CONSTRUCTION LAW INTERNATIONAL

FROM THE IBA INTERNATIONAL CONSTRUCTION PROJECTS COMMITTEE

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the global voice of the legal profession

New construction law jurisdiction in Asia

Recent reform of the French Civil Code

Time-related obligations in Austria

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CONSTRUCTION LAW INTERNATIONAL

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FEATURE ARTICLES

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Sunset aerial view of Yangon, Myanmar, with construction cranes.
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FROM THE EDITORS

In this edition we are delighted to publish contributions from four jurisdictions not often (or indeed, ever) covered by *Construction Law International*: Austria, Bulgaria, Finland and Myanmar.

We start with two more contributions to our 'FIDIC around the world' series, followed by an update from the English Commercial Court, which – on an appeal on law from an arbitration – revisited the issue of indirect and consequential loss exclusions. We then turn to Finland, with an interesting review of the Finnish General Conditions for Building Contracts: the YSE 1998.

Turning to our feature articles, we have our first contribution from Myanmar, with thanks to Goh Wanjing, who discusses urban planning and construction issues relevant to developers and contractors hoping to participate in the development of this growing country. We then have Building Information Modelling (BIM): Part II, our follow up to the ICP session at the IBA Annual Conference in Washington, DC. This is a multi-author effort; thanks to the team who not only gave a fascinating talk, but thereafter produced this useful reference piece. We are then back to one of our perennial topics: liability for delay. On this occasion, we have Thomas Frad to thank for enlightening us as to how time-related obligations operate in Austria. Finally, one of our editors, Virginie Colaiuta, discusses recent developments to construction law in France. Our book review for this edition is the second edition of Paul Reed QC's *Construction All Risks Insurance*.

With some sadness, we say goodbye to Arent van Wassenaer, who is standing down as Chair of the *Construction Law International* Editorial Board. We thank Arent for all his guidance over the years. But we are delighted to welcome Roger ter Haar QC as our new Chair to steer us forward as we start our second decade.

We are, as always, indebted to our contributors for their insightful articles. From country updates to full articles, FIDIC updates and a ten-year review, if this edition has inspired you to put pen to paper, please get in touch.

Looking forward, our June 2017 edition will focus on the Middle East region, before we turn our attention to the Pacific Rim (and Sydney 2017) for September 2017. If you practice in either of these regions please do not hesitate to send in a contribution, and help us showcase your region to our international readership.

Please note that we now have a new email address for contributions: **clint.submissions@int-bar.org**.

We hope to hear from you.

Jane Davies Evans, Managing Editor

Jane Davies Evans
(Managing Editor)
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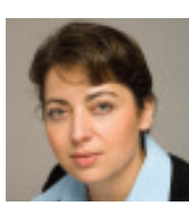

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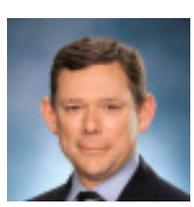

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We are pleased to open this first edition of 2017 by warmly welcoming Roger ter Haar QC as the new Chair of the Editorial Board of *Construction Law International* (CLInt), in succession to our long-serving Chair, Arent van Wassenaer. Roger has been active in international construction projects for some years. He is a leading construction barrister in London, with an international arbitration/construction practice extending across many jurisdictions, and is also the author of the authoritative English law works *Remedies in Construction Law* and *Construction Insurance and UK Construction Contracts*. We are delighted that Roger has agreed to take on this position. We also extend the warm thanks of members to Arent for his years in the role, and wish him well in retirement.

As the new year gets underway, we have been receiving a gratifying number of applications for speaking slots at our sessions at this year's IBA Annual Conference in Sydney (8–13 October 2017), and are working with the Co-Chairs of the various sessions planned for Sydney on the selection of speakers. By the time this edition appears, the selection should have been announced.

Prior to Sydney, we are looking forward to this year's ICP Working Weekend. As reported in our December 2016 edition, Edinburgh was selected for the weekend on the final day of the IBA Annual Conference in Washington, DC. The ICP Working Weekend has become extremely popular. This year, it was oversubscribed almost immediately after the venue was announced. We are looking forward to a lively weekend in an ancient and interesting capital city, with the arrangements in the capable hands of Shona Frame, her assistant Muriel Kidd and each of our three subcommittees organising a session.

The Brussels Construction Law Conference for Young Construction Lawyers will take place on 15–16 September 2017. The organisation is in the hands of Rouven Bodenheimer and Rupert Choat, as on the last occasion.

For the IBA Annual Conference in Sydney, the ICP Committee will hold five sessions: one on Tuesday afternoon, two on Wednesday and two on Thursday. The afternoon session on Thursday 12 October 2017 will conclude with the traditional planning session for 2018 (including the announcement of the venue for the May 2018 Working Weekend), which will be chaired by incoming Co-Chairs Helmut Johannsen (Vancouver) and Jaime Gray (Lima).

There will be the usual ICP Committee dinner on Wednesday 11 October 2017 and our traditional excursion on Friday 13 October 2017. The sessions will feature:

- Construction management: its pros and cons.
- A comparison between civil law and common law approaches to contract interpretation.
- Thoughts on contracting with powerful entities that will not negotiate terms, or impose their own chosen subcontractor/suppliers.
- Insights emerging from a number of 'mega-projects' in Australasia.

We will also hold an interactive session on a hypothetical project in crisis, with the audience divided into teams to undertake mock negotiations to rescue or terminate the project.

So, if you can, please come to Sydney for learning and fun!

We continue to encourage members to communicate via ICP-Net, reminding them that ICP members may access ICP-Net by entering the IBA website (www.ibanet.org), going to 'Committees and Divisions', 'Committees', 'International Construction Projects', and clicking on the link: 'Communication and discussion forum for members via ICP-Net'. The website will take you to the page where you can enter a 'New Thread'.

Tony & Claus

A new initiative – FIDIC around the world

At *Construction Law International*, we often receive articles addressing the use of FIDIC in different jurisdictions, and thought it would be interesting to run a series in which local practitioners answer standard questions about how FIDIC works in their country. Our aim is to print two or three responses per edition, and gradually build up a database of answers to which members can refer easily.

Please send any contributions to **clint.submissions@int-bar.org** in the normal way. If we receive multiple contributions from the same jurisdiction we will contact the authors as to the best way to combine contributions.

1	What is your jurisdiction?
2	Are the FIDIC forms of contract used for projects constructed in your jurisdiction?
	If yes, which of the FIDIC forms are used, and for what types of projects?
3	Do FIDIC produce their forms of contract in the language of your jurisdiction?
	If no, what language do you use?
4	Are any amendments required in order for the FIDIC Conditions of Contract to be operative in your jurisdiction?
	If yes, what amendments are required?
5	Are any amendments common in your jurisdiction, albeit not required in order for the FIDIC Conditions of Contract to be operative in your jurisdiction?
	If yes, what (non-essential) amendments are common in your jurisdiction?
6	Does your jurisdiction treat sub-clause 2.5 of the 1999 suite of FIDIC contracts as a precondition to employer claims (save for those expressly mentioned in the sub-clause)?
7	Does your jurisdiction treat sub-clause 20.1 of the 1999 suite of FIDIC contracts as a condition precedent to contractor claims for additional time and/or money (not including Variations)?
8	Does your jurisdiction treat sub-clause 20.1 of the 1999 suite of FIDIC contracts as a condition precedent to contractor claims for additional time and/or money arising from variations?
9	Are dispute boards used as an interim dispute resolution mechanism in your jurisdiction?
	If yes, how are dispute board decisions enforced in your jurisdiction?
10	Is arbitration used as the final stage for dispute resolution for construction projects in your jurisdiction?
	If yes, what types of arbitration (ICC, LCIA, AAA, UNCITRAL, bespoke, etc) are used for construction projects? And what seats?
11	Are there any notable local court decisions interpreting FIDIC contracts?

FIDIC around the world – Bulgaria

Boyana Milcheva and Martin Zahariev[1]

1. What is your jurisdiction?
Republic of Bulgaria, Eastern Europe.

2. Are the Fédération Internationale Des Ingénieurs-Conseils (FIDIC) forms of contract used for projects constructed in your jurisdiction? If yes, which of the FIDIC forms are used, and for what types of projects?
Yes, FIDIC forms of contract are commonly used for public work projects constructed by international contractors. As of 2012, the Bulgarian Spatial Development Act expressly introduced the option of using the FIDIC forms on any projects fully or partially financed by international financial institutions or funded by the European Union. Usually, the Red Book 1999 and Yellow Book 1999 are used in Bulgaria.

3. Does the FIDIC produce its forms of contract in the language of your jurisdiction? If no, what language do you use?
Yes. The Bulgarian Association of Consulting Engineers and Architects (Bulgarian abbreviation: БАИИК), acting as a representative of the FIDIC, has published the following books in Bulgarian: Red Book 1999, Yellow Book 1999, Green Book 1999, FIDIC Guide to Practice 1999, Procurement Procedures Guide 1999, EPC Turnkey Contract 1999, Client/Consultant Service Agreement 2006 and Construction (1999 Red Book) Subcontract 2011.

The English versions of FIDIC forms are also used.

4. Are any amendments required in order for the FIDIC Conditions of Contract to be operative in your jurisdiction? If yes, what amendments are required?
Bulgarian legislation introduces some specific positions and also envisages mandatory statutory requirements regarding different aspects of the construction process, including:

- the position of the independent construction supervisor (similar to an engineer but with mandatory obligations to verify compliance with construction requirements);
- special requirements in respect of the capacity of the designer;
- specific requirements for the design disciplines and content of the design;
- specific requirements for drafting and signing documentation to evidence the lawful commencement of the construction process and its compliance with the statutory construction requirements;
- specific procedure for commissioning; and
- statutory warranty periods (longer than the usually agreed defects notification periods).

Compliance with these statutory requirements is mandatory, regardless of whether they are incorporated into the FIDIC Conditions of Contract as they are applicable under Bulgarian legislation.

With reference to the above, the FIDIC Conditions of Contract could operate even if not amended. Usually, however, amendments are introduced to cover the aforementioned requirements (see answer to question 5).

In the case in which the respective project is financed by public funds and is awarded through a public procurement procedure, the requirements of the Public Procurement Act regarding presentation of specific documents should also be observed; these documents are described in the respective contract (see answer to question 5).

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

- Sub-Clause 1.1: some contracts provide for the inclusion of a person called a 'financial beneficiary'. This term is used to distinguish the employer from the person that shall use and benefit from the works;
- Sub-Clause 1.1: usually contracts include additional definitions to explain specific typical positions and mandatory requirements of the law towards them (see answer to question 4), such as definitions of: (1) independent construction supervisor; (2) warranty periods and their statutory terms; (3) built drawings as defined in Bulgarian legislation; (4) protocol for commencements of construction; (5) certificate of commissioning the project; and (6) letter for acceptance with specific content as stipulated in the Public Procurement Act;
- Sub-Clause 1.5: priority of documents is excluded from the general conditions and provided for in the contractual agreement;
- Sub-Clause 1.12: introduction of an obligation on the contractor to disclose data related to the execution of the project to the European Commission;
- Sub-Clause 3.1: additional obligations on the engineer to cover the statutory functions of the independent construction supervisor according to Bulgarian legislation;
- Sub-Clause 3.1: some of the engineer's powers concerning determination of additional costs or time or certifying variations that are subject to prior approval by the employer;
- Sub-Clause 3.5: engineer's determinations that lead to an increase of the contractual price

become effective after signing an addendum and approval of the financial institution for the projects financed by financial institutions;
- Sub-Clause 4.25: list of required permits to be obtained by the contractor according to Bulgarian legislation;
- Sub-Clause 4.26: additional obligations on the contractor to keep the so-called 'order book' and to execute all built drawings as defined by Bulgarian legislation;
- Sub-Clause 4.6: specifically for the projects financed by EU funds, introduction of an obligation on the contractor to allow an audit from a financing institution;
- Clause 5 of FIDIC Yellow Book 1999: additional obligation on the contractor to ensure its designer has full design capacity according to Bulgarian legislation;
- Sub-Clause 10.1: amendment concerning the moment for issuance of the taking-over certificate; it is issued after the certificate for commissioning according to Bulgarian legislation;
- Sub-Clause 11.9: additional obligation for the contractor to remedy defects within the statutory warranty period regardless of issuing the performance certificate;
- Sub-Clause 20.1: the procedure for filing claims before the Dispute Adjudication Board (DAB) is sometimes removed from contracts; and
- Sub-Clause 20.6: contracts sometimes provide for a term for commencing arbitration after the performance certificate is issued.

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

There are no specific regulations and no case law on this matter. However, by analogy with cases dealing with Sub-Clause 20.1, Sub-Clause 2.5 can be interpreted as a precondition for filing an admissible claim (see answer to question 7).

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

There is no specific statutory regulation on this matter.

There is one Bulgarian court decision that enforces foreign arbitral awards in which the arbitral tribunal rejected the consideration of claims not referred to the engineer under Sub-Clause 67.3 of the FIDIC Red Book 1992 (Decision No 1966 of 13 October 2015 under commercial case No 4069/2014 of the Court of Appeal, Sofia, Commercial Division). The decision is currently subject to appeal before the Supreme Court of Cassation. The Court of Appeal found that the contractor failed to follow the multi-tier dispute resolution procedure established in the contract and, as a result, its claims were inadmissible. The decision is signed with dissenting opinion. The dissenting judge deemed that any contractually established preconditions for filing a claim were void due to contradiction with the public order of the Republic of Bulgaria (the dissenting opinion referred to the principles of the right to be heard, the equality between the parties, etc).

There is also case law relating to arbitrations seated in Bulgaria, which deems that Sub-Clause 20.1 is compatible with the mandatory provisions of Bulgarian law. The sub-clause is interpreted as establishing conditions for referral and timely settlement of claims arising in the course of performance of complex investment projects. Thus, there is case law that treats Sub-Clause 20.1 as a condition precedent for filing admissible claims. The interpretation of the Supreme Court of Cassation on that matter will clarify how this clause shall be interpreted by Bulgarian courts in the future.

