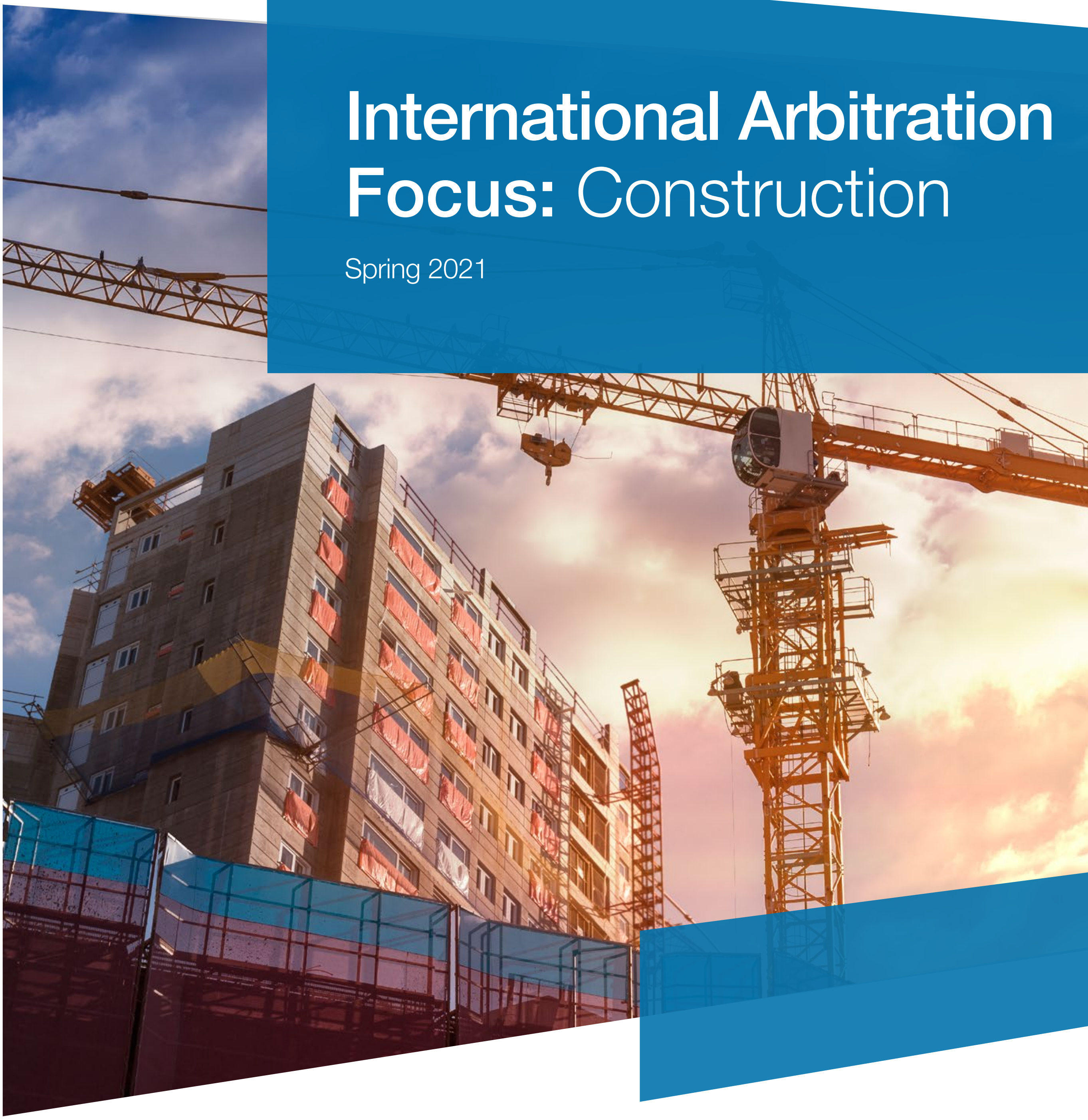
International Arbitration Focus: Construction

Spring 2021



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Welcome

Welcome to the latest issue of Reed Smith's newsletter on international arbitration.

Reed Smith's international arbitration practice is premised on three strands: specific industries such as energy and natural resources, certain "specialisms" (specific types of arbitrations regardless of industry, such as investor-state arbitration), and specific geographic regions in which our lawyers are especially well-suited to advise our clients.

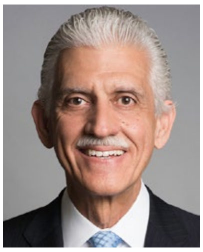
This issue of our newsletter brings together all three strands of our strategy by focusing on construction disputes.

