 20.2 claims procedure in respect of these amounts (second paragraph);
- (3) that such requirements can be complemented by specific requirements under the contract (third paragraph); and
- (4) determinations, DAAB decisions and awards must take into account the extent to which non-compliance with the claims procedure 'prevented or prejudiced proper investigation of the Claim' by the Engineer/Employer's Representative, as the case may be (fourth paragraph).

Issues and guidelines

Two points, which relate to the first and second paragraphs, are noteworthy.

Firstly, due to the general and specific obligations in the first paragraph, the Employer will have to certify amounts reasonably substantiated as due that have not been the subject of an agreement or determination Notice. This may cause confusion in that the certification made by the Employer advertently or inadvertently runs the risk of vitiating or detailing the sub-clause 3.7.1 (or 3.5.1) consultation to reach an agreement.²⁶

Secondly, the restriction in the second paragraph is mostly to prevent the Employer from setting off or deducting amounts owed by the Contractor from other contracts, unconnected torts or from any duty that the Contract may have to the Employer unconnected to the contract, such as general taxes.²⁷ This obligation is only owed by the Employer; therefore, the Contractor is entitled to set off or deduct any amounts against or from any amounts it owes the Employer.

Notes

- 1 International Federation of Consulting Engineers, 'FIDIC Rainbow Suite ed. 2017: Second edition of the Red, Yellow & Silver Books' https://afitac.com/wp-content/uploads/2020/04/press-release_rainbow-suite_2018_03.pdf accessed 15 June 2021.
- 2 See page 36 below under 'Characterising the claim'.
- 3 2017 FIDIC Red Book, sub-clause 3.7.2; 2017 FIDIC Yellow Book, sub-clause 3.7.2. See equivalent, 2017 FIDIC Silver Book, sub-clause 3.5.2.
- 4 2017 FIDIC Red Book, sub-clause 3.7.5; 2017 FIDIC Yellow Book, sub-clause 3.7.5. See equivalent, 2017 FIDIC Silver Book, sub-clause 3.5.5.
- 5 2017 FIDIC Red Book, sub-clause 3.7; 2017 FIDIC Yellow Book, sub-clause 3.7. See equivalent, 2017 FIDIC Silver Book, sub-clause 3.5.
- 6 *Ibid.*
- 7 *Ibid.*

- 8 Gabriel Mulero Clas, 'Employer's and Contractor's Claims' in Edward Corbett et al, *FIDIC 2017: A Practical Guide*, (Corbett & Co 2017), 489.
- 9 *Ibid.*, 491.
- 10 See pages 38–39, under 'Sub-clause 20.2.4 – Fully Detailed Claim'.
- 11 2017 FIDIC Red Book, sub-clause 1.8 subpara (b); 2017 FIDIC Yellow Book, sub-clause 1.8 subpara (b).
- 12 Thomas Young, 'Changes to the Claims Provision in the Proposed Second Edition of the Yellow Book', (2017) 21 *International Quarterly*, 31–33.
- 13 See n 8 above at 511.
- 14 *Ibid.*, 512.
- 15 2017 FIDIC Red Book, sub-clause 3.7; 2017 FIDIC Yellow Book, sub-clause 3.7. See equivalent, 2017 FIDIC Silver Book, sub-clause 3.5.
- 16 See n 8 above at 512.
- 17 *Ibid.*
- 18 *Ibid.*
- 19 *Ibid.*
- 20 *Ibid.*, 513.
- 21 *Ibid.*, 519.
- 22 2017 FIDIC Red Book, sub-clause 3.7.5; 2017 FIDIC Yellow Book, sub-clause 3.7.5. See equivalent, 2017 FIDIC Silver Book, sub-clause 3.5.5.
- 23 See n 8 above at 519.
- 24 *Ibid.*, 515.
- 25 *Ibid.*, 516.
- 26 *Ibid.*, 522.
- 27 *Ibid.*, 522.

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CONTRACT

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Termination of construction contracts

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Introduction

When a contractor or employer terminates a contract that exists between them, the risks are often high, and the outcomes can be unpredictable. With both parties likely to have opposing views of what happened and who is responsible, a counter claim is probable and the decision on liability is binary – winner takes all. Added uncertainty comes from the fact that, at the time of termination, the parties may not have a full appreciation of the eventual losses involved.

Why then would a party terminate with the stakes so high and the outcome so uncertain? What are the warning signs? What are the risks? And what should parties do when faced with the prospect of termination?

Below, we set out a number of key considerations from a commercial perspective, based on what we typically witness in termination

cases relating to major international construction and infrastructure projects.

Of course, any termination will be subject to the contract provisions and the applicable jurisdiction of the contract.

The key drivers

Is termination the best option? It may be feasible to explore other contractual remedies, such as the extension of time or variation mechanisms, or to consider commercial settlement to address underlying project issues eg, quality, continual delay or late payment.

Given the high risks involved – and the possibility of implementing other established contractual or commercial alternatives – what then might drive contractors and employers to take what is often termed the ‘nuclear’ option?

The key driver is usually the realisation that there is no chance of meeting the original project objectives. This might be precipitated by a serious breach that typically results in a breakdown of the relationship between contractor and employer. Usually, this will be default (or perceived default) under the contract relating to performance (whether poor contractor performance or employer prevention) or to payment (whether disputed payments or employer solvency issues).

External factors may also be relevant. For example, falling energy prices could make an in-progress mining infrastructure project financially unsound and the employer may be under pressure to terminate in order to mitigate its losses or take a much stricter (and perhaps unreasonable) approach to contractor performance issues. In another example, a contractor that has the opportunity to take on far more profitable work elsewhere might be inclined to look more closely at its entitlement to terminate.

What are the warning signs?

It is not uncommon for relations between employers and contractors to become increasingly contentious over the duration of the contract, particularly on large and complex projects. So how do you distinguish a project that is going through commonly experienced tensions between the parties from one that is likely to result in termination?

One of the first signs might be a large disparity between the contractor's claims and/or payment applications and the employer's corresponding assessments.

It is not uncommon for relations to become increasingly contentious over the duration of the contract

Typically, when there is a claim, the parties engage and push for commercial solutions at site level. However, where termination is contemplated or is about to be implemented, there is generally less activity and more of a focus on the legal and procedural elements. The language of communications becomes more legalistic and different to the language adopted in project communications previously. Key individuals may suddenly be distant or absent from site and there may generally be a deterioration of working relationships.

Another warning sign can be a sharp drop in activity and materials on site, as the contractor's focus shifts from completing the project to minimising spend. This might be a sign that the contractor is considering termination, though it may also be a sign of contractor insolvency issues. The latter may entitle the employer to terminate, which the employer may wish to do if it considers that termination would be the best way to minimise the risk of potential delays and non-performance, though again, commercial options might also be considered. Of course, applicable insolvency laws will affect the options available.

It may also be worth looking at warning signs related to the external factors described above. The current Covid-19 pandemic is a stark illustration of the potential impact of such factors and the effect they might have on project dynamics.

Covid-19 pandemic and termination

From supply chain disruption to reduced capacity to pressure on cash flow, the Covid-19 pandemic is impacting the ability of businesses to fulfil their contractual obligations. Initially, within the private sector, parties were generally showing understanding and tolerance of their counterparties' pandemic-related difficulties. However, we are already seeing greater contentious activity within some public sector contracts as a result of the pandemic. In all sectors, termination may become a more common consequence as the pandemic continues and the resultant impacts are better understood, so being prepared is essential.