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

See answer to question 7.

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

Some of the FIDIC-based contracts used in Bulgaria have not been amended and envisage use of the DAB. However, Bulgarian legislation has neither adopted specific regulations regarding the use of dispute boards as an interim dispute resolution mechanism, nor specific rules regarding the enforcement of decisions. Also, there is no publicly available case law on this matter.

Some legal scholars and practitioners have expressed the opinion that the dispute board decisions (and, in particular, DAB decisions) can be qualified as third-party determination, which is recognised by Bulgarian law (Article 299 of the Commercial Act). According to the said provision, third-party determination shall become binding to the parties only where the third party has made the determination in compliance with the objectives of the contract, its remaining content and the commercial custom. It remains to be seen how the courts and arbitral tribunals shall interpret the above criteria in situations when one of the parties has issued a Notice of Dissatisfaction regarding the DAB decision.

10. Is arbitration used as the final stage for dispute resolution for construction projects in your jurisdiction? If yes, what types of arbitration (International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), American Arbitration Association (AAA), United Nations Commission on International Trade Law

(UNCITRAL), bespoke, etc) are used for construction projects? And what seats?
Yes, it is. Where the contractor is a Bulgarian legal entity, contracts usually provide for the arbitration seat to be Bulgaria (mostly before the Arbitration Court of the Bulgarian Chamber of Commerce and Industry). Where the contractor is a foreign legal entity, contracts provide for ICC arbitration (mostly seated in Paris, but any other neutral jurisdiction could also be selected by the parties).

11. Are there any notable local court decisions interpreting FIDIC contracts?
Decision No 1966 of 13 October 2015 under commercial case No 4069/2014 of the Court of Appeal – Sofia, Commercial Division.

This is currently subject to appeal before the Supreme Court of Cassation (commercial case 788/2016, I Commercial Division): regarding the inadmissibility of claims not filed under Sub-Clause 20.1 before the engineer (see the answer to question 7).

Decision No 59 of 6 October 2015 under commercial case No 2/2015 of the Supreme Court of Cassation, I Commercial Division, Bulgarian Ministry (employer) v German Firm (contractor).

The court set aside an arbitral award, which awarded the contractor additional costs caused by delay of the employer. The arbitral tribunal qualified the claimed amounts not as contract price (as indicated in the claim) but as compensation for damages caused by non-performance of the contractual obligation. The court, however, found that the arbitral tribunal released the contractor from the burden of proof to prove the exact amount of costs it actually incurred (which is typical for liquidated damages due under penalty clauses). The court also found that the agreed mechanism for indemnification may only replace fixed or determinable amounts of the damages, but not the obligation to prove them. According to the court, the opposite would lead to unjustified enrichment, which is prohibited under Bulgarian law. Because the contract did not provide for a penalty clause and the arbitral tribunal considered a similar claim, the court set aside the award on the ground that the award contains decisions on matters beyond the scope of the submission to arbitration.

Note
1 The authors are at Dimitrov, Petrov & Co, Sofia.

FIDIC around the world – Finland

Juha Ryynänen[1]

1. What is your jurisdiction?
Finland.

2. Are the Fédération Internationale Des Ingénieurs-Conseils (FIDIC) forms of contract used for projects constructed in your jurisdiction? If yes, which of the FIDIC forms are used, and for what types of projects?
In domestic projects, FIDIC forms are not used at all. In such projects, the Finnish general conditions for construction contract, yleiset sopimusehdot (YSE) 1998, are the prevailing set of general conditions of contract. It is also extremely rare that FIDIC forms of contract are used in any international project located in Finland. It is more typical that such international projects are governed either by YSE 1998 or bespoke conditions of contract.

3. Does the FIDIC produce its forms of contract in the language of your jurisdiction? If no, what language do you use.
No. FIDIC forms of contract are not produced in Finnish. When FIDIC is used, it would certainly be the English language version.

4. Are any amendments required in order for the FIDIC Conditions of Contract to be operative in your jurisdiction?
Freedom of contract is one of the leading legal principles in Finnish Construction Law. Therefore, there are no amendments required when using FIDIC Conditions of Contract under Finnish Law. The FIDIC terms do not contain any provisions that are in conflict with Finnish Law.

5. Are any amendments common in your jurisdiction, albeit not required in order for the FIDIC Conditions of Contract to be operative in your jurisdiction?
There are no common amendments, simply because FIDIC Conditions of Contract are used extremely rarely.

6. Does your jurisdiction treat Sub-Clause 2.5 of the 1999 suite of FIDIC contracts as a condition precedent to contractor claims for additional time and/or money arising from variation?
There are no decisions from the Finnish courts addressing FIDIC Conditions of Contract. As a matter of principle, the clause would be treated (generally speaking, and with some exceptions) as a condition precedent to contractor claims.

7. Does your jurisdiction treat Sub-Clause 20.1 of the 1999 suite of FIDIC contracts as a condition precedent to contractor claims for additional time and/or money (not including variations)?
See answer to question 5.

8. Does your jurisdiction treat Sub-Clause 20.1 of the 1999 suite of FIDIC contracts as a condition precedent to contractor claims

for additional time and/or money arising from variations?
See answer to question 5.

9. Are dispute boards used as an interim dispute resolution mechanism in your jurisdiction?
Dispute boards are not typically used as an interim dispute resolution mechanism in Finland. There are some means of alternative dispute resolution mechanisms available in Finland, but they are not especially tailored to be interim mechanisms.

10. Is arbitration used as the final stage for dispute resolution for construction projects in your jurisdiction? If yes, what types of arbitration (International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), American Arbitration Association (AAA), United Nations Commission on International Trade Law (UNCITRAL), bespoke, etc) are used for construction projects? And what seats?
The local courts are the default forum for disputes arising under the Finnish YSE 1998. For construction contracts involving an international party, it is usual that there is an arbitration clause. Where arbitration is specified, it will typically be ICC, bespoke or Finland Arbitration Institute (FAI) rules.

11. Are there any notable local court decisions interpreting FIDIC contracts?
There are no local court decisions interpreting FIDIC contracts in Finland.

12. Is there anything else specific to your jurisdiction and relevant to the use of FIDIC contracts on projects being constructed in your jurisdiction that you would like to share?
There is scope to use FIDIC contracts more often in international construction projects located in Finland, rather than bespoke conditions, in particular, in the mining and energy sectors.

Note

1 Juha Ryynänen is a Finnish advocate based in Helsinki. Juha can be contacted on asianajaja@juharyynanen.fi.

UNITED KINGDOM

Indirect and consequential loss exclusions revisited

Aidan Steensma[1]

Introduction

An English Commercial Court decision late last year upheld a broad interpretation of a consequential loss exclusion in favour of the traditionally narrow interpretation given by the English courts to such clauses. The decision follows recent judicial commentary criticising the traditional rule and may encourage parties to argue for a more case-by-case approach to the interpretation of such exclusions in the future.

The traditional approach

Several decisions of the English Court of Appeal have established that contractual exclusions for 'consequential and indirect losses' will be limited to losses that fall within what is known as the 'second limb' of *Hadley v Baxendale*.[2] *Hadley v Baxendale* is an old and well-known decision in English law establishing a fundamental division between two types of recoverable losses for breach of contract.

Direct losses

'Direct losses' are damages that may fairly and reasonably be considered as arising naturally, that is, according to the usual course of things, from a breach of contract. For example, if the breach involved the destruction of a factory, both the cost of rebuilding and the loss of production suffered during rebuilding would fall within this first category.

Indirect losses

'Indirect losses' are any other damages which may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract. This category depends upon additional facts being known to both parties. In the example of the factory just given, it may be that loss of production during the period of rebuilding caused the loss of a particularly lucrative long-term contract. The loss of such a contract would not be recoverable unless both parties knew that the contract might be lost in the event of such a breach.

Exclusions for 'consequential and indirect losses' will usually exclude only those losses falling within the second category described above. In the case of the factory, such an exclusion would not therefore affect any claim for ordinary loss of production suffered during the period the factory was unavailable. Such an interpretation has been criticised as one that the average businessman would not expect. However, the rule is very well established, and in *British Sugar plc v NEI Power Projects*,[3] the English Court of Appeal commented that reasonable businessmen using such language must be taken to be aware of the distinction. As the present case shows, however, it is still possible for the specific circumstances of a given case to lead to a different outcome.

Star Polaris LLC v HHIC-Phil Inc

Star Polaris entered into a contract with HHIC-Phil Inc (the 'Yard') for the construction of a cargo ship. Approximately eight months

after delivery, the vessel suffered serious engine failure. The Yard denied liability for the failure and a dispute arose between the parties as to liability for the costs of repair and financial losses arising from the failure.

Among other things, the Yard relied on an exclusion in the contract for 'consequential or special losses, damages or expenses'. This exclusion was contained in a clause setting out detailed provisions as to liability for and the repair of defects discovered in the vessel. The clause was expressed to replace all other obligations and liabilities of the Yard under the contract or at common law. In this context, the Yard contended that the word 'consequential' was used in a cause-and-effect sense as excluding any losses caused as a knock-on effect of the engine failure.

The case was decided first by arbitration, with the Yard's interpretation of the word 'consequential' being upheld. The arbitral tribunal found that the defects clause as a whole made it sufficiently clear that the consequential loss exclusion was intended to exclude liability for losses over and above those specifically accepted by the Yard in the clause, which was limited to repair of defects and any physical damage caused thereby. The parties were not, therefore, held to have intended the usual interpretation of 'consequential loss', limited to second limb losses under the rule in *Hadley v Baxendale*.

Star Polaris was granted permission to appeal on a point of law to the English Commercial Court as to the tribunal's interpretation of the consequential loss exclusion. Unless excluded by agreement of the parties, such appeals are available under the English Arbitration Act 1996, but are subject to permission from the court and the meeting of certain criteria. The appeal was ultimately unsuccessful, with the Commercial Court agreeing with the reasoning of the arbitral tribunal.

Comment

The traditional 'second limb' interpretation of consequential and indirect loss exclusions has come under renewed criticism in England of late. In 2015, one judge in the English Commercial Court commented that 'this unnatural interpretation of the term 'consequential loss' is to be deprecated'.[4] In referring to the traditional interpretation of such exclusions last year, the English Court of Appeal commented that: 'It is questionable whether some of those cases would be decided in the same way today, when courts are more willing to recognise that words take their meaning from their particular context and that the same word or phrase may mean different things in different documents'.[5]

These comments may suggest judicial appetite for a change in the traditional rule. The present case may also be seen to give support to arguments in favour of a more flexible interpretation of such exclusions depending on the context of the clause in question, rather than the application of a fixed, judicially determined interpretation in all but exceptional cases. The traditional rule is, however, supported by a number of decisions at Court of Appeal level, and it remains to be seen whether any real case for change can be made.

Notes

1 Aidan Steensma is Of Counsel at CMS Cameron McKenna in London. He can be contacted at aidan.steensma@cms-cmck.com.
2 (1854) 9 Ex 341.
3 (1997) 87 BLR 42.
4 *Scottish Power UK Plc v BP Exploration Operating Company Ltd* [2015] EWHC 2658 (Comm) at para 180.5
5 *Transocean Drilling UK Ltd v Providence Resources Plc* [2016] EWCA Civ 372 at para 15.

FINLAND

International construction projects in Finland

Juha Ryynänen[1]

The Finnish construction market is worth €30bn a year. This includes major international construction projects in nuclear energy and some in the petrochemical, paper and biotech industries. As a small and open economy in the European Union with a reliable Scandinavian legal system, Finland is easily accessible to foreign players. However, when doing business in Finland's construction sector, there is still a need to take account of the national culture and Finnish construction law.

Status of general terms of building contracts

Finnish construction law is based on contract law that is closely related to Swedish contract law. In both countries, the Contracts Act covers only a few issues and has no specific rules that apply to construction contracts. Therefore, in both countries, independently from each other, national federations representing both employers and constructors have drawn up national sets of general terms of construction contract.

In Finland, the general conditions for building contracts, yleiset sopimusehdot (YSE) 1998, can be applied to all construction contracts, excluding consumer contracts. The YSE 1998 rules are generally accepted and regarded as

well-balanced, fair and suitable to construction projects of all sizes.

The YSE 1998 rules or bespoke rules tend to be used in international construction projects located in Finland. The Fédération Internationale Des Ingénieurs-Conseils (FIDIC) or other rules from abroad are seldom directly applied.

If a company commissioning a construction project in Finland is seeking more and better tenders, it is strongly advised to use YSE 1998. Even major constructors may avoid tendering for projects in which other rules are applied because YSE 1998 is more familiar and, therefore, seems less risky. Another advantage of YSE 1998 rules is the fact that they are the only general terms of contract that are well-known among local subcontractors. It is often practical to apply the same general terms throughout the subcontractor chain.

The YSE 1998 rules are routinely used by all multinational construction companies with a major presence in the Finnish market. There seems to be a consensus that YSE 1998 works well, or at least well enough. For this reason, no advantage can be seen in replacing YSE 1998 with other rules in standard projects.

Specific characteristics of YSE 1998

YSE 1998 was designed as a set of general terms of contract to be applied to construction projects of different types and sizes. There are, therefore, no separate terms for subcontracts or special contracts. Any specific issues should be taken into account in the actual construction agreement and its appendices.

Unlike the FIDIC terms, YSE 1998 does not define the term 'engineer'. Finnish construction law does not recognise the concept of an engineer as a neutral player. Although the concept of 'engineer' does not form part of Finnish construction law, the idea of the party commissioning the project (the customer) hiring a professional project manager to manage the building site is also generally familiar in Finland. This is often done when the customer does not have sufficient construction expertise of his own and the contract is reasonably large. Such contracts are known as project management contracts or project management service contracts. In the case of a project management contract, the contract between a project manager and a customer is typically a YSE 1998-based construction contract. In the case of a project management service contract, the contractual relationship between the parties is based on a consulting agreement typically regulated by the general conditions for consulting, Konsulttitoiminnan yleiset sopimusehdot (KSE) 2013.