First, given the nature of the industry, our clients in the energy and natural resources industry frequently face construction disputes. And, of course, many of our clients in other industries similarly confront such disputes regularly.

Second, construction is a quintessential "specialism," and is one of our firm's areas of concentration in international arbitration. In this edition, we also address issues confronted by another firm specialism – investor-state arbitration – by analyzing such issues in construction cases stemming from Libya.

Finally, given that construction arbitration is taking place around the globe, this issue covers some important questions across a range of jurisdictions and provides an in-depth look at construction in Saudi Arabia, based on our team's extensive construction arbitration experience in the Middle East.

We hope you enjoy reading this edition and as always, we welcome your feedback.



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Note from the Editors

Welcome to the fourth issue of *International Arbitration Focus: Construction*

In this issue, we look in particular at how contractual time bars are treated in construction contracts. We have sections authored across eight different jurisdictions on this topic. We also include three other bespoke sections on (i) subcontractor protective provisions of French law, (ii) investor-state construction dispute issues and (iii) the expansion of construction arbitration in the Kingdom of Saudi Arabia.

Time

Time is a valuable commodity. The only reason for time, said Albert Einstein, is so that everything does not happen at once. These two notions resonate with particular force when it comes to contractual time bars in construction contracts. Contractual time bars reflect the value of time. And in construction contracts, where time bars can often be short and prescriptive, they also acutely challenge Einstein's theory. For the employer, the claim should happen at the same time as the events that give rise to it, or at least in as short a timeframe as possible thereafter, failing which the contractor's claim should forever be lost in time and barred.

Particularities of construction contracts

The particularity of time bars in construction contracts is but one of many in this specialized area of the law. When it comes to arbitration, construction arbitration is a peculiar beast, with a wide array of particularities that distinguish it from other fields of arbitration.

1. Heightened complexity: Construction projects within the international sphere stand out due to not only their factual, but also their technical complexity. As such, it is only natural that construction arbitration tends to be subject to a heightened degree of complexity.

When it comes to international construction disputes, there are often major technical issues at stake, often accompanied with significant sums in play. Construction projects are also as varied as they are numerous. However, they are often approached and organized very differently to other commercial operations from start to finish. They often share a number of key features, each attracting its own difficulties, including: (i) a long term commercial relationship during which disagreements are likely to occur regularly; (ii) the need for special or external expertise; and (iii) multiple transactions and multiple parties, including, inter alia, contractors, subcontractors, governments, and development banks.

2. Legal particularities: In addition to its factual and technical complexity, construction arbitration can also give rise to significant legal complexity of both a substantive and procedural nature. Much of this stems from the standardization of contracts used in the construction industry, operated by international organizations such as the International Federation of Consulting Engineers and its suite of contracts, and the UK Institution of Civil Engineers with its family of New Engineering Contracts. The sheer variety of standard form contracts, including their distinct features and legal traditions, combined with their length and complexity and the fact that they remain relatively unknown outside of the sphere of construction, means that great care has to be taken not only at the drafting phase when adapting such standard forms to a particular project, but throughout the entire execution of the project.

Developed multi-tier mechanisms for dispute avoidance, including dispute boards, are one of the features that comes with such standard form contracts. Such preventative mechanisms, which often focus on the early identification of issues, aim to help parties avoid disputes by identifying and discussing issues throughout the life of a project. They can go a significant way to help parties reach the end of the project on time and within cost. At the very least, they may serve to refine or crystallize issues in dispute or reduce their magnitude.

Despite their attractions, from a dispute resolution perspective, such features bring their own challenges. Care must be taken to ensure that, in accordance with the applicable law or law of the arbitral seat, such pre-arbitral steps are complied with correctly.

3. Procedural peculiarities: From an evidentiary point of view, construction disputes frequently involve significantly more documents than other fields. In light of this, arbitration of construction disputes, and the threat of extensive document disclosure that goes with it, can be particularly challenging. Proficient contract and document management is essential.

4. Required expertise: As noted above, commercial projects relating to construction stand out because of their complexity. Expert testimony is frequently used in international arbitration to help tribunals with matters that extend beyond the tribunal members' own expertise. However, nowhere is this more true than in construction arbitration. The major issues at stake in construction disputes often touch upon incredibly complex and technical concepts that require specialized knowledge. For this reason, recourse to such expertise is very much the norm in construction arbitration. This specialized knowledge often comes from party-appointed experts.