The crucial role of recording status at termination

The status of the project leading up to and at the point of termination is of crucial importance to all involved parties.

For the employer, the status of the project at termination will be the basis for assessing the time and cost to complete the works, which will in turn determine the size of any claim against the contractor. For the contractor, it is important for assessing the value of work actually completed for payment purposes. It will also be crucial for understanding the position on liquidated damages and the split

between contractor and employer when it comes to assessing the causes of, and – by definition – liability for delays. Furthermore, the status of the project at termination will subsequently be used by the employer to agree the scope and cost of the remaining work with the replacement contractor.

The parties usually have different interpretations of progress achieved and value of work executed at the time of termination. Invariably, the contractor claims that the employer has understated the position, while the employer claims the opposite.

Hence, the status at termination is likely to be a matter of dispute between the parties. The parties should therefore seek to evidence progress clearly against the project programme, and should also seek to record other aspects, such as contractor’s materials and contractor’s plant and equipment on site, ideally incorporating photographic evidence.

While recording progress may be relatively simple in the most straightforward construction project, it can be more nuanced in, for example, a design and build contract, where the value of the work done is not so tangible. For example, a great deal of work may have gone into producing a design, but the design is not complete until key milestones or work products such as drawings and specifications are complete. Another example is the commissioning of a power station, where all the infrastructure and machinery could be in place and therefore mechanically complete but, until the plant has been commissioned, the power station cannot operate.

To optimise the outcome of a termination-related dispute, reliable evidence as to the project status at termination will assist all stakeholders in simplifying what are often complex arguments. Further, the parties are advised to appoint an independent assessor. In our experience, having an independent assessment significantly narrows the issues between the parties and the focus of any negotiations or formal proceedings.

Who pays and how much?

In any termination situation, the contract between the parties provides the specifics about payments and allowable costs.

If termination is due to contractor default, entitlement will generally be limited to the value of work executed up to termination. This will normally be measured work, variations and

valid claims, typically prolongation and disruption. Usually offset against that amount is the extra cost incurred by the employer to appoint a replacement contractor to complete the works and potentially other damages, such as, for example, finance-related costs. The assessment of the extra cost of appointing a replacement contractor is essentially the reasonable cost to complete the works minus what would have been payable to the original contractor for carrying out the same scope as the replacement contractor, though it may also include, for example, the cost of making good on defects.

If termination is due to employer default, the contractor will normally be entitled to payment for work carried out up to termination (as with contractor default), but may also include additional entitlements, such as demobilisation costs, and in some cases, other entitlements, such as loss of profit.

In summary, the contractor is at risk of paying for the extra costs to complete the project, plus other possible damages, and the employer is at risk of paying amounts to the contractor beyond the value of work executed as well as any additional costs arising from appointment of a replacement contractor.

However, the position might differ when considering shipbuilding and offshore construction. This is primarily because, in such cases, ownership and control of the asset normally remains with the builder and not with the employer/owner. The builder may be left with a partially built asset for which it no longer has a purchaser. If this arises due to employer default, the builder may have similar entitlements to those described above, but for its own default the builder may have no entitlement to payment for work executed up to termination. It may be possible for the builder to complete construction of the asset and sell to another purchaser. If this happens, the selling price and costs to complete will need to be taken into account in any assessment of damages arising from employer default.

Conclusion

There are significant risks and consequences arising from termination and the parties should properly consider these before proceeding. Sometimes termination may be the only viable option, in which case, parties should ensure they have taken adequate steps to manage the transition.

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'It costs what!?!': the uncertainty of costs in international arbitration – a path forward

Introduction

Costs in complex international arbitrations can be extremely high, both in proportion to the claims in dispute and in absolute monetary terms. Despite the significant impact on parties' balance sheets, costs are often regarded by tribunals and practitioners as an unpleasant afterthought once an award on liability and quantum is issued. This is

unfortunate, as the varying approaches to costs are predicated on differing policy and philosophical considerations. These policy considerations are designed to impact the way in which claims are brought and maintained. Without knowing in advance how tribunals will allocate costs, parties have no foresight as to the way in which their conduct in the arbitration will impact their ultimate cost exposure. This

uncertainty cuts against the very purpose of arbitration as a neutral, fair and efficient dispute resolution mechanism.¹ A central component of a fair and efficient process is that a party understands the principles that govern its dispute and that there is consistency in the application of those principles.²

There are three approaches to the allocation of costs in international arbitration. Namely, costs follow the event (CFE), each party to bear its own costs, and proportionate allocation. Each of these approaches is derived from differing municipal legal systems, and each is predicated on underlying policy considerations as to the manner in which proceedings ought to be conducted. Jurisdictions that order each party to bear its own costs may encourage the raising of claims and defences that may be relatively weak, although meritorious. This approach does not seek to deter bona fide claims on the basis of fear of adverse costs orders. In contrast, the CFE approach to an extent seeks to deter unmeritorious claims through the risk of an adverse costs order. The proportionate allocation of costs takes this rationale further and encourages parties to adjust their efforts based on their best claims and defences.

Each approach is valid and this article does not seek to advocate for the adoption of any particular approach in international commercial arbitration. Rather, this author submits that the complete uncertainty as to which approach is to be adopted across the various institutional rules, national law and arbitral practice undermines the ability of arbitration itself to deliver a fair and efficient dispute resolution process. If parties do not know from the outset of the arbitration what costs approach a tribunal will adopt, they cannot conduct the arbitration in accordance with the approach's underlying policy rationales. As a result, one party may be exposed to the high costs of another, or may fail to recover any portion of its costs, in circumstances where if it had known in advance of the approach to costs adopted by the tribunal, it may have reduced its exposure by modifying the number of claims or defences brought, or the attention devoted to each. Given the high quantum of legal costs involved in sophisticated and complex arbitrations, it is vital that parties understand the way in which forensic and tactical decisions will impact subsequent cost liability.

To resolve the present unfairness and inefficiency that plagues the resolution of costs in international arbitration, parties should expressly stipulate the way costs ought to be allocated. Failing this, a tribunal ought to invite submissions and make a ruling on the approach it will adopt early in proceedings. This would allow parties to conduct the dispute in accordance with the policy rationales underlying the various approaches, and therefore provide the efficiency and certainty required to make arbitration a just process.

This article considers the three main approaches adopted in international commercial arbitration. It goes on to consider the extent to which these approaches are adopted by the various arbitral institutional rules, arbitral laws and tribunals, before suggesting a framework by which the current unsatisfactory situation can be resolved.

Costs approaches in international commercial arbitration

Overview

There are three primary approaches to the resolution of costs in international commercial arbitration, each originating in different municipal systems.

- CFE, also called 'loser pays';³
- each party bears its own costs;⁴ and
- the proportionate allocation of costs in relation to the relative success of the claims and defences.⁵

Before considering each of these approaches,

The complete uncertainty as to which approach is to be adopted undermines the ability of arbitration to deliver a fair and efficient dispute resolution process

it is important to set out this article's definition of costs and to consider the applicable law governing costs.