The key principles applied to variations and the extension of time are the same in Finland as elsewhere. Any variations and their effects on the contract price and time must be agreed before work is begun on variations. There are also some national specialities, though, such as the concept of variation, which is narrower than it is in the FIDIC rules, for example. According to YSE 1998, a variation (modification work) refers to modification to work undertaken by the contractor due to a change in the plans referred to in the contract. Changes – due to the client – in the schedule, timing and the order in which work is performed are not variations as defined by YSE 1998. These are classified as customer-induced disruptions, and the related claims can still be presented during the acceptance of the work.

Dispute resolution

According to section 92 of YSE 1998, any disputes between the parties should be resolved in a district court, unless the parties agree otherwise. In large construction projects in particular, it is common for the parties to agree on an arbitration procedure. In the case of smaller construction projects and most public construction projects, disputes are typically resolved in public courts of law. Disputes are commonly resolved in a district court, or in a court of appeal at the latest. Finland's Supreme Court has issued a few dozen preliminary rulings on construction contracts. These precedents play a key role in Finland's construction law.

In practice, all international construction contracts in Finland include an arbitration clause. According to section 3 of the Finnish Arbitration Act, in order for it to be valid, an arbitration agreement must be in writing. Arbitration agreements typically agree on an ad hoc procedure or the application of the arbitration rules of the Finland Arbitration Institute (FAI) or International Chamber of Commerce (ICC).

YSE 1998 does not recognise dispute adjudication boards (DABs). When disagreements occur, the focus is on negotiations between the parties. According to a Supreme Court preliminary ruling (No 81 of 1995), the parties may not submit a disagreement to a court of law until they have attempted to resolve it by means of a final set-off of accounts. This is commonly interpreted as meaning that, prior to such a course of action, a dispute may not be submitted to arbitration either.

New winds

Although YSE 1998 and Finnish construction law are fairly conservative in nature, this does not mean that the construction industry is conservative in general. In recent years, large infrastructure and hospital projects carried out under alliance and integrated project delivery (IPD) contracts have drawn a great deal of attention.

The alliance as a model of contracting is becoming more common due to the largely positive experiences associated with it. A few dozen alliance projects are currently under way in different parts of Finland. Now that alliance contracts have become established and more common, the Finnish construction industry associations have begun to draw up a contract model for them.

Note

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FEATURE ARTICLE

Panoramic view of a building under construction near a harbour in Yangon, Myanmar, at sunrise. Credit: Perfect Lazybones/Shutterstock.

Myanmar: the emergence of a new construction law jurisdiction in Asia

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Introduction

With the opening of the Myanmar economy in 2011, the property development and construction scene in the country has boomed, bringing much excitement to investors and culminating in the swift growth of many mixed developments in Yangon, the key business hub in Myanmar. From being a country not familiar with the concept of high-rise buildings and painfully short of residential and commercial spaces, the Yangon landscape and skyline have now been transformed, with a host of new spaces and buildings introduced to the city and its people.

As more investments poured in, land prices rose steadily and demand dwindled,

with the pool of local buyers drying up and regulations for foreign investors remaining unclear. The historic political transition from the previous government to the National League for Democracy (NLD) party in 2015 also produced its own set of changes and uncertainties.

With developers and investors waiting in the wings, it is more important than ever for certainty in the landscape and regulations to set in. With regards to this, the government has been working on urban planning as well as its construction and property laws, to guide the country into its next phase of development.

For the purpose of this article, the focus will be on Yangon, where the bulk of private property development has taken place and will continue to take place.

Yangon's zoning plan

The zoning plan for Yangon is discussed as the starting point. Yangon's draft zoning plan was first drawn up in 2013 by a working committee, with recommendations from urban planners and representatives from the Yangon City Development Committee (YCDC), Ministry of Construction, Yangon Heritage Trust, Ministry of Science and Technology, and Japan International Cooperation Agency (JICA).

It is envisaged that when the zoning plan is passed, it will improve the building permit process in Yangon, introduce policy certainty to the Yangon construction scene and strengthen the city's legal framework

The goal of the zoning plan is to legislate the use of urban land and limit high-rises. It has only been in recent years that high-rise buildings have been in focus as foreign developers have sought to undertake such developments. High-rise buildings are to cover no more than 35 per cent of the town,[2] with building heights restricted to 12 stories in the downtown area, which is packed with many old colonial-era buildings.[3] There will also be a delineation of green spaces and industrial zones in each town.

It is envisaged that when the zoning plan is passed, it will improve the building permit process in Yangon,[4] introduce policy certainty to the Yangon construction scene[5] and strengthen the city's legal framework. A more explicit and transparent zoning law in Yangon will also help in the development of the city's real estate market.[6]

At present, the zoning plan is incomplete and no completion deadline has been set.[7] Although it was expected to be opened for public comment in late 2016,[8] there has been no such announcement as of January 2017.

Building laws and regulations

In addition to the zoning plan and the use of land, developers and contractors also need to be aware of and abide by laws and regulations. As the property investment landscape continues to grow, these laws are also evolving.

YCDC's procedure for building permits

The YCDC is the relevant authority for the application of building permits in Yangon, and new buildings in the city area require approval from the YCDC. The current process for obtaining building permits in Yangon is as follows:

- proposals for buildings under eight stories are to secure approval from the YCDC, assessed using the YCDC's by-laws;
- approval for high-rise buildings more than eight stories must be obtained from the High-Rise Building Inspection Committee; and
- prospective projects above 12 floors must be submitted to inspections by the Committee for Quality Control of High-Rise Building Constructions Projects (CQHP), as well as regulatory approvals involving other government agencies.

According to U Toe Aung, Director of the Urban Planning Division of the YCDC, with all documentation in order, the process of obtaining building permits takes around two months for small projects and as long as a year for big projects. In addition, such permits usually require that construction be completed within a certain time frame, although contractors can apply for extensions.[9]

In the course of 2016, there was some significant news regarding the reviewing and suspension of high-rise buildings with nine floors and above. In May 2016, the Yangon

regional government (YRG) and YCDC began a citywide review, which covered projects already under construction, those that had begun foundation work and those still in the planning stage. More than 200 of these high-rise building projects had received varying levels of approval under the previous administration. By suspending operations, developers and contractors faced uncertainty and incurred losses.[10]

Six months later, in November 2016, the YCDC announced that it had finished reviewing the final group of buildings (ie, those that had received a permit in principle under the previous YCDC administration but were still in the planning stage)[11] and is now accepting permit applications for new construction projects.[12]

It is to be noted that while the YCDC is in the midst of amending its building permit regulations, new construction permits are still assessed based on existing laws and by-laws.[13] In the interim, the amended regulations have already been shared with industry associations, but will only be publicly available and adopted by the YCDC when the YRG has approved it.[14]

YCDC Rules on Buildings and Structures

In relation to building and structures, the relevant law would be the YCDC Rules on Buildings and Structures (1999) (the 'YCDC Rules'). These rules govern, among others, the following:

- application for building construction permits;
- issuances of licences to building contractors, architects and engineers;
- safety of buildings; and
- erection of signboards and advertisements.

As part of the efforts to raise building standards, the YCDC is also updating regulations concerning building contractors. Examples are:

- the cost of a licence deposit has increased from MMK5m ($3,700) to MMK20m ($15,000) for small contractors and MMK20m ($15,000) to MMK50m ($37,000) for larger operators;
- the requirement that contractors obtain a licence before undertaking any kind of building work in Myanmar;[15]
- the requirement that builders leave a deposit of MMK3m ($2,220) per building with the YCDC, which can only be regained after the building is completed;[16]
- the requirement that contractors have one mandatory electrical transformer with every new construction;[17] and
- the requirement that contractors secure agreement from ten neighbouring houses or apartments – up from only two previously – before starting a construction site.[18]

The recent mass review of high-rise building projects made it clear that strict policies, rules and regulations on high-rise buildings are necessary to tackle non-compliance

Along with these amendments, contractors' expenses have increased significantly, causing some to lament about cashflow problems as their money gets tied up with no interest.[19] However, it is submitted that the increase in the deposit will benefit Myanmar's construction industry in the long run as contractors will be compelled to comply with the applicable rules and regulations, as they risk forfeiting their deposit money if they violate regulations or carry out unapproved construction.

Further, the recent mass review of high-rise building projects, which found that many approvals have not been in line with the law, made it clear that strict policies, rules and regulations on high-rise buildings are necessary to tackle non-compliance.[20] In response to this, the YCDC is currently drafting new rules and regulations for high-rise buildings (ie, nine stories or more) to prevent overcrowding in the city's metropolitan area.[21]

On a national level, the Chief Minister has also indicated that as part of the YRG's broader development agenda, the YRG are looking at:

- developing policies and procedures for the systemic granting of building permits in Yangon;
- upgrading existing wet markets and exploring the feasibility of multistoried buildings to house such wet markets and car parks;
- upgrading the 29 industrial zones to ensure electricity, water supply and proper waste treatment; and
- upgrading bus, train and water taxis along the Yangon River.[22]

Accordingly, with the influx of businesses and an increasing population in Yangon, these initiatives by the YRG and YCDC to improve laws, regulations and assessment procedures are certainly welcome.

Myanmar's National Building Code

The Myanmar National Building Code (MNBC) was drafted and circulated in 2012, when there were few high-rise buildings in existence. While the draft MNBC has been in existence since that year, it was not enacted because it would have been difficult for local contractors to adhere to the code. In their submissions, developers and contractors would refer to various codes, for example, the British, Indian and Singaporean codes, and permits have been issued on that basis.

Since 2013 amendments to the code have been ongoing, and these amendments apply to all buildings, with a focus on the construction of municipal buildings, such as schools and hospitals.

In view of the fact that natural disasters such as earthquakes, cyclones, storms and flooding are common in Myanmar, fire safety, extreme weather and natural disaster measures are also to be included in the code. This will help to achieve one of the main objectives of the MNBC, which is to ensure structural resilience from these potential disasters so that safety is not compromised, destruction is minimal and development gains are not vulnerable to their occurrences.[23] Further, the increase of high-rise buildings over the years pushed for a need to amend the existing rules, which have been deemed unsuitable for high-rise development.[24]

The new code will require approval from the Ministry of Construction before it can be implemented. Although it was reported in August 2016 that the Ministry is making efforts to release the new MNBC, as of November 2016, it has yet to implement the new MNBC.[25]

Proposed YCDC-Licensed Contractors Association

Apart from the enactment of laws, contractors are also taking the initiative to assist in their implementation and provide 'on the ground' feedback. In light of the increasing number of licensed contractors in Yangon and the tightening of rules and regulations by the YCDC, Yangon's licensed contractors are considering banding together to form an association. The proposed YCDC-Licensed Contractors Association's main purpose will be to help Yangon authorities ensure applicable rules and regulations are adhered to and deal with problems collectively.[26]

Previously, the YCDC was unable to impose its rules effectively, resulting in low-quality buildings and it is envisaged that this new association will prevent its recurrence. Further, through this forum, the YCDC can better understand the problems contractors face, address their concerns and administer the system more effectively.

Hsinbyume white pagoda, Mingun, Myanmar. Credit: Avigator Thailand/Shutterstock.

Construction contracts

As for the contracts entered into between parties, the most common type of contract used in Myanmar's construction industry is the simplified version of the Standard Form of Contract published by the Joint Contracts Tribunal (JCT) and FIDIC,[27] as their projects are largely engineer driven. The Singapore Institute of Architects Articles and Conditions of Building Contract have also been modified for use in construction projects in Myanmar.

Investment laws

Apart from the zoning and building laws specific to the construction industry, there are two investment laws that are also relevant to continued investment in this space.

Condominium Law

Pursuant to the Condominium Law passed in January 2016, foreigners now have the right to buy up to 40 per cent of condominium apartments in a given block, provided the condominium building is at least six storeys high.[28] To qualify under the law, a building must meet the following main requirements:

- the licensed developer must construct the building on collectively owned land;
- the land shall be of a type that may be utilised for residential development as well as for which right of ownership/title may be transferred;
- the land must be registered through local authorities as collectively owned land, even if the developers are the actual owners of the land;
- before the project is developed, the developer must obtain the approval of the Ministry of Construction to have the building qualified as a condominium;
- after construction is complete and the building is inspected, an 'occupancy permit' must be obtained; and
- the condominium must be constructed on a land area of at least 20,000 feet.

The Condominium Law also provides a legal framework allowing for the financing of condominiums, as there is no limitation on financing for foreign buyers, who may seek financing from abroad. In light of the fact that the number of condominium units in Myanmar is five times more than the number of Myanmar citizens who can afford such a unit,[29] the Condominium Law was envisaged as a promising legislation that would usher in a spate of foreign purchases and give the stagnant property market a much-needed boost.

However, ten months on, such expectations have proven unfounded. Few foreigners have bought a condominium as they are waiting for the issuance of the by-laws, which would provide clarity on whether foreign buyers can buy in collaboration with banks. In particular, the question of ownership is unclear because under the Condominium Law, condominium owners shall have shared ownership of both the land and apartment; however, existing laws in Myanmar prohibit foreign entities from owning land.[30] Thus, although banks may offer mortgages for condominiums built on private land if they have a specific land area and comply with other stipulations in the Condominium Law, banks cannot offer mortgages for build-operate-transfer (BOT) projects (owned by Myanmar government entities) until the by-laws have been passed.

Further, the law also does not allow foreigners to 'manage' condominium units, which raises the question as to whether they can rent out the units. In this regard, the much anticipated by-laws, targeted to be released by end of 2016,[31] should provide clarity.

Myanmar Investment Law

The long-awaited Myanmar Investment Law was passed on 18 October 2016. The new law combines the 2013 Myanmar Citizens Investment Law and the 2012 Foreign Investment Law (Foreign Investment Law).[32] However, the by-laws are yet to be approved and are expected to be released by end of March 2017.[33]

The Myanmar Investment Law has been widely anticipated, and is part of the government's efforts to continue to attract foreign investment. The authority that regulates this law, the Myanmar Investment Commission (MIC), stands as the gateway to foreign investment. Certain categories of investments that require or obtain a permit from the MIC are afforded certain benefits, such as tax incentives, longer land leases and a specific procedure to repatriate money.