While it may be true that cases are often won on expert testimony, it is not only party-appointed experts that are required to flex their expertise muscles in construction arbitration. Often, the arbitral tribunal and external and internal counsel are expected to possess a certain degree of expertise. It is expected that they should have sufficient grasp of the issues at stake, in order to assist in the efficient and effective resolution of the dispute.

In this issue

We start with an analysis of the operation of time bar provisions, a common feature of construction contracts, across eight different jurisdictions and regions. The authors of each section examine a number of issues arising in connection with time bars, including how contractual time bar clauses have been construed and held to operate under the applicable law, as well as any possible antidotes that may arise under doctrines such as impossibility, substantial compliance, "no harm, no foul," waiver, estoppel and good faith.

Turning to another key issue, guest co-editor Peter Rosher and Adam Calloway consider the role and effects of international subcontracting (from a French perspective), focusing in particular on the main protective provisions under French law which aim to provide subcontractors with recourse against their employers for non-payment by the main contractor. The authors further consider the international reach of these provisions, as well as the divergent approaches adopted by the French courts in their application.

Next, Chloe Carswell, Clément Fouchard, Ben Love and associate editor Lucy Winnington-Ingram look at the recent slew of construction arbitrations brought under international investment agreements against Libya, arising out of the Arab Spring. The authors examine some of the main jurisdictional issues that claimant investors have faced in bringing their claims, and consider what investors in like circumstances can do to protect themselves. The article further considers the circumstances in which a state may be held liable for war and/or insurrection, and some of the international law breaches that have been found to arise out of the same, before considering possible defenses that may be available for a state.

Finally, Laura Adams considers the expansion of construction arbitration in the Kingdom of Saudi Arabia by reference to recent legislative reforms in the Kingdom and developments within the Saudi Center for Commercial Arbitration. The article further examines some of the challenges facing construction arbitration in the jurisdiction, including in relation to enforcement and confidentiality, before setting out some thoughts on the likely continued growth of arbitration in this sector.

We hope you enjoy this issue of our international arbitration newsletter.

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Time bar provisions

Time bar provisions have become a common feature of construction contracts. They now appear in the most frequently used industry standard forms. Such provisions typically prevent a contractor from claiming entitlement to additional time and/or costs where it provides late or insufficient notice to an owner of an event, delay or claim.

Designed to protect a project's interests, time bar clauses serve a valuable commercial purpose. When operated correctly, they serve to benefit both owners and contractors by:

- incentivizing contractors to promptly inspect, investigate and manage time and cost-impacting events, including gathering contemporaneous evidence to support a valid claim;
- ensuring that both parties are aware of their ongoing financial positions in the project at all critical times;
- promoting certainty and finality for owners and contractors alike by ensuring claims are dealt with as and when they arise, rather than months (or even years) after the project has ended; and
- facilitating proactive project management by allowing owners to reconsider the commerciality of a variation or other instruction before a contractor proceeds.

Of course, a contractor's failure to adhere correctly to a time bar can have harsh consequences, as the contractor risks forfeiting an otherwise meritorious claim due to late or insufficient notice. Moreover, not all time bars are equal. Some are particularly onerous for contractors, demanding notice of claim events within very short time periods and, in the most egregious example, regardless of whether a contractor itself was aware of the matter for which notice is required. For this reason, the enforceability of time bar provisions is a hotly contested topic in international construction arbitrations.

A number of legal issues arise. In particular, arbitrators will first need to consider whether the relevant provision qualifies as a time bar provision under the contract's governing law (or is instead a mere notice requirement) and whether the contractor has in fact failed to comply.

If the answer is yes to both these questions, then the time bar will in principle apply. However, the deciding factor may be whether the applicable law of the contract offers any relief for the contractor under doctrines such as impossibility, substantial compliance, "no harm, no foul," waiver, estoppel and good faith.

Adding a layer of complexity to the issue, there can be significant differences in how the laws of different jurisdictions address and enforce time bars. These differences are most pronounced between common law and civil law countries, but even appear among them. In particular:

- For the most part, and absent express and clear wording to the contrary, common law jurisdictions, including England and Australia, are often inclined to treat time bars as a form of exclusion clause, which then tends to be construed strictly against the party seeking to rely on the clause.
- The United States is a common law exception where many states treat time bar provisions like any other condition precedent that operates to bar a claim. Where a time bar provision is deemed to be a condition precedent, the court or tribunal seized with the dispute is typically bound to apply the provision in accordance with its terms (regardless of any prejudice caused) pursuant to the overarching principle of freedom of contract.
- Absent a body of binding judicial precedent, civil law jurisdictions, including France and the UAE, have considerably greater flexibility in determining when and how time bars should be held to apply. These will be assessed on a case-by-case basis and often weighed against statutory principles, including that of good faith. German law goes further and imposes additional conditions, including that the time bar must not undermine the purpose of the contract.