Generally, tribunals make orders on both legal costs and arbitration costs. Costs in this article, unless stated otherwise, refer to both categories. Legal costs are the costs incurred by the parties in conducting the arbitration. This includes the costs of solicitors, barristers/counsel, and the costs incurred in preparing any lay and expert

witness statements or reports. The costs of the arbitration include the costs of the arbitrators that comprise the tribunal, any costs of the arbitral institution, costs of the hearing room and transcription during a hearing, and the costs of any experts appointed by the tribunal. The various institutional rules often delineate between these legal costs and arbitration costs. The law governing the resolution of costs in international commercial arbitration is comprised of a “matrix” of (procedural) provisions created by the parties’ express agreement, their agreement by reference to arbitration rules, if any, and the *lex arbitri* of the seat of arbitration’.⁶ While, subject to national laws, parties may expressly provide in their arbitration agreement for the way costs are to be allocated, such agreement is rare in practice.⁷

This article now considers each of the above approaches, the rationale behind them and the extent to which there is any certainty in various institutional arbitral rules, national laws or the practice of tribunals.

CFE/loser pays

The CFE approach finds its origins in the United Kingdom and is often referred to as the ‘English approach’. It has guided the resolution of costs in England for centuries. Under this approach, the ‘party who turns out to have unjustifiably either brought another party before the court, or given another party cause to have recourse to the court to obtain his or her rights, should be required to recompense that other party in costs’.⁸ The CFE approach requires the identification of the relevant ‘event’ or ‘winner’. The tribunal orders that the ‘loser’ pay the legal costs of the ‘winner’, and potentially also the arbitration costs. The winning party is generally the one who receives the monetary award in its favour. The English Chartered Institute of Arbitrators states:

‘If a claimant recovers a monetary award, he is normally to be regarded as successful since he had to bring the arbitration in order to recover the sum in question. The “event” is the recovery of money. It is normally no ground for depriving the claimant of his costs that the amount recovered is less than that claimed unless the recovery is so small that it can be regarded as nominal or derisory.’⁹

It is important to note that in the CFE approach, a party does not cease to be the ‘winner’ merely because they did not experience success on all of their claims or defences.

Phillips J states in *Channel Island Ferries Ltd v Cenargo Navigation Ltd*.¹⁰

‘Where a claimant recovers significantly less than he claims, this of itself provides no justification for not awarding the claimant all of his costs. To deprive him of his costs on the ground that he has been only partially successful would be to err in principle.’¹¹

Further, in a statement typifying the CFE approach, it was observed:

‘In many instances it would not be fair to penalise a successful party for having raised issues or made claims which have ultimately been held to be unsustainable. If it was reasonable to raise these issues or claims and if they have not led to a substantial extra expenditure of time or money, then it may be fair to award the claimant the whole of his costs on the basis of the principle that “costs follow the event”.’¹²

The underlying policy rationale of the CFE approach is that the successful party should not be out of pocket for having to vindicate its rights or for having to defend a claim that was wrongfully brought. Thus it has been said: ‘the view [is] that it is just for a successful litigant, and perhaps *a fortiori* a successful appellant, to be able to recover his costs from someone.’¹³ As a matter of policy, the CFE approach deters parties from bringing ‘frivolous claims, defenses and engaging in bad faith conduct, given the risk of having to pay the entire costs of the other party’.¹⁴

Thus the CFE approach involves the identification of one party as winner and permits them to recover such costs. It is informed by the desire to ensure that meritorious claims are not left dormant, and also to ensure that a party found to have been wrongfully compelled to seek recourse or wrongfully compelled to defend itself not be out of pocket as a result. Without predictability as to the adoption of this approach, parties in commercial arbitration cannot know the impact that the claims and defences maintained will have on their ultimate cost exposure.

Each party bears its own costs

An alternative approach is to order that each party bear its own costs. This is sometimes termed the ‘American rule’, given that courts in the United States will not order a losing party to pay costs unless required by statute.¹⁵ This rule, however, is ‘as old as the common law itself’ and was once the position in England.¹⁶ Lord Hatherley observed that ‘Common Law Courts were obliged to go back to a legislative enactment in order to arrive at their power, or rather their duty, for power they had none, of dealing with costs.’¹⁷

While the British legislature granted the power to provide for costs as early as 1278, the US system has retained this approach.¹⁸ Requiring each party to bear its own costs is the standard approach in China, Indonesia, Japan and the Philippines, as well as the US.¹⁹ Various formulations of the rationale behind this approach have been discussed, and it has been contended that it is just to require each party bear its own costs because ‘the losing party may have had good and justified reasons for pressing a strong but ultimately unsuccessful claim’.²⁰ Accordingly, imposing the CFE approach is regarded as deterring otherwise meritorious claims. In the US, it has been observed that the principle that each party bear its own costs is appropriate because the economic risk is borne by the plaintiff’s attorney and is therefore calculable and limited. Imposing an alternative approach would render the ‘economic risk [...] much less calculable or limited if the plaintiff has to also factor in the possibility of having to pay for the legal costs of the adversary’.²¹

While this approach is certainly the most predictable in terms of parties’ ultimate cost exposure at a municipal level, and encourages settlement within the systems that adopt it, it provides no guidance to parties in international commercial arbitration because there is no certainty as to its application.

Proportionate allocation based on relative success

Tribunals may apportion costs on the basis of the parties’ degree of success. While this has a simplistic attraction, its precise operation is nuanced in practice. One method is to ‘look at the ultimate outcome and the degree to which the successful party achieved the remedies it sought’.²² Another is to ‘look at how many

claims were raised, which were successfully pursued and which were not’.²³

Such costs may be calculated by simply identifying a percentage of success and awarding the winning party this amount.²⁴ This latter approach resembles the CFE methodology, with a reduction made on the basis of issues the ‘winning’ party did not succeed on. A further alternative calculation is to award each party costs in respect of issues it succeeded on, and to then set off these amounts against each other.²⁵ While proportionate allocation is conceptually distinct from the previous two models, in practice there may not necessarily be a bright-line distinction between each. The underlying policy rationale of this approach is to ensure that costs reflect each party’s success. Further, it ‘encourages all parties to make their claims as realistic as possible. Thereby facilitating amicable settlements’.²⁶

Notwithstanding complexities in the allocation of success to each party, this approach constitutes a further valid basis on which costs may be awarded. The goal of encouraging parties to bring realistic claims and defences cannot be achieved in international arbitration, however, unless parties know in advance that such an approach will be adopted by the tribunal.

Guiding factors: party conduct and the reasonableness of costs

It is important to note that whichever approach is adopted by a tribunal, two key factors shape the allocation of costs. Firstly, party conduct, or more accurately, misconduct, is an important consideration by tribunals. Conduct that may lead to adverse costs awards due to unsatisfactory conduct includes:

- failure to comply with deadlines;
- late delivery of materials;
- vexatiously revisiting matters already resolved by a tribunal; and
- the presentation of claims in an obtuse and disorganised manner.²⁷

In *European American Investment Bank AG (EURAM) v Slovak Republic*,²⁸ the tribunal, constituted under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules 1976, stated:

‘Success is not, however, the only relevant criterion. The conduct of each party is a material consideration, particularly where it has led to costs being unnecessarily incurred.