For the new law, one key aspect is that some decisions regarding investments would be decentralised from the MIC to states and regions, although not in all cases. Some tax exemptions, previously in place for companies with foreign investment, will also be removed as part of attempts by the government to level the playing field for local and foreign companies.[34] The new law also allows companies that invest in a less developed region to obtain higher tax exemptions.[35]

The new law allows companies that invest in a less developed region to obtain higher tax exemptions

New approval processes for land leases and tax incentives have also been put in place, so that accessing such benefits may not be as costly or time-consuming as before.

As per the previous Foreign Investment Law, notifications and guidelines will be issued as to whether a foreign company is able to operate as a wholly owned foreign company, or whether a joint venture and local shareholding is required, depending on the nature of the investment. This may have an impact on developers and contractors in terms of how they may operate in the country. With a view to cutting red tape and facilitating further investment into the economy, we look forward to what the new Myanmar Investment Law will bring.

Dispute resolution

Apart from the building and investment laws, a key area in legal infrastructure is dispute resolution.

Recent developments demonstrate the country's willingness and enthusiasm to position itself as an arbitration-friendly jurisdiction

In recent years, Myanmar has been taking steps to enhance foreign investors' confidence in Myanmar's legal system as the country looks to attract increased levels of foreign investment. A common concern for foreign investors is the available channels for dispute resolution. Foreign investors tend to prefer arbitration in a neutral venue over dispute resolution by the local courts, as arbitration is less time-consuming, more professional, kept private and less prone to local bias.[36] To alleviate these concerns, the Myanmar parliament enacted the Arbitration Law 2016, following its accession to the New York Convention in 2013. These changes mean that there will be a system to enforce foreign arbitral awards in Myanmar and are indicative of Myanmar's growing receptiveness to arbitration as an alternative dispute resolution. Accordingly, they reassure foreign investors that Myanmar is a place to invest and conduct business safely.

Apart from having a system in place to facilitate arbitration, Myanmar has also been taking steps to ensure that the stewards of this system are familiar with international commercial arbitration. Arbitration seminars and workshops such as those conducted by the International Chamber of Commerce (ICC) at the Union of Myanmar Federation of Chambers of Commerce and Industry (UMFCCI) in Yangon is one such initiative.[37]

Further, to boost local arbitration infrastructure, the UMFCCI is also taking steps towards setting up an independent arbitration centre, which will deal with and mediate economic disputes across the country.[38] The first arbitration centre will be at the UMFCCI headquarters in Yangon, with plans to set up more across the country.[39] In this regard, experts from the Singapore Mediation Centre were invited to Yangon to share their experience and expertise. This represents an opening of their own legal mindset and willingness to adapt to the new arbitration system.

Although arbitration is still a new form of dispute resolution in Myanmar, where the interpretation of the Arbitration Law has yet to be tested in domestic courts, recent developments nonetheless demonstrate the country's willingness and enthusiasm to position itself as an arbitration-friendly jurisdiction.

Conclusion

From the above, we see that the government is making efforts to evolve its laws and secure its urban planning, so that more investors will be encouraged to venture into Myanmar. With that in mind, we hope to see further developments and continued progress in the country.

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Legal aspects of Building Information Modelling: a world view (Part II)

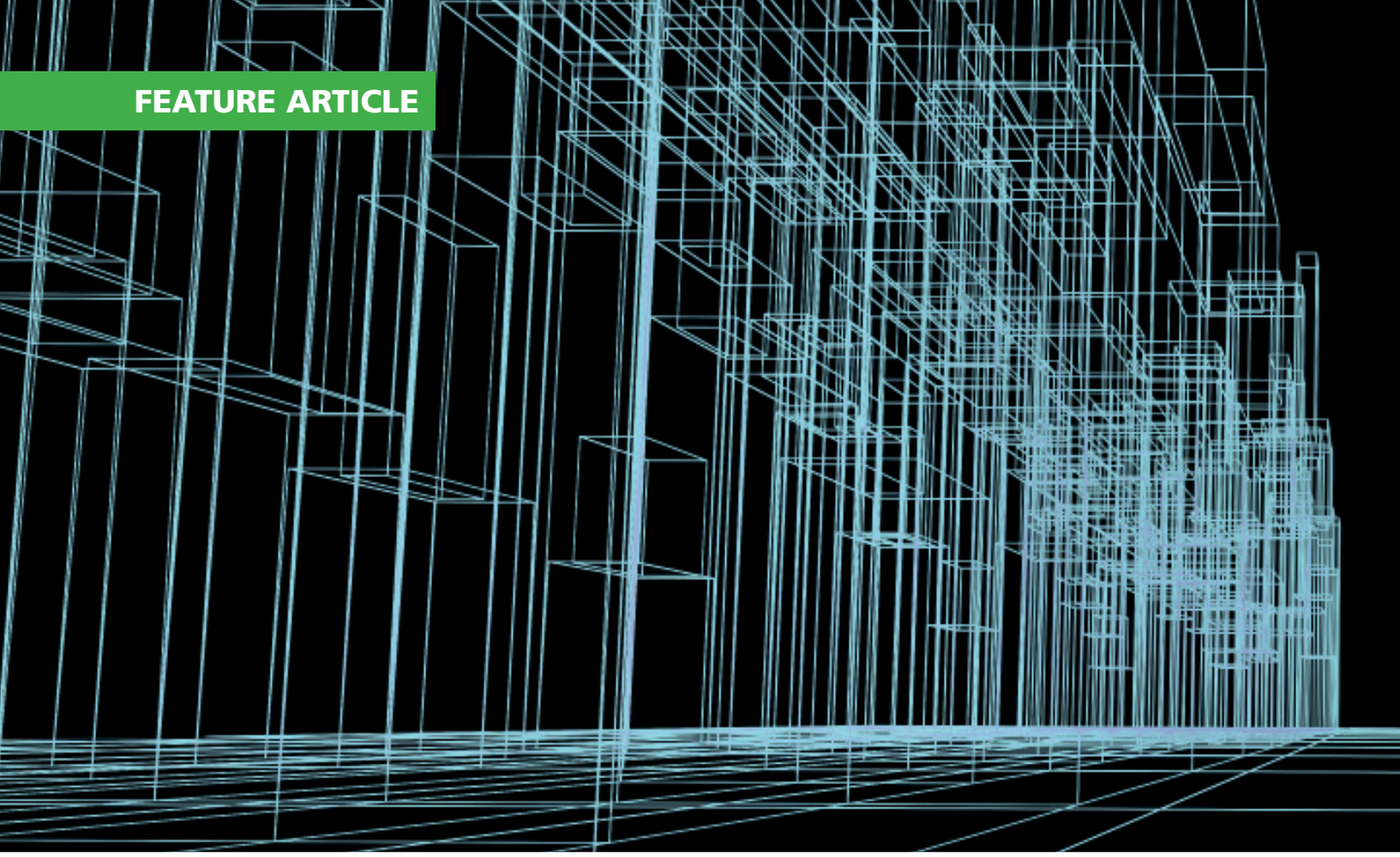
Building Information Modelling (BIM) is increasingly in the spotlight as its use starts to increase around the world. This article analyses legal aspects of BIM in six different jurisdictions: Brazil, Canada, Denmark, Ireland, theUK and the US. The content of this article was presented at the session on 'Building information modelling (BIM): progress in adoption and the legal and contractual implications' organised by the International Construction Projects Committee for the IBA Annual Conference held on 22 September 2016 in Washington, DC.

This article analyses legal aspects of Building Information Modelling (BIM) in six jurisdictions: Brazil, Canada, Denmark, Ireland, the United Kingdom and the United States.

This is the second part of an article based on a session entitled 'Building Information Modelling (BIM): progress in adoption and the legal and contractual implications', organised by the International Construction Projects Committee for the IBA Annual Conference held on 22 September 2016 in Washington, DC. Part I of this article was published in the December 2016 issue of *Construction Law International*. In Part II, the authors address the questions of contract structures, insurance, data and lessons learned.

What contract structure would ideally be used?

Across the jurisdictions herein considered, there is a consensus that while BIM can bring benefits under employer-led traditional design-bid-build procurement contracts (in so far as BIM is specified correctly), it offers greater benefits through early contractor engagement (ie, two-stage tendering) or



where there are collaborative contracts. It is therefore considered that the two-party model is not the optimum one for the full benefits of expanded social BIM to be realised. BIM in that form is a collaborative process. Ideally, the consultants and the contractor would be appointed on a common basis, working to deliver a set of building information models, but being contractually required to adopt common ways of working.

Early engagement of all involved parties, including the design team, contractor, key subcontractors and building end-user, with a view to total expenditure (totex) over the life of the building, not capital expenditure (capex) of construction of the building, would be preferred. This is on the basis that this leads to greater savings either in programme or cost, and to take account of benefits over the project life cycle.

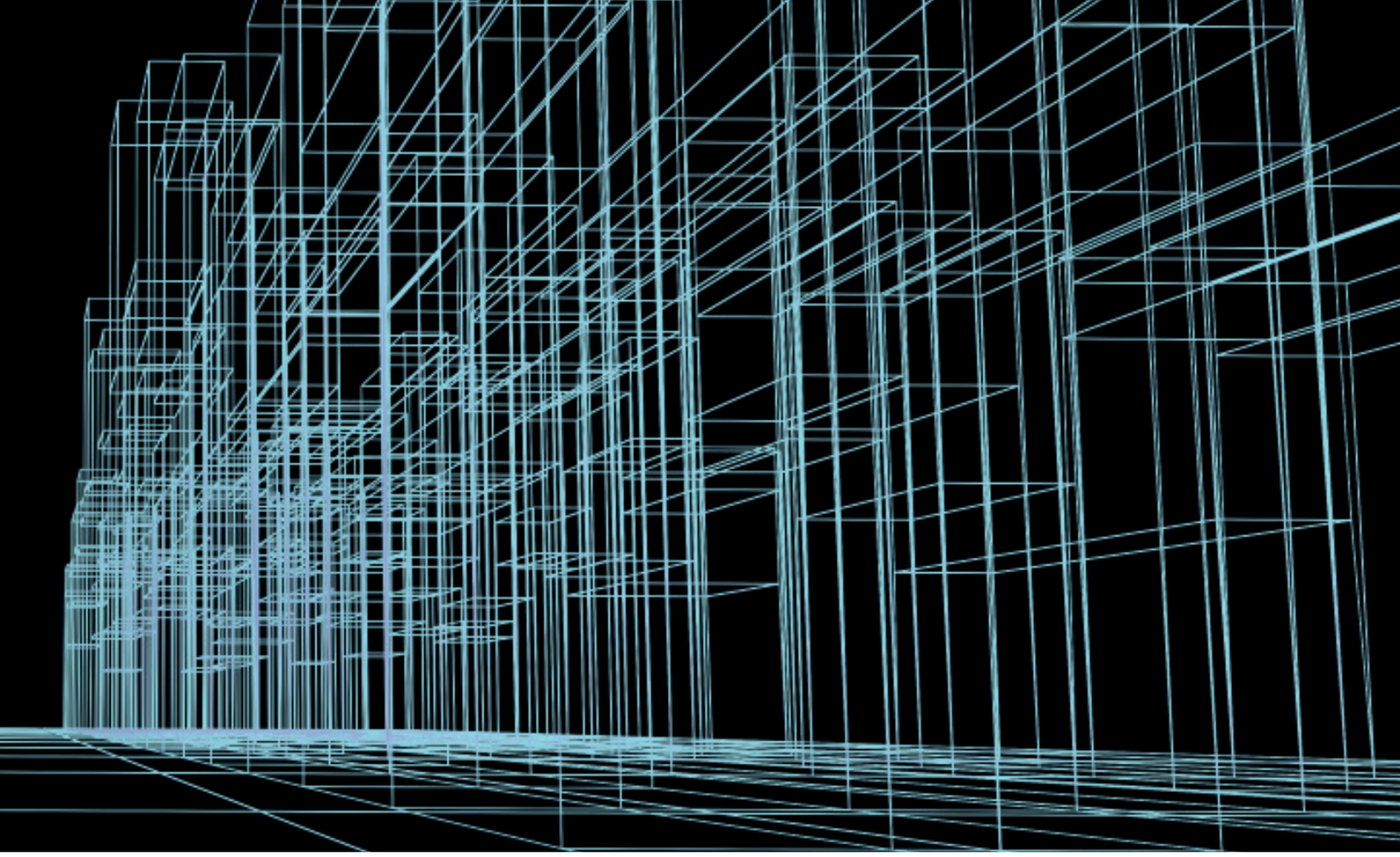
The integrated project delivery (IPD) model may be more effective to promote collaboration among the parties. This model requires early involvement of all project team members and decision-making processes based on what is 'best for project', with a built-in incentive and risk allocation structure supporting that approach. However, the use of the IPD model has accompanying risks, for example, with regards to the allocation of liability, as it requires the participants to the project to develop a much more symbiotic mindset than under a two-way contract. Mutual waivers of claims and a robust dispute resolution mechanism may temper the risks of multiparty contracting. This may work best when backed by insurance.

While IPD is not required for BIM to be utilised, there is a widely held view that the benefits of BIM can only be fully realised where IPD is used.[1] The entire purpose of BIM as an efficient and cost-saving technology depends on collaboration, which IPD is geared towards.

How is the insurance market responding to BIM?

Brazil

Given the early stage of the use of BIM in Brazil, there has not been any effective impact in the Brazilian insurance market so far. The current insurance market practice in Brazil is that, usually, the owner procures an all risk insurance policy for the project and imposes the contractual obligation for each party (designer, contractor and suppliers) to procure specific insurance policies (including, eg, professional liability/errors and omissions,



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workers compensation, life insurance and commercial general liability).

With the development of BIM in Brazil, some complexity may derive from the operation of various parties' insurance in relation to the parties' work in BIM (ie, cross-liability and waiver of subrogation).