Since international arbitration panels increasingly reflect a diverse mix of legal qualifications, it is critical for any party attempting to rely on or defeat a time bar to present the legal position clearly and comprehensively, with support from local counsel as necessary. A common concern, regardless of the applicable law, is clarity of language: the value of well drafted time bar provisions is immeasurable.

Astute construction arbitrators will be well versed in time bar arguments and will appreciate the nuances in different governing laws. If there is sufficient room in the applicable law to excuse a notice-delinquent contractor, they may think long and hard before precluding a contractor's recovery on the basis of a time bar clause. However, where the governing law is inflexible, contractors are well advised to avoid the pitfalls of non-compliance.

In this edition of the IA newsletter, we offer insight on approaches to time bar provisions, with an emphasis on constitutional constraints. We have looked at eight jurisdictions and/or regions: Australia, England and Wales, France, Germany, Hong Kong, Singapore, the United Arab Emirates, and the United States.

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Australia

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Relevant law

In Australia, long-standing judicial precedent holds that contractual time bars are enforceable according to their terms.[1] As a type of exclusion clause, courts will construe time bars strictly against the principal and will only depart from their plain meaning in exceptional cases, namely, if it would lead to an absurdity or defeat the main object of the contract.[2] By way of example, the court in *Etlis* held that construing a time bar clause in a way which would require a contractor to notify the owner that he had given the contractor an "instruction" would be absurd.[3] However, requiring notification of delay as a **result** of an instruction would not be absurd because the principal may be unaware of the instruction's delay impact. Similarly, it would not be absurd to require a contractor to notify a principal that its instruction constitutes a variation to the works' scope.[4]

Time limit or time bar?

A contractor may avoid an apparent time bar if it can establish that the relevant clause is merely a time limit, rather than a precondition to entitlement. A court will decide whether the language is "mandatory" or merely "directory." In essence, there must be clear words barring a claim if the conditions of the clause are not satisfied.[5] Clear words stating that timely notice is a precondition will suffice (e.g., "… will not be liable on any claim ... unless ...").[6] However, courts have also read preconditions into a clause from the presence of a carefully regulated regime for notice, notwithstanding the absence of express wording establishing a precondition.[7]

Effectiveness of notice

Where there is no more than a requirement of "notice," the courts take a non-technical approach to determining compliance. They will consider the surrounding circumstances to determine whether a principal had sufficient notice.[8] However, where the contract is prescriptive as to the content of the notice, courts will enforce these requirements.[9] In an even less sympathetic outcome, the court in *CMA v. John Holland*[10] barred a claim notwithstanding that the principal knew of the delay and matters giving rise to it (i.e., they had a program showing the delay). The court upheld the time bar because the notice requirements were extensive and specific as to the information required in the notice.