There is a presumption in international arbitration that costs are reasonable

Thus, if a party advanced a claim (or a jurisdictional objection) that was manifestly untenable or frivolous, that would be a highly pertinent consideration. Time-wasting tactics, failure to meet deadlines, and other procedural misconduct are also relevant.’

Additionally, tribunals generally require that the costs incurred by parties are ‘reasonable’. There is a presumption in international arbitration that costs are reasonable. This can be traced to a statement of Judge Holtzmann: ‘A test of reasonableness is not, however, an invitation to mere subjectivity. Objective tests of reasonableness of lawyers’ fees are well known [...] The pragmatic fact that a businessman has agreed to pay a bill, not knowing whether or not the Tribunal would reimburse the expenses, is a strong indication that the amount billed was considered reasonable by a reasonable man spending his own money, or the money of the corporation he serves. That is a classic test of reasonableness.’²⁹

These factors are relatively uncontroversial and are a well-accepted feature of international commercial arbitration. It is suggested below, however, that these factors should be expressly noted by the parties as impacting the allocation of costs or ruled to do so by the tribunal. Doing so early in proceedings allows the tribunal to ‘better manage’ the ‘expectations’ of parties and their lawyers,³⁰ and therefore shape the way in which claims and defences are brought.

Treatment of costs in international commercial arbitration

Institutional rules

The arbitral rules of major institutions do not stipulate with any certainty which approach a tribunal ought to employ. They therefore provide no guidance to parties prosecuting their claims or defences. While some rules provide the appearance of certainty by adopting one of the approaches as a presumption, any certainty is undermined by an accompanying discretion to apportion costs.

For instance, article 38(4) of the 2021 Arbitration Rules of the International Chamber of Commerce (ICC) simply provides that ‘[a]t any time during the arbitral proceedings, the arbitral tribunal may make decisions on costs, other than those to be fixed by the Court, and order payment.’ The only requirement is that the tribunal consider ‘the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner’.³¹

In contrast, article 42 of the 2010 Arbitration Rules of UNCITRAL state that the costs of the arbitration, which include legal costs, ‘shall in principle be borne by the unsuccessful party or parties’. Jan Paulsson and Georgios Petrochilos observe that this article reflects the CFE approach.³² Notwithstanding, article 42 also makes it clear that the tribunal may depart from this approach and apportion costs as it determines reasonable.

Article 28.4 of the 2014 Arbitration Rules of the London Court of International Arbitration (LCIA) provides for a ‘general principle that costs should reflect the parties’ relative success and failure in the award or arbitration or under different issues, except where it appears to the Arbitral Tribunal that in the circumstances the application of such a general principle would be inappropriate [...]’.

Despite this apparent presumption in favour of a proportionate allocation of costs, it has been observed that ‘LCIA Tribunals rarely engage in a detailed assessment of the relative success and failure of each and every claim or counterclaim made by a party. Rather, most Tribunals tend to take a broad-brush approach to this question.’³³

All institutional rules examined allow the tribunal to apportion costs. Thus, the tribunal is free to depart as it sees fit. The end result is that:

‘most institutional rules [...] grant the arbitral tribunal broad powers to award legal costs, according to standards established principally by the arbitrators; the exercise of these powers is left largely to the arbitrators, with only limited and general references to the degree of a party’s success on its claims and the reasonableness of a party’s legal expenses. All leading institutional rules also expressly confirm the arbitrators’ authority to “apportion” legal costs, allowing awards of less than 100% of a party’s reasonable costs’.³⁴

Accordingly, none of the institutional rules provide any certainty to parties as to the way in which costs will be allocated. While some rules appear to provide a semblance of certainty, and potentially a semblance of guidance as to the way in which the arbitration ought to be conducted, the reality is that such certainty is negated by the broad discretion and power to apportion costs contained in each institution's rules.

UNCITRAL Model Law and national laws

In circumstances where the agreement of the parties is silent on the costs approach to be adopted, and where the relevant institutional rules confer broad discretion on tribunals, regard may be had to the *lex arbitri* and any relevant national rules.³⁵

The UNCITRAL Model Law on International Commercial Arbitration (1985, with 2006 amendments) (the 'Model Law'), which forms the basis of many national arbitral laws, is silent on the question of costs.³⁶ While the issue of costs was raised in the preparatory work for the 1985 Model Law, these issues were left to institutional rules and have not been raised since.³⁷

The treatment of this question by national arbitration laws differs greatly, and a complete review of the treatment in each national law is beyond the scope of this article. However, the following examples indicate that there is sufficient uncertainty in the allocation of costs to require a solution. The national laws of many jurisdictions, such as France and the US, do not make provision for costs.³⁸ Other jurisdictions, such as Australia, provide a power to award costs but do not require the tribunal to adopt any particular approach. For example, the Australian International Commercial Arbitration Act 1974 (Cth) section 27 provides that:

'(1) The costs of an arbitration (including the fees and expenses of the arbitrator or arbitrators) shall be in the discretion of the arbitral tribunal.

(2AA) In settling the amount of costs to be paid in relation to an award, an arbitral tribunal is not required to use any scales or other rules used by a court when making orders in relation to costs.'

Perhaps an outlier, section 61 of the English Arbitration Act 1996 (UK) expressly adopts

the general common law position that 'costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs'. Even then, a tribunal is granted discretion to depart from the CFE approach.

There is thus no further certainty as to the allocation of costs in the Model law or national laws, and therefore no greater guidance as to the way in which parties ought to conduct their case.

Approach in practice

Given the lack of certainty in institutional rules and many national laws, commentators have considered whether there is any observable trend in published awards, and some have contended that the CFE approach is becoming the norm. Gary Born writes:

'International arbitral tribunals generally possess the authority to award the prevailing party the costs of the arbitration, including its legal costs. In practice, this authority is frequently exercised; awards of costs can involve substantial financial amounts (not infrequently involving fees exceeding 10 million) and can have significant tactical importance.'³⁹

Some have contended that the CFE approach is becoming the norm

Julian Lew, Loukas Mistelis and Stefan Kröll state that the adoption of the CFE approach in relation to 'all or the substantial part of the costs [...] is widely accepted'.⁴⁰

Gustav Flecke-Giammarco observes that: 'Several authors have identified that "[c]osts should follow the event is becoming a governing principle in international arbitration. There is an emerging trend for Arbitral Tribunals to order the losing party to bear both the procedural costs and the legal costs of the other party unless the circumstances of the case warrant a departure from such rule" and that "[t]he conventional wisdom holds that in international arbitrations, tribunals follow the CFE approach in accordance with the practice of most countries". These quotes reflect a growing tendency in international arbitration to allocate costs to the successful party and are in line with the users' desire as recently

expressed in the Queen Mary University and White & Case “2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process” for Arbitral Tribunals to allocate costs according to the result more frequently.⁴¹

In 2015, the ICC conducted a review of the treatment of costs pursuant to a variety of institutional rules.⁴² It found that the majority of arbitral tribunals adopt the CFE approach ‘as the starting point, thereafter adjusting the allocation of costs as considered appropriate’.⁴³ The literature is not unanimous that tribunals adopt an approach in favour of CFE. Christopher Koch contends that the CFE approach is generally adopted in relation to arbitration costs, but not legal costs, stating that ‘the American rule is used twice more often than either costs follow the event or proportional allocation’.⁴⁴ Koch’s view was formed on a much smaller data set than that available to the ICC. It therefore seems that the current practice by tribunals is best described as an ‘outcome-based approach, using the “costs follow the event” principle as a starting point and thereafter exercising their discretion to adjust or apportion costs between the parties based on a number of factors’.⁴⁵

This is an undesirable state of affairs. While a party may bring multiple claims and defences on the basis that its success on a portion of them might see it rendered the ‘winner’, that party cannot know whether the apportionment will be utilised to penalise it for unsuccessful claims or defences, or merely used to penalise dilatory and inefficient conduct. The current approach does not provide sufficient predictability for parties to understand how best to prosecute their case to reduce their ultimate cost exposure.