Given that the use of BIM will certainly increase in Brazil, the Brazilian insurance market will have to take into consideration the particularities of the use of BIM by possibly revising the insurance policies and perhaps offering special premiums for projects that imply such a use, because it could be argued that there would be a reduction of risks – and thus exposure of liability from insurance companies – as a result of the use of BIM.

Canada

The Insurance Bureau of Canada has not yet introduced any specific policy wording that is applicable to BIM. In the BIM context, an inherent risk is the blurring of risk allocation between the members of a BIM project. Ultimately, as with any insurance product, insurers will need to develop risk allocation policies specific to the use of BIM software and the risk allocation within the contracts.

Denmark

Currently, the Danish insurance market includes no coverage restrictions due to the use of BIM. Insurance companies do not (yet) see BIM as a special area; they consider BIM to be a tool among other tools. Consequently, the traditional insurance model is still used in Denmark, which means that the parties take out their own policies to cover their risks, and that no endorsement or policy modification is required.

United Kingdom and Ireland

The Construction Industry Council (CIC) has published a *Best Practice Guide for Professional Indemnity Insurance* when using building information models. In both the UK and Ireland, this guide contains the generally accepted advice.

In terms of the insurance market, the current position is that although parties operating in a BIM environment should disclose this to their broker or insurer because it is likely to be a material fact relevant to coverage, there are no coverage restrictions due to a project either applying Level 2 BIM or a BIM light model operating outside the CIC BIM Protocol. Insurers currently regard use of BIM as not making

any material change to the risk profile on a contract and indeed consider it to be a risk mitigation tool. This means that no endorsement or policy modification would be required. There are also minimal, and maybe no, premium implications.

Insurers are generally comfortable with the CIC BIM Protocol because it provides a clear liability picture. It is regarded as 'best practice'. The advice, if either the CIC BIM Protocol is amended or other protocols are used, is to discuss this on a case-by-case basis with the insurance brokers authorised to write business in the relevant jurisdiction.

Insurers are keen to have clarity on roles and responsibilities of the professional design team consultants, contractors and key subcontractors regardless of the BIM Protocol adopted. For CIC Level 2 BIM, insurers are comfortable on the basis that lines of responsibility are clear and it is possible to identify which party is the author of any models passed to the information manager.

In the future, the market may move towards Integrated Project Insurance, where all parties are covered on a no-fault basis, with each party contributing a percentage of the premium. This is available through certain insurers in the UK and Irish insurance markets now, although on a limited basis and without the benefit of reinsurance coverage. In practice, such policies are expensive and limited in terms of the level of coverage available.

United States

As a general rule, a number of insurance products are employed for most significant construction projects. These primary policy types include: professional liability, general liability and builder's risk. It is not uncommon for these primary coverages to be supplemented with additional coverages, including cyber liability, subguard, permanent property risks, and loss of use and delayed startup coverage.

Under the traditional design-bid-build model, the design professional typically carries professional liability coverage and is covered under it. Similarly, the general contractor and its subcontractors typically carry primary general liability policies applicable to the project, and the owner frequently purchases builder's risk property policies.

The traditional design-bid-build model also relies on well-defined responsibilities. The design professionals are not responsible for construction means and methods, and the general contractor is not responsible for design production, deficiencies and errors.

The more evolved implementations of BIM provide the potential for all project participants to contribute to and modify the design. Many BIM implementations also provide significant opportunity for design professionals to willingly, or perhaps unwillingly, advise upon and influence the means and methods of construction. The result is a blurring of the traditional lines of responsibility.

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This has the potential for leaving gaps in insurance coverage. By way of example, a general contractor who actively modifies a project's design through the BIM model may be inserting design errors. Such errors are potentially not covered by the contractor's general liability policy, and the contractor cannot be covered under the design professional's professional liability policy. A potential coverage gap may be the unintended result.

Another shift in traditional risks relates to cyber liability. Under the traditional design-bid-build approach, the design professional prepares its design within its offices and stores it on its computer servers. The final design is provided to the general contractor as printed construction documents or as read-only electronic files. The general contractor is not allowed access to the source files or to the design professional's computer servers. Under many BIM implementations, all project participants have access to the source documents and the common server on which they are secured. Such broad access increases the possibility of security breaches and cyber theft.

Many owners attempt to address these issues through the implementation of an owner controlled insurance programme (OCIP). Such programmes are also often referred to as 'wrap policies' or 'wrap coverage' to indicate the intent of wrapping all required policies into a single, project-specific programme. Depending on the coverage available, OCIPs can effectively insure the BIM-related issues. It is anticipated that, as the use of BIM evolves and becomes more relevant, more insurers will offer products specifically written to address BIM liabilities.

What issues may arise in relation to the use of data?

Brazil

In Brazil the employer usually owns and manages the model. However, as the BIM technology/process is based on the contributions of several parties involved in the same project, the intellectual property rights over such contributions are usually claimed by each contributor.

In cases where the contractual provisions in relation to BIM are inadequate or non-existent and BIM is used on a project, there are several risks associated, especially in relation to contributions and intellectual property rights. Adequate contractual provisions regarding the use of BIM could undermine such risk by addressing the parties' access to and use of the contributions (granting licences or sublicences), joint authorship and confidentiality of the information shared.

As an example, if the contracts do not have specific clauses ensuring that all contributors:

(1) warrant that they hold the intellectual property rights over their contributions; and (2) provide an indemnity to all the other parties who may use such contributions in the event of a third-party intellectual property dispute, there might be a risk of all such parties being liable for an intellectual property rights infringement.

The same applies to other liability issues related to the use of BIM. It is important that the contracts are very clear and detailed on the liability of each of the parties involved for the model, data in the model, corruption of data, software defects and use of data provided. All these issues require addressal in the contracts between the parties involved in a project, stating who will bear the risks/costs of each situation and the limitations of liability that shall apply.

With regard to the mitigation of data corruption risk, it is suggested the contract provides for excluding liability for any use of a model for purposes other than those intended (including data corruption).

Canada

Intellectual property concerns include the protection of data and the propensity for data corruption. Under the AEC (CAN) BIM Protocol's terms of usage from consultant to constructor, an acknowledgement is included that BIM project files may represent an imperfect data file with the potential to contain errors, omissions, conflicts, inconsistencies, improper use of modelling components and other inaccuracies. The terms of usage also include that all subcontractors will be bound to the same terms of usage and that neither the constructor nor any subcontractors working on the project will be permitted to transmit or share the information contained in BIM project files to any third party.

AEC (CAN) also recommends that proprietary information in the BIM project files can be protected by including a copyright notice on a drafting view which serves as the default when opening the model. An example of a copyright notice from the IBI Group is included in the protocol:

> 'Any reproduction or distribution for any purpose other than authorised by IBI Group is forbidden. Written dimensions shall have precedence over scaled dimensions. Contractors shall verify and be responsible for all dimensions and conditions on the job and IBI Group shall be informed of any variations from the dimensions and conditions shown on the drawing. Shop drawings shall be submitted to IBI Group for approval before proceeding with fabrication'.

In Canada, the Institute for BIM contract documents also do not contain any warranty with respect to the integrity of electronic data

In Canada, the Institute for BIM contract documents also do not contain any warranty with respect to the integrity of electronic data.

Denmark

In Denmark, the information and communications technology performance specification normally includes obligations related to the format, exchange and authorship of data. The current position is that, when designing and making calculations with a BIM model, architects and engineers disclaim their liability for the model. They extract two-dimensional (2D) drawings from the model and are liable only for such drawings. They merely submit the three-dimensional model to the contractors as inspiration. This has resulted, for example, in a case in which the BIM-model included a wall as intended, but the 2D drawings did not. The architect was therefore liable for the error.

As architects and engineers are still contracting on the basis of 2D drawings, there has not yet been any change in relation to intellectual property rights defined in the contracts. There is a clause stating that the BIM model only serves as inspiration. In these cases, the contractors often make their own BIM model.

When the contractors contribute to the project, it makes no difference if they make the changes through a BIM-model or on 2D drawings. If the contractors make any changes, they risk becoming liable for any errors in their changes.

In relation to copyright regulation, there have been no changes. There is, however, no case law in this area yet.

Ireland

In Ireland there can be a misconception that there is a single BIM model for a project. In CIC BIM Level 2, which is the BIM model most commonly in use in Ireland, there are

separate professional discipline/contractor/subcontractor supplier models.

The project team members own and are responsible for their elements of design and information (their model). Models can be federated (brought together) to present a combined model but the underlying individual models are the legal design/construction 'deliverable'.

A project team member's intellectual property in Ireland is protected under law irrespective of whether that information is digital or paper-based. Nevertheless, there is some concern in the industry about the impact of BIM on intellectual property rights in construction design and information, particularly where the design is produced in a collaborative BIM environment.

The owner's right to use construction design and information has always existed and is included within express intellectual property provisions in standard form contracts for both public and private sector projects. The right further allows the owner to share the design and information with other parties involved in the project.

Liabilities for data corruption, security, software exchange and use of information for the purpose they were prepared or produced are covered in the CIC BIM Protocol

In light of the concerns about the infringement of intellectual property rights that could arise from the implementation of a BIM form of working, the CIC BIM Protocol has laid down clear provisions about the management and licensing of those rights, which enable the respective models to be used by the project team, while at the same time safeguarding the intellectual property rights of the individual project team members. Liabilities for data corruption, security, software exchange and use of information for the purpose they were prepared or produced are covered in the CIC BIM Protocol.

Data issues should be dealt with in the Employer's Information Requirements (EIR) and BIM Execution Plan (BEP) and, where these are not applicable, in the underlying consultant appointments and/or building contract. It remains to be seen in Ireland whether or not the infringement of intellectual property rights is no more or less likely to arise in a BIM project than in non-BIM projects.

UK

The CIC BIM Protocol contains provisions relating to data. It provides that project team members do not warrant, expressly or impliedly, the integrity of any electronic data delivered in accordance with the protocol.

Further, project team members have no liability to the employer in connection with any corruption or unintended amendment, modification or alteration of the electronic data in a specified model that occurs after it has been transmitted by the project team member, except where such amendment, modification or alteration has occurred as a result of the project team member's failure to comply with the protocol.

The CIC BIM Protocol also makes provision in respect of use of models, including in respect of the material (defined broadly as meaning all information in any electronic medium prepared by or on behalf of the project team member and comprised in the models) and the models themselves. Rights (including copyright) in the material remain vested in the project team member. The employer is given a non-exclusive licence (and sublicence if required) to transmit, copy and use the material and any proprietary work contained in the material for the permitted purpose.

'Permitted purpose' is defined as meaning any purpose related to the project (or the construction, operation and maintenance of the project) which is consistent with the applicable level of detail of the relevant model and the purpose for which the relevant model was prepared.

The licence and sublicence granted may be suspended or revoked in the event of non-payment to the extent the licence provides for this.

Importantly, the licence does not include the right to amend or modify the material without the permission of the project team member, except where that amendment or modification is provided for in the information requirements or made for the permitted purpose following termination of the project team member's employment under their contract. It also excludes the right to reproduce any proprietary work contained in the material for any extension of the project.

There are also provisions for grant by the

employer of licenses/sublicenses to project team members in respect of the work of other project team members on the same basis as above.

The CIC BIM Protocol provides that the project team member has no liability to the employer arising out of any modification or amendment to, or any transmission, copying or use of, the material, or any proprietary work contained within the material, other than in respect of permitted purposes. There is a reciprocal provision providing that the employer, similarly, is not liable to the project team member.

US

BIM models are subject to the same copyright laws as designs in traditional design-bid-build procurements. As a general rule, the author of the work holds the copyright. This general rule however, is easily changed through written agreement.

In the US, BIM models are subject to the same copyright laws as designs in traditional design-bid-build procurements

In traditional design-bid-build construction, it is not uncommon for the owner to require the design professional to assign all of its copyrights to the owner. This is especially prevalent on projects performed for the federal government and other public entities. That being said, it is also not uncommon for design professionals to retain the copyrights in their work product. This is often seen in privately financed construction projects.

On projects where the contract documents require a full assignment of all copyright and intellectual property rights to the owner, BIM adds very little to no additional complexity. Indeed, because the owner owns all rights in the work product of the parties, there is no intellectual property need to track authorship or contribution.

The issue becomes more complicated in projects where design professionals or general contractors retain the intellectual property and copyrights. In such instances the lines between which party authored the design and which party is a mere user may become blurred.

The American Institute of Architects (AIA) has published a form BIM Protocol exhibit to accompany its various form contracts. AIA document E202 is titled 'Building Information Modeling Protocol Exhibit', and is suggested for use on projects where BIM is utilised. The E202 relies on the intellectual property and copyright allocation of the applicable underlying agreement. In addition to relying on the intellectual property terms of the underlying agreement, the E202 also addresses ownership of the BIM model. It provides that the author does not convey any ownership right in the content provided or in the software used to generate the content. In addition, unless otherwise granted in a separate license, any subsequent party's right to use, modify or further transmit the model is specifically limited to the design and construction of the project, and there is no right to use the model for another purpose.[2]

ConsensusDocs has also published an addendum to be used on projects utilising BIM. The document is known as the ConsensusDocs 301 and is titled 'Building Information Modeling (BIM) Addendum'. Similar to the AIA E202, the ConsensusDocs 301 is intended as a supplement to the other ConsensusDocs forms. Article 6 of the ConsensusDocs 301 addresses intellectual property and copyright issues. This article provides for the grant of licenses to reproduce, distribute, display, make derivative works of and otherwise use for the purposes of the project: the contributor's contributions, the contributions of other project participants who have granted that contributor an identical license, and any model relating to the project to which that contributor has intellectual property rights.[3]

Both the AIA and ConsensusDocs approaches are to primarily rely on the intellectual property and copyright provisions of the underlying agreements. This is indicative of the typical approach on privately financed projects. The approach may vary on publicly financed projects, where the owners typically insist upon obtaining all intellectual property rights.

Conclusion: lessons learned

Experiences from BIM projects in the jurisdictions contributing to this article brought out the following common themes:

- to gain best results, secure the early

commitment of all parties to the process and back that up with the early establishment of protocols to regulate how the process is to operate;
- better understanding of the project results from the early stage involvement of the various parties, and allows the development of cost-saving ideas and improved efficiency;
- improved coordination at the design stage can lead to benefits during construction, including improved design coordination, clash detection and early change management;
- the end-user benefits by being able to do a virtual 'walk through', allowing 'in use' issues to be identified and resolved at the design stage;
- consider what the employer/end-user requires from BIM in order to operate and manage the building – data is not required for every component;
- on a practical level, work from a dedicated server, which is backed up each night to avoid issues with loss of data and has robust measures in place for the security of data;
- collaboration needs to be more than just words in a contract – positive measures are required to secure all-party buy-in to it, for example, using a 'Big Room': one office from which all those involved operate, allowing regular and easy communication;
- do not make it more complicated than it needs to be, and be realistic with the goals to be achieved; and
- keep in mind that BIM is a tool to facilitate the construction process – it should not be the project's master, and its implementation should be reasonable and flexible.

Notes

1 *Integrated Project Delivery for Public and Private Owners* (2010), NASFA, COAA, APPA, AGC, AIA www.consensusdocs.org/News/Topic/IntegratedProjectDelivery accessed 24 February 2017.
2 AIA E202, s 2.2 (2008).
3 ConsensusDocs 301 – Building Information Modeling (BIM) Addendum (2008, Revised 2015).

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Time-related obligations in Austria[1]

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This article describes a series of time-related concepts under Austrian law, including liability for delays, how these types of risks are assigned under the law and under the standard forms in Austria, and how concurrent delay is understood, in addition to other relevant concepts, such as burden of proof.

Introduction

Contractors and owners in construction projects all over the world face similar issues when they need to determine who is responsible for completing the project within the foreseen period of time.

Austria has its own distinct approach on how to manage and resolve these issues. To clearly understand time-related obligations in Austria, and specifically, how concurrent delay is dealt with in this Central European jurisdiction, it is necessary to distinguish between two types of delays, because Austrian legislation regulates the existence of a creditor delay and a debtor delay. Depending on the type of delay (whose delay it is), the consequences vary radically.

Austrian legislation regulates the existence of a creditor delay and a debtor delay. Depending on the type of delay, the consequences vary radically

A note of warning: in Austrian law the principle of 'concurrent delay' does not exist, as such. Nevertheless, the Austrian Civil Code does, of course, stipulate a number of provisions regarding delay and its consequences. These regulations, however, resolve cases in which both parties are simultaneously liable for delays.

With that said, an overview of the types of delay in Austria follows below.

Debtor's delay

Section 918 of the Austrian Civil Code establishes that: 'If a contract for consideration is not performed by one party either at the due time, the due place or in the agreed way, the other party can request either performance and damages due to the delay, or declare rescission from the contract subject to a reasonable period of time to deliver performance'.[3]

Therefore, if the performance is not completed at the time stipulated in the contract, performance is considered to be in delay. If the parties do not agree about the time to complete the performance, then it has to be achieved within a reasonable time. What is reasonable depends on the nature and purpose of the contract.

In cases of delay, the debtor bears the risk of loss or damage. There are two types of delay according to Austrian law.

The first type of delay occurs without the debtor (contractor) being at fault. In this case the creditor (owner) is entitled to insist on specific performance or to withdraw from the contract by giving a reasonable period of grace. Obviously, no damages are to be paid in favour of the creditor.

The second type of delay is caused by negligence on the part of the debtor. Naturally, in addition to the aforementioned remedies, the creditor is entitled to damages. The amount of damages depends on whether or not the contract is terminated by the withdrawal of the creditor.

If the creditor decides to insist on specific performance or if the debtor performed within the period of grace, the creditor can seek damages for the delayed performance (eg, rent for the creditor's old apartment if the contractor is late in building the new house for the creditor). In the event of termination of the contract, the creditor is entitled to damages because of the non-performance (eg, the difference between the originally stipulated price and the price of another construction firm completing construction of the house).

Creditor's delay

According to Austrian law, the creditor generally is under no obligation to accept the performance of the debtor. Hence, the debtor is not entitled to legally enforce acceptance of performance. If acceptance of due performance is refused by the creditor, a creditor's delay occurs. This delay on the part of the creditor may trigger other legal consequences. From the moment that acceptance of conforming performance (ie, the offer of non-defective performance in due time) is refused, the creditor must assume the risk for loss or damage (eg, for materials provided by the contractor).

Additionally, in some cases (eg, in construction law) the creditor has to cooperate with the debtor or deliver plans in order to enable the debtor to perform. If the creditor does not meet its obligation to cooperate, the debtor is then entitled to request the agreed payment. In some cases the debtor is even entitled to terminate the contract.

Risk

A so-called 'contract for work' (eg, construction contract) obligates the contractor to carry out certain work. However, the contractor fundamentally owes a specific successful performance (the works). This type of contract is duly regulated in Austrian law, which contains specific rules concerning 'contracts for work'.

These regulations establish that each party has to bear the risk occurring in its particular sphere of responsibility, independent of fault. The responsibility for delay without fault is regulated in the Austrian Civil Code (section 1168, see point 11) for 'contracts for work'.[4]

Section 1168 of the Austrian Civil Code provides that in the event of a delay caused by circumstances falling within the sphere of the owner, the contractor still has the right to be remunerated. Furthermore, he may ask for additional payment on the basis of the delay. This additional payment is considered as remuneration and not as damages.

Owner's sphere of responsibility

As mentioned above, the sphere of responsibility is important when determining which party bears the risk.

The materials provided and instructions given by the owner (final sentence, section 1168a of the Austrian Civil Code) belong to the owner's sphere, in addition to all other circumstances that interfere with the work and are attributable to the owner.[5]

This includes, for example:

- official permits;
- plans;
- coordination of the principal's contractors;
- commissioning of a planning coordinator and a construction site coordinator (obligation under ÖNORM, point 5);
- notification of any installations (eg, pipes);[6] and
- providing materials: if contractually agreed the principal has to provide the necessary materials in time; materials are the site, including sub-surface conditions, construction materials or services that are provided by the principal.[7]

Contractor's sphere of responsibility

The contractor's sphere includes risks inherent to its respective duties and obligations, for example:[8]

- the technical procedure of operation;
- the supply of materials;
- acquisition of the workforce;
- obtaining necessary permits in time in order to provide services;
- calculations; and
- contractual obligations to examine the employer's documents.

Neutral sphere

Circumstances that cannot be attributed to a specific party of the 'contract for work' fall within the neutral sphere.[9]

The Austrian Civil Code assigns the risk related to the neutral sphere to the contractor. Circumstances that do not come directly under the owner's sphere are therefore transferred to the contractor. However, parties are duly allowed contractually to agree on some other arrangement.

The Austrian ÖNORM B 2110 is the most popular standard form contract for construction contracts in Austria. Among other things, ÖNORM B 2110 regulates the neutral sphere differently to the Austrian Civil Code.

ÖNORM

General

ÖNORM B 2110, published and issued by the Austrian Standards Institute, is the most common standard form of contract used for construction contracts in Austria. However, it is not a legally binding national standard; to become legally binding, ÖNORM B 2110 must be explicitly agreed on by the contracting parties.

ÖNORM B 2110, published and issued by the Austrian Standards Institute, is the most common standard form of contract used for construction contracts in Austria

The parties to a contract do not commonly execute ÖNORM B 2110 unmodified; they usually adapt a number of clauses to the particularities of the project and the negotiated risk assignment.

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Rules regarding delay/transfer of risk in ÖNORM B 2110

The rules of ÖNORM B 2110 concerning the responsibility for hazards differ from the Austrian Civil Code. Under the Austrian Civil Code, as mentioned above, the owner is responsible only for circumstances falling within its sphere. The contractor is also responsible for circumstances belonging to the neutral sphere, as well as for those risks of its own sphere.

By contrast, in ÖNORM B 2110, the owner is furthermore responsible for situations arising from the neutral sphere under certain circumstances. Unpredictable incidents, such as uncommon weather conditions or strikes that were unforeseeable at the time of concluding the contract, do not usually belong to the contractor's sphere but the owner's.

Moreover, ÖNORM B 2110 (point 7.2.1. section 3) defines specific incidents that are allocated to the owner's sphere:

- incidents that obviously lead to a situation in which the execution of performance is impossible; or
- incidents that were unforeseeable at the time of concluding the contract and are therefore not reasonably manageable for the contractor.

Additionally, ÖNORM B 2110 states that, in the aforementioned circumstances, the contractor will only be exempted from liability if it has taken all possible measures to avoid such incidents.

All decisions based on tender documents for pricing, including the risk of incorrect calculation, and all dispositions of the contractor, including its choice of suppliers and subcontractors, are the responsibility of the contractor.

In addition, ÖNORM B 2110 provides that all risks are allocated to the sphere of the contractor, if not explicitly allocated to the employer.

Concurrent delay

As mentioned at the outset, the legal concept of concurrent delay, as such, does not exist in Austria.

However, it is, of course, possible for both the owner and contractor to be simultaneously in default.

It is possible for both the owner and contractor to be in a case of debtor's delay as they could be debtors of pending obligations. This situation will be discussed using the following case as an example:

The parties to a construction contract have agreed on a time schedule and payment schedule.

The time schedule determines all necessary deadlines and milestones regarding the construction of the building. The payment schedule refers to dates on which payments are due.

Owing to a lack of excavation support, the building pit collapses. As a result, the contractor cannot comply with the time schedule. Furthermore, the owner does not pay in accordance with the agreed payment schedule. According to the contractual schedules, the performances of both parties were due on the same day, independent of each other.

In this case, each of the parties is in a debtor's delay, which is probably the most common situation of concurrent delay in Austria.

Because the obligations are due independently of each other, the parties may insist on performance by the other party. They might also withdraw from the contract if a reasonable period of grace has been granted previously. The owner is entitled to damages as the lack of excavation support is probably attributable to the contractor. On the other hand, the contractor is entitled to ask for the due payment, including interest.

However, if, for example, access to the land is not granted to the contractor and the contractor at the same time does not have the equipment necessary to work in that specific area, the contractor can only ask for an extension of time (see 'Extension of time' below), but they will not be entitled to ask for additional payment (according to section 1168 paragraph 1 Austrian Civil Code).

Extension of time

In the event of interference by the owner based on changes in the contractual scope or duties, or if there is an absence of cooperation on the part of the owner, the contractor has the right to an appropriate extension of time for performance. Delayed delivery of drawings by the owner is one of the most common cases of lack of cooperation between the parties.

In such cases, the contractor's right to an extension of time depends on the extent of the delay. In general, delays for a period of eight to 14 days on the critical path are considered manageable. The delay has to be quantified on the basis of the services still to be provided and the economic strength of the contractor.

Manageable short delays that can be attributed to the sphere of the owner shift the due date accordingly. The time limit for liquidated damages will also be adjusted accordingly.

If delays attributable to the owner are significant, the time schedule becomes invalid. In addition, liquidated damages clauses are ineffective. The contractor is still obliged to perform, but instead of complying with the time schedule, the contractor only has to perform within a reasonable time.

The question of whether the time schedule is valid (manageable short delay) or not has to be decided by the courts on a case-by-case basis.

Burden of proof in the event of delay

Whoever claims a right bears the burden of proof for all causal circumstances. On the other hand, a person denying a right has to present evidence for his or her assertions.[10]

If the contractor claims for additional costs due to interference (ie, delay) on the part of the owner based on section 1168, paragraph 2, sentence 2 of the Austrian Civil Code, the burden of proof lies with it and it has to provide evidence that the reason for the interference falls within the owner's sphere of responsibility.

The question of whether the time schedule is valid or not has to be decided by the courts on a case-by-case basis

Should the contractor not have already presented the necessary allegations in its written pleadings – or at the latest in the first oral hearing – the court will dismiss the action as being inconclusive. As a result, the contractor will not even have the chance to provide evidence.

If the contractor succeeds in showing that the interference is attributable to the owner, the contractor then has to prove the consequences of the interference. The contractor must provide evidence of cause and effect.

The proof of cause and effect presupposes that the contractor first asserts and proves the cause (eg, delayed submission of drawings). Subsequently, the contractor must assert and prove the consequences or the effect. That means that the contractor has to prove that the delayed delivery of the drawings affected its services. In daily court practice this is very hard to prove, and contractors often fail to do so.

As concerns the monetary evaluation of obstruction consequences, there is a relief of the burden of proof for the contractor. The contractor may be obliged to provide proof for the additional costs incurred, but the court may estimate the additional costs, usually with the assistance of experts.[11]

As aforementioned, it is a condition for damages in Austria that one of the parties is in default. The contractor benefits from the reversal of burden of proof according to section 1298 of the Austrian Civil Code. The owner has to prove that it has not been in default.

To summarise, the contractor generally has to assert and prove that it is not responsible for the delay.[12]

Public procurement

Public procurement is governed by the Federal Public Procurement Law. Public Procurement Law defines the legal framework for the acquisition of goods and services by a public contracting authority.

Public Procurement Law ensures the equal and non-discriminatory treatment of all candidates and tenderers. In order to open contract negotiations for a competition, a request for proposals has to be published by the contracting authority. Only under certain conditions may the public authority conclude a contract without prior publication of a request for proposals.

In principle, the public contracting entity acts like a private contracting party but, of course, there are still some differences compared to other private contracting parties. A further important aspect is that there is legal protection for the private contracting party to ensure a fair balance of power between private contracting parties and with the powerful public opponent.[13]

These rules ensure the equal and non-discriminatory treatment of all parties and therefore lead to increased competition and more efficiency.