Resolving the current uncertainty

The issues identified in this article ought to be resolved firstly by the parties pursuant to their arbitral agreement. Failing this, they ought to be resolved by the tribunal early in the arbitral process, pursuant to its general case management power, after receiving submissions from the parties. While the former is desirable, the latter is still preferable to the current state of affairs.

Many authors have suggested potential frameworks to resolve the uncertain application of various approaches to costs by tribunals.⁴⁶ John Yukio Gotanda identified the uncertainty

inherent in the awarding of costs by international tribunals. In summary, his model provided that the tribunal is to enforce the agreement of the parties on the allocation of costs. Failing this, the tribunal is to adopt a CFE approach, but with the discretion to apportion costs if it determines that apportionment is reasonable, taking into account the circumstances of the case. The tribunal is given discretion to otherwise depart from the rule for special reasons.⁴⁷

This author agrees with the first limb of Gotanda’s approach, but suggests an alternative second limb. In the first instance, parties should modify their arbitration agreements to expressly stipulate the approach to costs that ought to be adopted by tribunals. This is not a novel or ground-breaking concept. It is inherent in the very essence of arbitration as a consensual dispute resolution process.⁴⁸ In cases where parties have set out an approach to costs, ‘tribunals will virtually always purport to give effect to its terms’.⁴⁹ It is not suggested that any particular model is preferable to the other. Each model, as set out above, has compelling policy reasons which support its adoption. Rather, the uncertainty and its concomitant impact on the prosecution of a case or defence may be remedied by the adoption of *any* of these models.

Set out below is an example of an arbitration clause that is directed towards reducing this uncertainty:

1.1 All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of the [selected institution] by [number of arbitrators if not dealt with by the relevant rules], subject to the provisions set out below.

1.2 The parties agree that costs are to be allocated by the Tribunal in a Final Award issued after one or more Interim Awards on liability and quantum. Unless otherwise agreed by the parties in writing following the commencement of arbitration, [the following options may be selected]:

[Option A]: the Tribunal is to award costs to the successful party. A party is regarded as successful if it prevails on the majority of its claims or defences.

[Option B]: the Tribunal is to order that each party pay one-half of the costs set out at paragraph 1.4(b) below, and each party to otherwise bear its own costs.

[Option C]: the Tribunal is to allocate costs in proportion to each party's success. [The method of apportionment may be set out if desired].

1.3 In allocating costs, the Tribunal may reduce any costs awarded to reflect dilatory or inefficient conduct by a party.

1.4 For the purposes of this clause, costs include the following:

- (a) the reasonable legal costs of each party, with such costs including the costs of solicitors, counsel and lay and expert evidence; and
- (b) the costs of the arbitration, including any costs charged by the arbitral tribunal, any costs charged by experts appointed by the arbitral tribunal, and any costs of the arbitral institution; and
- (c) any other costs that may be recovered pursuant to the institutional rules selected by the parties under this agreement.

This is not a comprehensive one-size-fits all option, but it provides some guidance as to the composition of such a clause. If parties select Option A, they ought to also consider whether the tribunal can reduce the quantum of the successful party's costs to reflect any successes of the other party.

Unfortunately, in practice, parties are unlikely to set out the treatment of costs. In such cases, the tribunal ought to invite the parties to agree on the approach it should adopt to the allocation of costs. Failing this, at the next case management conference, the tribunal ought to invite submissions from each party and then make a ruling accordingly. This can be done on the papers, unless a party objects or the relevant institutional rules otherwise require.

The adoption of this methodology, with parties selecting the desired approach to the allocation of costs, or the tribunal doing so at the outset of the proceedings following submissions from parties, will allow parties to prosecute claims and defences with a full awareness of the corresponding cost implications. Without this certainty, parties will continue to conduct themselves in a manner that may see them penalised, even where such forensic calculations are perfectly justifiable, if not encouraged,

under one or more of the potential approaches to costs. The adoption of this methodology would thus allow for the certainty that is essential to a fair and efficient dispute resolution process.

Conclusion

For arbitration to be fair and efficient, it must be sufficiently certain and predictable. The current approach to costs in international commercial arbitration is neither. Parties must know in advance a tribunal's approach to costs in order to bring and defend claims. This knowledge will ensure that tactical decisions taken do not result in unforeseen, and therefore unjustified, cost exposure. By parties stipulating in the arbitration agreement the approach to costs, or by tribunals ruling on the question at the outset, arbitration will be better able to achieve the certainty and predictability that render it such a prized avenue for dispute resolution across the globe.

Notes

- 1 Gary B Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) 2287–8.
- 2 Lon Fuller, *The Morality of Law* (Yale University Press 1969).
- 3 ICC Commission Report, 'Decisions on Costs in International Arbitration' (ICC Dispute Resolution Bulletin 2015, Issue 2) 3 [5].
- 4 *Ibid*, 5 [14].
- 5 Jeffrey Maurice Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012) 1220–1.
- 6 Micha Bühler, 'Awarding Costs in International Commercial Arbitration' (2004) 22:2 ASA Bulletin 249, 253.
- 7 Mika Savola, 'Awarding Costs in International Commercial Arbitration' (2017) 63 Scandinavian Studies in Law 276, 288.
- 8 G E Dal Pont, *Law of Costs*, (4th edn, LexisNexis 2018) 169 [7.2].
- 9 Chartered Institute of Arbitrators, *Practice Guideline 9: Guidelines for Arbitrators on Making Orders Relating to Costs of Arbitration* [4.4.1].
- 10 *Channel Island Ferries Ltd v Cenargo Navigation Ltd* (1994), 2 Lloyds Rep 161, 169-70
- 11 *Ibid*.
- 12 See n 9 above, [4.6.1].
- 13 *Holden & Co v Crown Prosecution Service (No 2)* (1994) 1 AC 22, 39.
- 14 Steven P Finizio and Ross Galvin, 'Chapter 8: Allocation of Costs in International Arbitration: A Comparative Analysis of Approaches in International Commercial Arbitration and Investment Treaty Arbitration' in Sherlin Tung and others, *Finances in International Arbitration*:

- Liber Amicorum Patricia Shaughnessy* (Kluwer Law International 2019) 117–8.
- 15 Christopher Koch, ‘Is There a Default Principle of Cost Allocation in International Arbitration? – The Importance of the Applicable Provisions and Legal Traditions’ (2014) 31(4) *Journal of International Arbitration* 485.
- 16 *Ibid.*, 490.
- 17 *Garnett v Bradley* (1978) 3 App Cas 944, 953–4.
- 18 *Steele v Sailing Vessel “Polaris”*, No GJH-19-3314, 2020 WL 7489022 (D. Md. 21 December 2020).
- 19 See n 6, above, 251.
- 20 *Ibid.*
- 21 See n 15, above, 491.
- 22 See n 5, above, 1220–1.
- 23 *Ibid.*
- 24 *Ibid.*
- 25 *Ibid.*
- 26 See n 7, above, 310.
- 27 See n 5, above, 1224.
- 28 *European American Investment Bank AG (EURAM) v Slovak Republic* PCA Case No 2010–17, Award on Costs, 20 August 2014, [43].
- 29 ‘*Sylvania Technical Systems Inc v The Government of the Islamic Republic of Iran (Award)*’ (1985) 8 Iran-US CTR 298. See discussion in Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 533–6.
- 30 See n 3 above, 7 [31].
- 31 *ICC Arbitration Rules 2021*, Art 38(5).
- 32 Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration* (Kluwer Law International 2017) 364 [12].
- 33 Maxi Scherer, Lisa Richman and Rémy Gerbay, *Arbitrating under the 2014 LCIA Rules: A User’s Guide*, (Kluwer Law International 2015) 313–32.
- 34 See n 1, above, 3347.
- 35 See n 6, above, 253.
- 36 Howard M Holtzmann and others, *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International 2015) 676.
- 37 *Ibid.*
- 38 See n 1 above, 3343.
- 39 Gary B Born, *International Arbitration: Law and Practice* (2nd edn, Kluwer Law International 2015) 182.
- 40 Julian D M Lew, Loukas A Mistelis and Stefan M Kröll et al, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 654.
- 41 Gustav Flecke-Giammarco, ‘The Allocation of Costs by Arbitral Tribunals in International Commercial Arbitration’ in Jorge A Huerta-Goldman, Antoine Romanetti and Franz Xaver Stirnimann Fuentes (eds), *WTO Litigation, Investment Arbitration, and Commercial Arbitration* (Kluwer Law International 2013) 411–412.
- 42 See n 3, above, 12 [65].
- 43 *Ibid.*
- 44 See n 15, above, 496–7.
- 45 See n 14, above, 124.
- 46 See n 7, above, 309–14.
- 47 John Yukio Gotanda, ‘Awarding Costs and Attorneys’ Fees in International Commercial Arbitrations’ (1999) 21 *MichJIntL* 1, 26–7.
- 48 See n 1, above, 1515–7.
- 49 *Ibid.*, 3351. Note, however, that pursuant to the Arbitration Act 1996 (UK) in England, an agreement that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen.

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Social initiatives may trigger new perspectives for large construction projects

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Introduction

Large construction projects often have a difficult relationship with the surrounding social environment. Project acceptance¹ by stakeholders and project affected persons (PAP) is a challenge that employers and contractors must take on jointly, in order to work peacefully and complete the project on time.

This article focuses on the social aspects of large international projects located in remote areas. It explains what can be done to ensure a successful relationship with the local communities around the project area and the advantages that a construction company may reap by adopting a collaborative social attitude,

beyond its contractual requirements to project stakeholders. The former approach will hereafter be called ‘social work initiative’ and is distinguished from the concept of ‘corporate social responsibility (CSR)’.

A large construction project is an enterprise to build a unique piece of work, over a span of several years, employing a workforce of more than 500 persons,² who are working and living together on site. In a remote area, the construction company may need to provide infrastructure for feeding and lodging the workforce, sometimes building a small town with services, including: canteens; security;

maintenance; medical and banking services; water supply and wastewater treatment; solid waste removal/recycling infrastructures; fuel tanks; a fire brigade; phone/radio/internet communications; and places of worship, among others.

The project builders need the support of the local community to provide personnel and fresh food supplies to the workers, as well as to avoid harassment from people and authorities. At the same time, the local communities gain an immediate and direct advantage from the project through employment opportunities for trading, public works, such as roads, wells and buildings of public utility, and many other aspects that will be discussed below.

The knowledge that there is interdependence between the project and its social environment may be a drive for the contractor and stakeholders to prevail upon each other, causing conflict, or an incentive to cooperate and interact for mutual advantage. It is common that when the contractor establishes a site in a new place and brings in its workers for the initial activities, the contractor's presence is often received with some mistrust and intolerance. This is the time when the contractor should extend its corporate hand, making the first steps to establish a positive feeling. Fair labour engagement rules, respect of human rights and professional capacity-building policies are essential, but promises of collaboration are also important and must be followed by practical action.

Social work initiatives: a case study

This article outlines the case of a hydropower project in Ethiopia as an example of a social work initiative.



The construction project currently in progress.

At the starting phase of the project, while we were still building the permanent clinic for the workers, we asked for permission to use the existing public health office that was understaffed and run-down. In return, we refurbished the building, provided water, supplied electricity with our generator, and directed our medical doctors and nursing staff to work inside it with the directive to serve the public free of charge. We also provided streetlights and replaced the adobe-built local administration building with a masonry building fitted with water and light. We built gravel roads



Drilling of water wells.



Safe water for the community from wells.



The new town hall for gatherings.



Roads and culverts built for the community.

and drilled several water wells, since it was easy for us to do so with our equipment for drilling and grouting in the dam.

Access to the permanent project site clinic, once complete, was made available free of charge not only for site personnel, but to the entire community. An HIV counselling and testing service was also opened for all. A malaria prevention campaign has been regularly carried out on site and in surrounding areas, by a joint public-private team spreading government-supplied insecticide with a pump mounted on a contractor's vehicle, with evident benefits for all.



The pre-existing health post after renovation.



The new site clinic.

This cooperation continued and the relationship with the local authorities and the towns in general were strengthened, which made it possible to resolve many day-to-day problems. The influx of job seekers, the project traffic (in such a small town, the dust and noise were unprecedented), and road construction issues were all resolved by agreement and common sense as if we had always been part of the community.

When the political scenario in the country suddenly changed, we had to face the challenge of dealing with new persons and groups with different opinions. For a period, the relationship soured. The time to redress this situation came when a large mudslide hit the town, destroying several houses and killing their inhabitants. No one called for our help, since nobody expected our intervention, considering that the slide occurred far from the construction site and without any fault on our side.

Project builders need the support of the local community

Despite this, we immediately mobilised our equipment and personnel with tools to rescue the victims, retrieve the bodies of the dead, safeguard the town from further mudslides and reinstate access roads. This intervention was so much appreciated by all, that the relationship with the town authorities and the people improved again, and has remained positive to this date.

This level of communication and mutual help was especially important when both we and the local authorities had to face the challenge of Covid-19 from March 2020.



The site area is in a remote location.

The Covid-19 pandemic

As the pandemic made its way through Ethiopia, the remoteness of the area in which the project site is located became a safety factor. Once again, we managed the crisis in collaboration with the authorities and the local community, which initially lacked the basic tools for Covid-19 prevention, such as thermometers, masks and gloves.



Checking the workers' temperature.



Health checkpoint on access roads.

Upon our request and with our equipment, the authorities set up health control checkpoints up to 100km away along the roads leading to the zone in which the project is located, thus protecting everybody. Within the site, all site personnel had their temperature checked on a daily basis. Ventilators and bio-isolated stretchers

were procured from overseas, and quarantine areas were established in our camps with yellow and red zones for suspect or positive cases, respectively. A referral agreement for symptomatic patients was made with well-equipped hospitals in major towns countrywide.