In accordance with section 97, paragraph 2 and section 99, paragraph 2 of the Public Procurement Law, the latest announced ÖNORM (eg, ÖNORM B 2110) must be considered in the request for proposals as it concerns construction contracts. However, amendments to an ÖNORM are permitted. The public owner has to record the amendments and put forward its arguments for the amendment, if requested by a bidder. According to the Austrian Supreme Court, there is no need for an objective justification for the amendment.[14]

Unlawful deviations from the ÖNORM violate the Federal Public Procurement Law

Nonetheless, unlawful deviations (eg, against good morals) from the ÖNORM violate the Federal Public Procurement Law.[15] A request for proposals containing such provisions may be challenged during the procurement procedure or may even be void.[16]

Methods in Austria for the calculation of delay

In Austria, there is no legally determined method for the calculation of delay. Neither contracts nor ÖNORM B 2110 define a method to calculate delay. Austrian law and contracts provide the possibility to claim for damages or liquidated damages in cases of delay. The calculation of delay and its pecuniary consequences is performed by the court with the help of an expert. Therefore, the stipulated construction schedule will usually be compared to the time within which performance has been affected.

Cancellation in accordance with section 1168 of the Austrian Civil Code

Austrian law is ruled, among others, by the principle of *pacta sunt servanda*. Although this is a very strong principle in the Austrian civil law tradition, section 1168 of the Austrian Civil Code, which applies to contracts for work in general (and for this reason, also to construction contracts), provides a rule for frustration of performance. Section 1168, paragraph 1 states:

> 'If the performance of the work remains undone, the agreed remuneration is still due to the contractor if he has been prevented by circumstances attributable to the purchaser; however, he has to set off what he saved due to the non-performance of the service or acquired due to alternative employment or wilfully missed to acquire. If he has been prevented from performing the work by delay due to such circumstances, he is entitled to a reasonable compensation'.

Paragraph 2 states:

> 'If the work is not performed due to the lack of the purchaser's necessary cooperation, the contractor is also entitled to declare a reasonable period of time to cooperate subject to cancellation of the contract after expiry of such period of time without results'.

Doctrine and jurisdiction deduce from this provision that the owner is entitled at any time to cancel the contract with the contractor. In a usual 'contract for work', the main interest of the contractor is remuneration. As the contractor's right to remuneration remains effective in the event of cancellation by the owner, the contractor has no right to perform its obligation.

If the contract is cancelled, the contractor has to set off what it saved due to non-performance. This means that the saved costs of performance, or an alternative employment opportunity, reduce the contractually stipulated payment. These circumstances have to be proved by the owner, so that the contractor can request full payment. Only if the owner is able to prove that there have been savings, (which is very difficult), will remuneration be reduced.

Very often parties stipulate that the owner is entitled to cancel the contract at any time without any reason and that the legal consequences of section 1168 of the Austrian Civil Code shall not apply. This common contractual clause might be void, as it is considered *contra bones mores* by some scholars.[17] However, there is judicature both confirming and refuting this opinion.

Conclusion

Austria has its own distinct approach on how failure to complete a project within the foreseen period of time is dealt with. Understanding the concept is crucial, as consequences vary significantly.

In the case of a debtor's delay, the owner may, even if the debtor is not at fault, insist on specific performance or withdraw from the contract by giving a reasonable period of grace. If the delay is caused by negligence, the creditor is entitled to damages additionally. A delay on the part of the creditor, by contrast, does not have the same consequences but requires the debtor to assume the risk of unforeseen loss or damage.

As concerns delay without fault, under Austrian law, each party has to bear the risk attributable to its particular sphere. Generally, the burden of risks not attributable to either sphere also lies with the contractor. However, the parties may choose to depart from this provision, just as a common Austrian standard form of contract does.

While a concept of concurrent delay strictly speaking does not exist in Austria, the aforementioned rules may resolve such problems as the owner and contractor may be in delay simultaneously.

Despite the complex set of rules on delay, practically, the burden of proof is of the utmost importance. As a rule of thumb, the contractor generally has to assert and prove that it has not been in default. It is thus advisable for the contractor to document any circumstances on the part of the owner that may have caused the delay.

Notes

1 This article has been adapted from a paper given in October 2016 at the IBA Annual Conference in Washington, DC.

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3 Eschig/Pircher-Eschig, Das österreichische ABGB, The Austrian Civil Code, Art 918.

4 Welser/Zöchling-Jud, Bürgerliches Recht (14 Auflage), Rz 1129f.

5 OGH 1 Ob 42/86 wbl 1987, 219.

6 Austrian courts state that the contractor has the obligation to verify if any installations exist in the ground, before starting the work.

7 OGH 8 Ob 63/98 t, ecolex 1998, 626 = bbl 1999/43.

8 Krejci in Rummel, ABGB3 s 1168 Rz 11.

9 OGH 16 November 2009, 9 Ob 6/09m.

10 Klauser/Kodek, ZPO17.00 (2012) s 266 ZPO E 4 mwN.

11 OGH 9.8.2011,4 Ob 116/11d.

12 OGH 1 Ob 725/80 SZ 54/4; 1 Ob 566/88 wbl 1988,403.

13 Holoubek/Fuchs/Holzinger, Vergaberecht, p 19ff.

14 OGH 24.10.2013, 6 Ob 70/13g.

15 Art 7 Abs 1, Art 18 Abs 1 B-VG, Art 5 StGG, Art 1 1.ZP EMRK, ss 97 Abs 2, 99 Abs2 BVergG 2006- VfGH 9.3.2007, G 174/06.

16 OGH 24.10.2013 6 Ob 70/13g.

17 Kletecka in Kletecka/Schauer, ABGB-ON s 1168 ABGB Rz 2.

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Recent reform of the French Civil Code

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This article will focus on some selected provisions introduced by the French reform of the Civil Code that may have an impact on construction contracts.

French contract law is not only relevant for business activities conducted in France but also often applies to international contracts, especially those relating to infrastructure projects located in Francophone countries in Africa.

Article 1112: good faith in pre-contractual negotiations

One of the new provisions introduced in the recent reform of the French Civil Code relates to the duty to act in good faith during pre-contractual negotiations. This new provision has codified a principle that was established in a decision rendered on 26 November 2003 by the French Court of Cassation in the *Manoukian* case,[2] where the court ruled that an unfair break-off of pre-contractual negotiations before the contract had been concluded entitled the party who lost the opportunity to conclude a contract to obtain compensation. In the *Manoukian* case, a party misled a counterparty in conducting long contractual negotiations even though it never intended to conclude a contract, as it had already concluded the contract with a third party in parallel negotiations.

Article 1112 of the 1 January 2017 consolidated version of the French Civil Code states that:

> 'The initiative, progress and termination of pre-contractual negotiations shall be freely determined. They must mandatorily fulfill the requirements of good faith.

For any wrong committed during the negotiations, the compensation of the damages that may derive from it cannot have as its purpose to compensate the loss of profits expected from the contract that was not concluded'.[3]

It is a general principle of French law that contracting parties must behave in good faith. French law already provided for the general obligation of the parties to act in good faith during the performance of the contract.

The new provision extends to pre-contractual negotiations the obligation to act in good faith. The new Article 1104 states that: 'Contracts must be negotiated, formed and executed in good faith'.[4]

Under French case law, there is abusive behaviour or a break-off of negotiations, in breach of the duty to act in good faith, when:

- a party incurs costs in relation to negotiations misled by a counterparty, which never wanted or always knew itself to be unable to conclude the contract (see the aforementioned *Manoukian* case); and
- a party abruptly and unilaterally breaks off negotiations without legitimate reasons; an example of such abusive behaviour in pre-contractual negotiations was defined by the French Court of Cassation in a decision rendered on 7 January 1997,[5] where after negotiating for over a year, having exchanged

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several drafts of the contract and having incurred considerable costs in studies of the project, a party abruptly ended the negotiations without any explanation. French law found that there was abusive conduct even though, in such a case, the intent to harm was not established.

In the aforementioned cases, the abused party could claim compensation for the breaking off of pre-contractual negotiations. Such compensation would cover the costs incurred in connection with the negotiations. However, as stated by the new Article 1112 of the French Civil Code, the lost profits that were anticipated from the contemplated contracts may not be claimed.

As the new provisions represent a consolidation of some pre-existing case law, it is reasonable to expect that the application of the new provisions to new cases will not substantially differ from the approach previously followed by courts.

The general good faith principle and the above provisions are peculiar to French law. A different approach is followed in other jurisdictions.

For instance, English law defines the extra-contractual liability of a party who misled a negotiating counterparty with an action in the tort of deceit. For such an action to be successful, a party must prove that the counterparty has deceived it as to the existence

of some factual information while knowing that the information was false and with the intention to make the victim rely on that information. Furthermore, certain English laws applicable to commercial subjects impose some good faith conduct in pre-contractual negotiations. This is the case in the Fair Trading Act 1973, Consumer Credit Act 1974, Restrictive Practices Court Act 1976, Resale Prices Act 1976, Unfair Contract Terms Act 1977 and Sale of Goods Act 1979.

However, there is no general duty of good faith under English law in commercial contracts in relation to pre-contractual negotiations and performance of the contract. English law proceeds on a case-by-case basis by analysing the specific circumstances of each factual situation. There is no general guiding good faith principle that is mandatorily applicable. The general approach of English law is that negotiations are undertaken by the parties at their own risk and that obligations arise only from the conclusion of a valid contract.

The impact of the new provisions of the reform of the French Civil Code on contracting parties trading internationally is unclear.

Given the different legal approaches followed under French and English law in the situations described above, contracting parties might wish to be aware of how their behaviour may be viewed and the relating possible consequences when negotiating and performing international contracts depending on whether French or English legal principles apply.

Article 1143: economic duress

Article 1143 of the 1 January 2017 consolidated version of the new French Civil Code refers to cases where a party's consent to enter into an agreement is impaired by economic duress. According to Article 1143:

> 'There is also duress when a party abuses the other contracting party's state of necessity in order to lead it to conclude an agreement it would not have entered into had it not been in such a necessity while deriving from the agreement a manifestly excessive advantage'.[6]

This new provision does not represent a new principle in French contract law because such a principle already existed in French case law. It is a codification of a decision rendered by the Court of Cassation on 4 February 2015.[7]

The 4 February 2015 case related to a dispute between Bouygues Immobilier (the real estate branch of the multinational industrial group Bouygues) and the real estate company Karous. In that case, Bouygues Immobilier had entered into a contract with Karous, whereby Bouygues Immobilier was to pay €500,000 so that Karous would not commence legal action to contest the validity of some building permits that Bouygues had obtained in a project. Even though the Karous claims were not sound and would probably not have succeeded, Bouygues Immobilier entered into the contract because it was under severe time pressure and needed to have the building permits issued in order to finalise the land acquisition and start construction work.

The introduction of Article 1143 in the new French Civil Code has been criticised because it could represent an escape offered to parties seeking to avoid compliance with their contractual obligations

The court found that the circumstances under which Bouygues Immobilier had entered into the agreement with Karous represented economic duress. Time pressure was considered a key element in order to find economic duress and €500,000 was considered excessive given that the Karous claims would not have succeeded anyway because they were totally unsound. It is worth noting that the financial size of the company was not considered a bar for the application of the principle of economic duress.

French courts considered that economic duress could also be found when a company undergoing restructuring induced an employee to sign, under threat of being made redundant, a new employment contract in order to increase his or her chances to remain employed. If it were proven that the employee would have been potentially made redundant, the employee could have the contract set aside. In a similar case,[8] the court found that there was

economic duress as it was not proven that the employee would have been potentially made redundant.

The introduction of Article 1143 in the new French Civil Code has been criticised because it could represent an escape offered to parties seeking to avoid compliance with their contractual obligations. However, as the cause of action was already defined by French case law, the new provision is expected to apply in the same limited circumstances previously defined by the courts.

A parallel cause of action may be found also under English law in the case *Atlas Express Ltd v Kafco*,[9] where the claimant was forced to enter an agreement accepting higher delivery charges before the Christmas season, which represented a key business period for the claimant. The High Court found that these circumstances represented economic duress.

Article 1195: hardship under the new French Civil Code

With the new Article 1195, the French reform of the Civil Code has introduced the so-called theory of *imprévision*, known in common law jurisdictions as the doctrine of hardship.

The theory of *imprévision* refers to a change of circumstances, unforeseen at the time of the conclusion of the contract, that makes performance of the contract excessively onerous for one of the parties, who had not accepted to bear such a risk.

According to Article 1195:

> 'If a change of circumstances, unforeseen at the time of conclusion of the contract, makes the performance of the contract excessively onerous for a party, who was not to bear the relating risk, such a party may ask the other contracting party to renegotiate the contract. The affected party must continue to perform its obligations during the negotiations.
>
> If the other party refuses to negotiate or the negotiations fail, the parties may agree to terminate the contract, at the date and under the conditions they will define, or may agree to ask the judge to define how the contract must be modified. If the parties are unable to reach any agreement within a reasonable delay, the judge may, following the request of one of the parties, revise or terminate the contract at the date and according to the conditions that he will define'.[10]

The test that is applied is that the event must have been unforeseeable by a reasonable person at the time of the contract and in the circumstances in which it was made. When such unforeseen circumstances occur, the party for whom the contractual performance has become too onerous may ask the other contracting party to renegotiate the terms of the contract. In the case of refusal or unsuccessful negotiations, the parties can either agree to terminate the contract or ask the French courts to adapt the terms of the contract to the changed circumstances. Otherwise, as a last resort, either party may, within a reasonable time, ask the French courts to either revise or terminate the contract.

The theory of imprévision refers to a change of circumstances, unforeseen at the time of the conclusion of the contract, that makes performance of the contract excessively onerous for one of the parties, who had not accepted to bear such a risk

Furthermore, it must be noted that the aforementioned mechanism can take place only if the other contracting party also did not accept taking the risk of the changed circumstances.

The theory of *imprévision* used to be applicable in France to administrative contracts only, which are mostly the contracts concluded with a French public body or an entity providing a public service. Before the reform of the French Civil Code, the application of the concept of *imprévision* to contracts concluded between private entities or individuals was not clearly expressed by French law, even though there had been some court decisions that had attempted to extend its application to private law contracts by invoking the application of the principle of good faith.

According to French law, there is a fundamental distinction between public/administrative law and private law, which represents two distinct systems laws and implies the jurisdiction of a separate

hierarchy of courts: the administrative courts and ordinary civil courts.