Later, when Covid-19 became predominantly asymptomatic, the project site was protected by quarantining all incomers, and by confining transport trucks to isolation following fast 'load/unload and go' policies. The wearing of face masks and using sanitisation materials became a common feature.

Isolation policies were accompanied by continuous testing of those persons in quarantine and in other Covid-19-sensitive areas. Through collaboration with local health authorities, more than 10,000 tests were made on site in the last 12 months and, when the vaccine became available in April 2021, within a few days 1,055 persons (ie, 25 per cent of the project community) were vaccinated. This campaign is expected to continue until the majority of workers have been vaccinated. Testing and vaccination were only possible through the collaboration and support we received from the local health authorities, which was the result of a long-standing, good relationship.

Beyond corporate social responsibility

Baron Thurlow (1731–1806), Lord Chancellor of England, said: 'Did you ever expect a corporation to have a conscience, when it has no soul to be damned and no body to be kicked? (And by God, it ought to have both!)

Nowadays, companies are accountable for civil responsibility in tort and under criminal law for leaders' illegal actions, if these actions were intended to benefit the corporation.³ A corporation can be made 'absolutely liable' in tort when involved with potentially harmful activities or if it causes a disaster,⁴ and the corporate veil does not protect the shareholders from paying for their director's lack of due care and diligence in discharging their duties.

In a pollution case for mining activities, the parent company in the UK incurred a duty of care for damage caused by its subsidiary in Africa insofar as it 'exercised a sufficiently high level of supervision and control of [its] activities [...] with sufficient knowledge of

the propensity of those activities to cause toxic escapes into surrounding watercourses'. The parent company had group-wide environmental control and sustainability standards, and was responsible for their implementation and enforcement throughout the group, assuming a duty of care towards third parties.⁵

Most corporations have good CSR policies that consist in those 'actions that appear to further some social good, beyond the interests of the firm and that which is required by law'.⁶ In fact, the implementation of environment and social management plans, which is expected by the contract or by the law, is not CSR. Beyond corporate philanthropy, at best CSR is the balancing of economic, ecological and social goals for a corporation.

Eventually, '[c]orporate responsibility may cost time and money, but studies have consistently found that environmental enhancement goes hand in hand with above-average growth and earnings.'⁷

In construction projects, consideration for the environment, labour and social issues may be a requirement of the contract or a request of the financing banks, which are concerned with reputational risk or have specific policies. The World Bank has a Corporate Responsibility Strategic Plan,⁸ which was established in 2016 and follows ten 'bedrock principles' that are generally related to project sustainability, and include positive actions towards the project affected community.⁹ Transparency and accountability are key principles.

In practice, the notion of accountability is often viewed as a reaction to environmental and social damage done during construction, and provides for redressing project-related harm through compensatory measures for the environment and the affected community. As these are reparatory measures, they are ethically and legally due, and do not stop the community from being angered by the situation created by the project. These measures alone do not promote trust and good will, in the same way as compensation for an incident may not be sufficient to bring peace to those that suffered a permanent loss or damage.

While the above is fair and should be regularly done by contractors and their employers, the proactive engagement in social work initiatives on the project site, without having caused any loss or damage,

At best, CSR is the balancing of economic, ecological and social goals for a corporation

promotes trust and tolerance, helps prevent issues from being raised, and may assure a swift and amicable solution in case of disputes. The advantages also extend to the contractor's employees, who will have improved morale and, besides their salary, work with the sense of purpose in developing their community. The result is a lower turnover of personnel and a committed workforce. This goodwill does, in my experience, also improve the relationship between contractor and employer, in that they will be happy to receive more at no additional cost, while increasing the advantages of the project.

Conclusions

Because of the long-term presence on site, the project team, consisting of contractor and employer, becomes well aware of the needs of the community. As long as the contractor is mobilised on site, it has the capacity to carry out simple work, swiftly and at a low cost considering that the contractor's overheads have already been paid through the project. The advantages of establishing a collaborative approach have been explained above, and eventually may provide a competitive edge in the procurement process. On the other hand, CSR should not be used instrumentally – that is, other than benefitting the community or delivering a better project – or the initiative could backfire, causing disappointment and loss of confidence.

Mandatory CSR has been enacted under some jurisdictions like India, where the Companies Act 2013¹⁰ requires companies to spend up to two per cent of their profit on CSR. However, this looks like an additional tax, and not a genuine commitment to better the project sustainability. A different proposal could be that of allocating a percentage of the contract sum to be declared at bidding stage as a budget for social work initiatives to be managed transparently and jointly by both employer and contractor. It would, ultimately, be paid by the employer, but applied by the contractor, while the benefits belong to the project.

The author acknowledges that the freedom to operate socially is, to a large extent, made possible by the circumstances in which the contractor builds a remote public project. Undoubtedly, many of these operations would not be possible in the centre of London or in Europe, where everything is structured and developed. Moreover, it raises the question of what a campaign of social initiatives, beyond mere CSR, could have achieved in case of projects that are contested by local communities.¹¹

In fact, members of construction teams should know what is useful for the community anywhere, and could discuss their ideas with the local authorities about how to add value to their project through social work.

In conclusion, these social initiatives, which have a comparatively low impact on the contractor's budget, bring about a smooth relationship with stakeholders and help expedite the progress of the works.

Notes

- 1 In this context, 'acceptance' refers to feeling a sense of ownership and alignment with the goals of the project. It does not relate to the formal process of handing over a project.
- 2 The project I am working on employs up to 9,000 persons.
- 3 Eg, s 37 of *Health and Safety at Work Act*, 1937 and s 157 of *Environment Protection Act* 1990, Offence by Body Corporate.
- 4 In the Indian case *MC Mehta v Union of India AIR 1987 SC 1086*, after the Bophal gas disaster in 1984, it was held that
'where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to

anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in the escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortious principle of strict liability rule in *Ryland vs. Fletcher*.'

- 5 *Vedanta Resource Plc v Lungowe* [2019] UKSC 20 at 55.
- 6 Abigail McWilliams and Donald Siegel 'Corporate social responsibility: A theory of the firm perspective' (2001) 26 (1), *Academy of Management Review* 117–27.
- 7 Organisation for Economic Co-operation and Development, 'Environment and the OECD Guidelines for Multinational Enterprises' (2000), 8, www.oecd.org/env/34992954.pdf accessed 10 June 2021.
- 8 World Bank, 'Corporate Responsibility Strategic Plan' (December 2016) <http://documents1.worldbank.org/curated/en/702821506406388173/pdf/120000-WP-PUBLIC-CorpResponsibilityStrategicPlan.pdf> accessed 10 June 2021.
- 9 They are: 1. Be Climate Resilient; 2. Be Energy Smart; 3. Be Water Efficient; 4. Ensure Resource Efficiency; 5. Reduce Waste; 6. Promote Sustainable Land Management; 7. Eliminate Corruption; 8. Enhance Diversity & Inclusion; 9. Ensure Staff Wellbeing; 10. Engage & Preserve the Community.
- 10 Under s 135 of the Act.
- 11 Eg, the Turin – Lyon Railway Link in Val di Susa, Italy, <https://peoplesdispatch.org/2021/04/21/protests-in-italys-susa-valley-over-fresh-construction-bids-for-turin-lyon-motor-link> accessed 10 June 2021.

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The International Compendium of Construction Contracts

Reviewed by Joseph Moore

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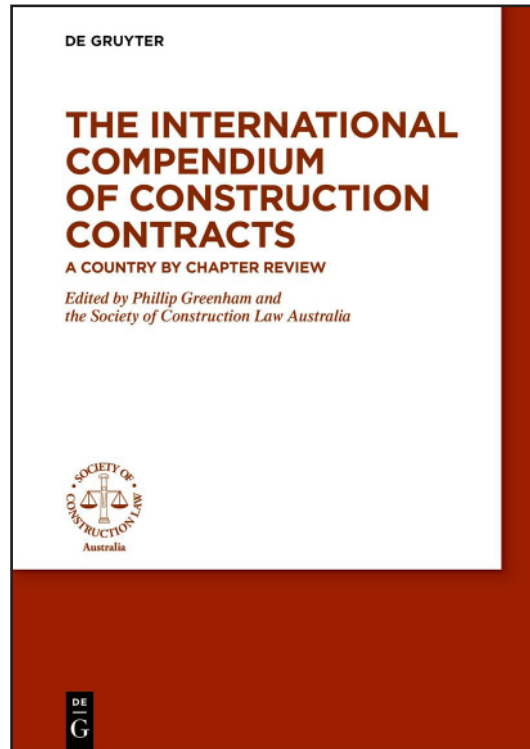
Publication date: 24 May 2021

Editor Phillip Greenham has orchestrated a remarkable and unparalleled compilation of the law of international construction contracts. His *International Compendium of Construction Contracts* (the ‘*Compendium*’) is an immediately useful resource for anyone employed in the world of international construction. Procurement officers, contract administrators, construction managers, project executives, bankers, arbitrators, mediators, claims managers, counsel and all others will find it a valuable desk resource.

In his opening notes, Greenham reveals that his efforts on the *Compendium* began more than eight years ago, in 2013. As one absorbs the details of the *Compendium*, the tremendous effort of those eight years comes into focus. Indeed, the book itself successfully brings focus to the seemingly refracted pursuit of international contracting.

Greenham’s opening notes also make mention of the collegiality and collaboration found in the construction industry. Greenham writes, ‘[t]his collegiality and collaboration is across disciplines, across countries, across cultures and across financial interests’. Greenham’s words ring with sincerity and are the doubtless echo of the cross-cultural collegiality and collaboration he experienced and fostered among the book’s contributors.

The *Compendium* covers 39 countries and touches every continent. It contains the work of no fewer than 95 authors, each of whom are well-respected and accomplished construction-law experts in their respective country. The *Compendium* presents the combined knowledge of the world’s top construction lawyers, and it does so in a pragmatic, efficient and approachable manner. Such an achievement can only be the result of the aforementioned collegiality and collaboration.



Inside the *Compendium*, readers will find an organised and adept presentation of Common, Code and Shariah systems, and of the combinations thereof. The chapters are organised by country in alphabetical order, and each begins with a useful and focused description of the country comprised of the most relevant historical and cultural facts. These descriptions successfully orient the reader with the perfect amount of cultural reference. Each chapter then provides an efficient yet comprehensive summary of the subject country’s legal system – another helpful reference point for the reader – and then presents more detailed and educational discussions about the subject country’s economy and construction industry. Insights into the size of the industry, worker safety, quality assurance, and environmental protection can be found. These insights provide the reader with a true understanding of the nature of the business in the country of interest. Before the reader embarks on an analysis of the contractual regime, they are provided with an invaluable frame of reference and cultural foundation.

Each chapter then presents an informative discussion of the underpinning contract law and educates on topics including contracting philosophy, public policy, statutory limitations and implied terms. The chapters present a highly instructive section on

government involvement for the respective countries in which topics such as licensing and regulation are presented.

As impressive as each of these sections are, the true knowledge of the *Compendium* is found in the sections 'Construction Contracts', 'Key Issues' and 'Dispute Resolution'. Chapter-by-chapter and country-by-country, the authors present a focused discussion of the contracting practices, standard forms, typical provisions and most active legal issues in their country. The heart

of the *Compendium* is found in these sections, and they are approachable, useful and instructive. The genius of the *Compendium* is found when one reads the contracting practices sections after having read the sections on history, culture, industry and legal system. The book provides the reader with a spectrum of cultural and legal knowledge, the result of which is a pragmatic and unique understanding of construction contracting practices around the World. Greenham and the many authors deserve sincere gratitude.

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.

The Editorial Board cannot guarantee publication. All contributions may be subject to evaluation by the Editorial Board prior to publication.

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.

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International Bar Association



EVENTS 2021

WEBINARS 2021

The International Commerce, Trade, Franchising and Product Law Section: Hot Topics Digital Round Tables

5 October 1430 – 1600 BST

Asset financing the transportation industry

6 October 1400 – 1515 BST

Strengthening the International Criminal Court and the Rome Statute System: the Role of States Parties

7 October 1500 – 1600 CEST

The psychological aspects of retirement

8 October 1300 – 1400 BST

Adoption of technology by law firms – fact or fiction?

12 October 1300 – 1400 BST

Learning from millennials: are diversity policies and programmes really working?

13 October 1400 – 1500 BST

The Spy Trade: The IBA International Commerce and Distribution Committee's Virtual Tour of the International Spy Museum in Washington, DC

19 October 1400 – 1500 BST

ESG oil and gas general counsel and regulators discuss recent developments and what the future holds

21 October 1700 – 1800 BST

Enhancing diversity in the legal profession through education and training

2 November 1300 – 1400 GMT

Hype or Hope: is blockchain technology revolutionising criminal investigations in the US?

4 November 1400 – 1500 GMT

Masterclass on the overview of the AfCFTA

8 November 1300 – 1500 GMT

Fast-tracking the commercial deployment of Carbon Capture Utilisation and Storage (CCUS)

9 November 1300 – 1400 GMT

Masterclass on understanding the protocol on trade in goods

15 November 1300 – 1500 GMT

VIRTUAL CONFERENCES 2021

The Future of Law Firms

22 October

IBA Global Showcase

25 – 29 October

IBA Global Immigration Virtual Conference

18 – 19 November

CONFERENCES 2021

Virtual fever, the new pandemic? News and trends in Intellectual Property, Communications, Media, Technology, Art and Outer Space Law Conference

11 – 12 October Berlin, Germany

From start-up to IPO

17 – 19 October Paris, France

23rd Annual IBA Transnational Crime Conference

3 – 5 November, Madrid, Spain

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

5 November, Singapore

7th IBA Asia Pacific Regional Forum Biennial Conference

17 – 19 November, Singapore

Digitising of International Commerce: new trends from product development and purchasing, through to manufacturing, logistics, supply chains and transportation

17 – 18 November, Milan, Italy

Building the Law Firm of the Future

19 November, London, England

26th Annual IBA Global Insolvency and Restructuring Conference

28 – 30 November, Edinburgh, Scotland

7th Annual Corporate Governance Conference

2 – 3 December, Frankfurt, Germany

The New Era of Taxation

2 – 3 December, Dublin, Ireland

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