The main purpose of administrative laws is to ensure the supremacy of public interest. The French public administration has the power, often expressly stated in the contract, to unilaterally modify or abrogate the contract with a private party if that is necessary to protect the public interest. In such cases, the private party has, however, the right to be properly compensated.

As a result of Article 1195 of the French Civil Code, the theory of *imprévision* explicitly applies to private law contracts. The introduction of such a theory in private law contracts is inspired by the concern of protecting the weaker contracting party.

The theory of *imprévision* must be distinguished from the concept of force majeure, which is defined in Article 1218 of the new French Civil Code.

According to Article 1218:

> 'There is force majeure affecting contractual obligations when an event, which could not be reasonably foreseen at the time of the conclusion of the contract and whose effects could not be prevented by any appropriate measures, is outside of the control of the debtor and prevents the performance of the debtor's obligation.

If the event affects the obligation only temporarily, the performance is suspended unless the resulting delay justifies the termination of the contract. If the event affects the obligation definitively, the contract must be terminated and the parties are freed of their obligations according to the conditions defined in articles 1351 and 1351-1'.[11]

The theory of imprévision refers instead to events that make the performance of contractual obligations excessively onerous, but not impossible

Even though the two concepts refer to external and unforeseeable events, the force majeure events make the performance of the obligations of a party temporarily or definitively impossible. The theory of *imprévision* refers instead to events that make the performance of contractual obligations excessively onerous, but not impossible.

Nevertheless, it remains unclear what events justify the application of the theory of *imprévision*. It also remains to be seen the confines of the powers given to the French judge to adapt (ie, to change the contractual obligations of the parties) or terminate the contract for the conditions and the time the judge will have to decide.

Such broad powers could encourage some parties to expressly exclude the application of Article 1195 of the French Civil Code. In fact, as the new *imprévision* provision is not mandatory, the parties can agree to exclude its application.

For that purpose, contractors need to be aware of the existence of such a provision in the new French Civil Code, which would otherwise apply to their contracts by default.

With respect to lump sum contracts, French case law does not allow the granting of additional sums because unforeseen circumstances have greatly affected market conditions. However, Article 1195 could help a contractor to renegotiate or terminate a contract on the basis of unforeseen circumstances.

Most construction contracts often include hardship contractual clauses defining the consequences that the parties should expect in the event of changes of certain unforeseeable circumstances. This is especially so when contracts refer to major infrastructure projects and the works are expected to last several years.

Such clauses would allow the parties to control the adaptation of the contract and would prevent the uncertainty that may derive from the French courts' intervention.

Furthermore, in their contract, the parties often define the party who will bear the burden of some specific risks. The allocation of specific risks to a contracting party would thus deprive that party of the right to ask for a judicial adaptation or termination of the contract under Article 1195 of the new French Civil Code.

In light of the above possible restrictions, the pragmatic impact of Article 1195 of the new French Civil Code could therefore be greatly reduced.

Conclusion

Even though several new provisions appear that introduce substantial changes, they mostly represent the codification of rules already developed by French case law over the years. Some of these new provisions are inspired by the

concern of protecting the weaker contracting party and allowing the judge to revise, under certain circumstances, contractual obligations freely negotiated by the parties.

Notes

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2 Appeal No 00-10243 00-10949.

3 '*L'initiative, le déroulement et la rupture des négociations précontractuelles sont libres. Ils doivent impérativement satisfaire aux exigences de la bonne foi.*
En cas de faute commise dans les négociations, la réparation du préjudice qui en résulte ne peut avoir pour objet de compenser la perte des avantages attendus du contrat non conclu'.

4 '*Les contrats doivent* être *négociés, formés et exécutés de bonne foi'.*

5 Appeal No 94-21561.

6 '*Il y a* également *violence lorsqu'une partie, abusant de l'*état *de dépendance dans lequel se trouve son cocontractant, obtient de lui un engagement qu'il n'aurait pas souscrit en l'absence d'une telle contrainte et en tire un avantage manifestement excessif'.*

7 Chambre Civile, Case No 14-10920.

8 Court of Cassation, Chambre Civile I, 3 April 2002, Case No 00-12932.

9 [1989] QB 833.

10 '*Si un changement de circonstances imprévisible lors de la conclusion du contrat rend l'exécution excessivement onéreuse pour une partie qui n'avait pas accepté d'en assumer le risque, celle-ci peut demander une renégociation du contrat à son cocontractant. Elle continue à exécuter ses obligations durant la renégociation.*
*En cas de refus ou d'*échec *de la renégociation, les parties peuvent convenir de la résolution du contrat, à la date et aux conditions qu'elles déterminent, ou demander d'un commun accord au juge de procéder à son adaptation. A défaut d'accord dans un délai raisonnable, le juge peut, à la demande d'une partie, réviser le contrat ou y mettre fin, à la date et aux conditions qu'il fixe.*'

11 '*Il y a force majeure en matière contractuelle lorsqu'un* événement échappant *au contrôle du débiteur, qui ne pouvait* être *raisonnablement prévu lors de la conclusion du contrat et dont les effets ne peuvent* être évités *par des mesures appropriées, empêche l'exécution de son obligation par le débiteur.*
Si l'empêchement est temporaire, l'exécution de l'obligation est suspendue à moins que le retard qui en résulterait ne justifie la résolution du contrat. Si l'empêchement est définitif, le contrat est résolu de plein droit et les parties sont libérées de leurs obligations dans les conditions prévues aux articles 1351 et 1351-1'.
According to Art 1351 of the new French Civil Code: 'The impossibility of performing the contractual obligation makes the debtor free as well as when it derives from a definitive force majeure event, unless the debtor had undertaken the relating risk or he had received a formal notice of breach'.
('*L'impossibilité d'exécuter la prestation libère le débiteur à due concurrence lorsqu'elle procède d'un cas de force majeure et qu'elle est définitive, à moins qu'il n'ait convenu de s'en charger ou qu'il ait été préalablement mis en demeure*').
Art 1351-1 provides as follows: 'When the impossibility of performing the obligation derives from having lost the object of the obligation, the debtor becomes free even though he had received a formal notice of breach if he proves that the object would have been lost anyway, even if the obligation had been performed'.
('*Lorsque l'impossibilité d'exécuter résulte de la perte de la chose due, le débiteur mis en demeure est néanmoins libéré s'il prouve que la perte se serait pareillement produite si l'obligation avait été exécutée.*
Il est cependant tenu de céder à son créancier les droits et actions attachés à la chose').

Construction All Risks Insurance

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It took a very long time for English legislators to produce the Insurance Act 2015 (the 'Act') and as the author, Paul Reed QC, says: 'the 2015 Act marks the culmination of a particularly long and drawn out legislative process and is the most substantial reform to insurance law in England and Wales since the introduction of the Marine Insurance Act over a century ago'. In fact, the process lasted from a Law Reform Committee Report in 1957 until 2015. However, the author of this excellent book has wasted no time in updating the first edition with the assistance of some named contributors. The Act came into force on 12 August 2016, and the text in this new edition is up to date as of the end of August 2016. While it means an earlier reach into the pocket than might otherwise have been the case, this prompt new edition is an entirely worthwhile acquisition.

For those familiar with the first edition of this book, little introduction is needed. However, those new to the book should know that it has the benefit of being both accessible and readable. It is accessible for the majority using this book who want to find the answer to a particular knotty question or problem and, at the same time, readable for those with a more general interest in the subject. Thus, by way of example, the historical overview will be of interest to a much wider readership than that struggling to understand the intricacies of Construction All Risks (CAR) insurance.

The book deals largely with English law, but with some helpful passages comparing English law with other jurisdictions. Apart from the genesis of the new Act dealt with below, there are references to cases in Canada and elsewhere when they throw light on the interpretation of contractual terms.[2]

The major addition to this edition is the treatment of the Act. In Chapter 5, the author leads us through the changes, providing some thoughtful insight into the ways the courts may interpret those areas of the Act that are less prescriptive. One example of this is the extent to which the courts will use the duty of utmost good faith to reach conclusions on the adequacy of disclosure and fair presentation. The book also covers the corresponding legislation in Australia and New Zealand, with some helpful analysis. The Act, in part, can be traced back to the law reforms enacted by New Zealand and Australia.[3] This major change in the law brings English law more in line with the rest of the developed world at a time when there was increasing concern that the disproportionate remedies provided by English law were out of step with modern practice.

The chapter 'Misrepresentation, Fraud and the Duty of Utmost Good Faith' provides the reader with the old English law, which will continue to operate on contracts incepted up to 11 August 2016, together with the effects of the new law that operates on contracts incepting thereafter. There is also a new section providing an introduction to the duty of fair presentation under the Act, covering the major points of interest and the important features of the statutory regime.

The English Enterprise Act 2016, which introduces an implied term into every contract of insurance that the insurer will pay the insured's claim within a reasonable time, is also examined. That act comes into force on 4 May 2017. The author provides some sensible insight on the likely approach of the courts as to what is a reasonable time within which to pay in advance of the courts, providing practitioners with more definitive guidance. Clearly, there will initially be much dispute as to when insurers should make payments, particularly in relation to such things as delay in startup claims, and it will take some time for a recognisable form of practice to be adopted.

The book also contains a new section on the Wellington Syndicate 2020's Offshore

Construction Project Policy ('WELCAR'). WELCAR was first introduced in 2001. This section is invaluable to those involved in offshore construction projects and its insurance. The revised version of WELCAR is still a work in progress.

As well as updating this edition with the new Act, the book has references to all the material new authorities, thus saving the reader considerable time in performing research. The many internet references are carefully provided with the date the internet was accessed. The numerous dates from 2016 provide some assurance that matters in the book are up to date as well as providing the reader with ready access to the material available.

It is inevitable that in covering an area of insurance law in a comprehensive way it is necessary to cover a myriad of parts of legal jurisprudence that are secondary to the main subject matter. Thus, within the book, one finds a detailed analysis of the principles of construction (of words rather than buildings), thus enabling the user to find all that he or she needs in a single volume. The same might be said of the law of causation, which is also covered to the extent that it arises in relation to insurance risks.

I mentioned WELCAR, which is covered within the section dealing with marine all risks. But the book also covers aviation all risks and property all risks, thus providing a useful reference work for these important areas.

Specialist books on insurance, of which this is undoubtedly one, have to find a middle course between taking as read the basic principles of insurance law on the one hand and explaining to the reader those principles as they apply to the specialism being addressed on the other. In *Construction All Risks Insurance* this balance is nicely achieved. Thus, a person with no knowledge of insurance law is given some assistance on all those basic principles, while the specialist will not feel that he or she is being lectured on matters that might be considered trite.

At the end of the book, there is a helpful sample CAR project policy based on English law with up-to-date standard clauses in common usage. The ultimate value of any legal text is greatly enhanced by a good index to enable the user to locate all the references in the book that address the particular subject of concern. By using the Sweet & Maxwell Legal Taxonomy, the reader is provided with a decent guide to the content of the book, and users should find the index of great assistance in finding their way round this impressive book.

The book will be useful for all those involved with English insurance law: insureds in the form of risk managers and contractors, brokers seeking to place insurance in the CAR market and insurers who write such business, in addition to in-house lawyers and those lawyers practising in this area. It is an essential part of any library seeking to have access to the modern law of CAR insurance. I commend it to you.

Notes

1 The reviewer practices as an international commercial arbitrator and can be contacted at cs@3vb.com.
2 See, for example, the treatment of defects exclusions with reference to Ontario law.
3 S 11 of the Act is to be compared with the Insurance Law Reform Act 1977 in New Zealand and the Insurance Contracts Act 1984 in Australia.

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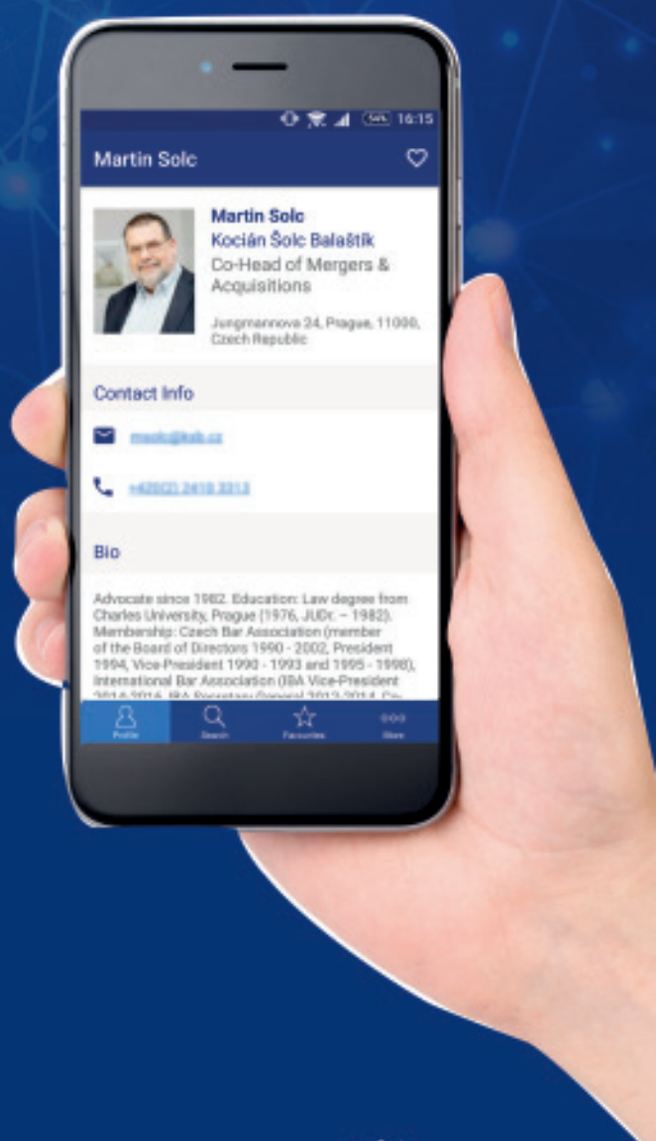

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