Penalties

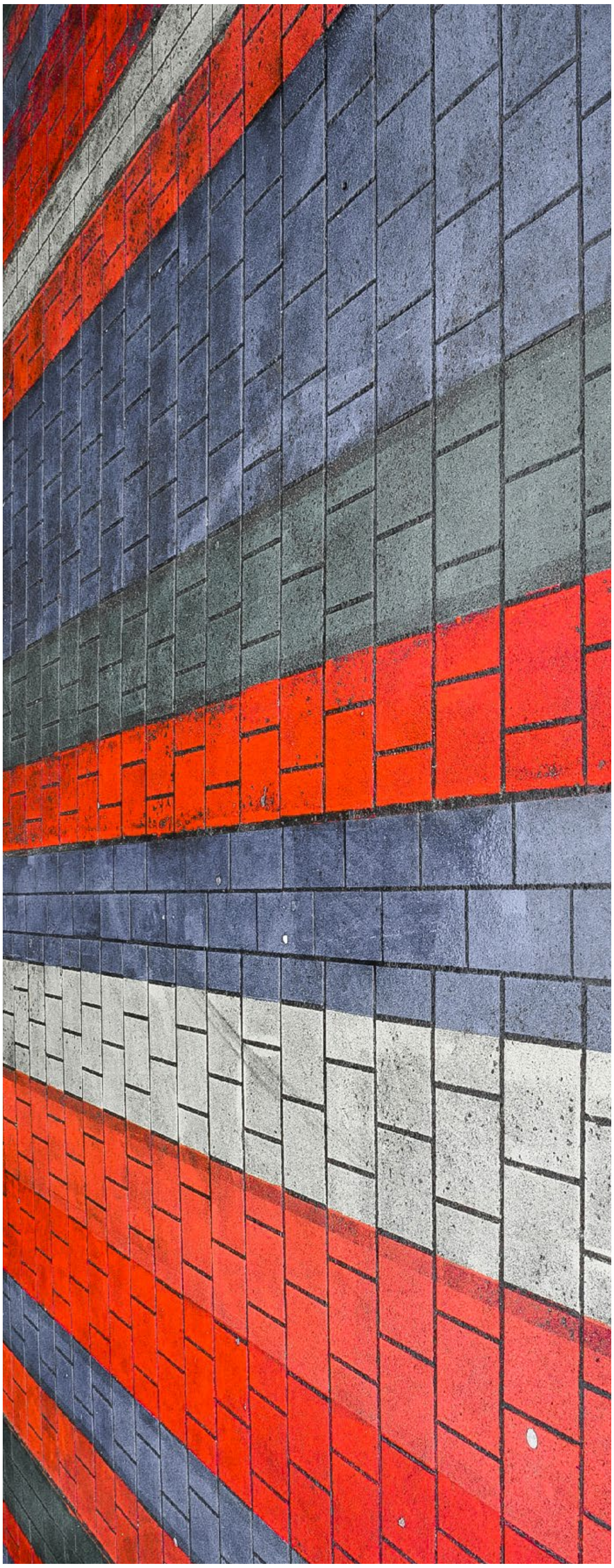
It has been argued that a time bar can be construed as a penalty where a contractor's entitlement can be forfeited despite the delay in giving notice.[11] However, legal practitioners and academics have argued against such an expansion of the penalties doctrine.[12] For now, judicial authority dictates that a time bar "is not a penalty because it is part of the circumscription or the definition of the entitlement; it is not the forfeiture of accrued property for the collateral purpose of encouraging compliance with the contract."[13]

Prevention principle

In construction contracts, courts will generally imply a term of non-hindrance, whereby parties promise not to prevent each other from performing their contractual obligations. One might consider that the imposition of a time bar by a principal to deny an extension of time to a contractor would conflict with this "prevention principle." However, this generally implied term yields to any term that expressly permits an act of prevention[14] and can be excluded from the contract altogether.[15] Provided the contract entitles a contractor to extension of time for a principal-caused delay, a contractor will generally be considered to have thwarted its own claim if it fails to request an extension of time within the allotted notice period.[16]

Waiver

A contractor may avoid a time bar if it can show that the principal has waived the right to invoke it.[17] However, (a) the contractor must show clear and unequivocal words or conduct by the principal which indicates that it does not intend to enforce the time bar; (b) the principal must have knowledge of the right or the performance requirement; and (c) the words or conduct must be communicated to the contractor.[18] In *Civil Mining*, the court held that the owner had waived its right to rely on the notice provisions because it had granted extensions of time for claims that were notified well beyond the time period for notice and requested the contractor to withdraw claims and resubmit them as a single global delay claim.



Estoppel

A contractor may also avoid a time bar if it can demonstrate that the principal should be estopped from relying on it. Reliance and detriment must be proven by the party who seeks to rely on estoppel. In *Update*[19] the court found that the doctrine of estoppel operated to prevent a principal (through the conduct of its agent) from relying on a clause that required the contractor to provide written notice of a variation, based on representations arising out of a conversation between the agent and the contractor. The court held that the agent "thus having led [the contractor] to act to its detriment by representing (even if indirectly) that the requirement of writing was not being insisted on, should not by the rules of estoppel, later be allowed to rely upon the requirement for written notice as an answer to [the contractor's] claim under the contract."[20]

Practitioner insights

Under Australian common law, clearly worded time bars in construction contracts will be enforced against a non-compliant contractor. A tightly drafted condition precedent can easily resolve interpretation risk, and players in the modern construction industry are typically apt to ensure such provision is included in their contracts. If the imposition of a time bar would lead to a grossly disproportionate gain to a principal compared with the prejudice, if any, the principal has suffered due to late notice, Australian common law will only come to a contractor's aid by exception. There is no overarching safeguard that permits a court to cure even extreme applications of a time bar. While waiver and estoppel offer contractors a potential escape, principals are increasingly cautious to avoid conduct that might jeopardize their right to rely on time bars.

The situation in Australia may seem severe compared with other jurisdictions where time bars do not have such a lofty position of protection. While there is always room for the common law to develop (such as to amplify the existing doctrine of penalties or relief against forfeiture), having not done so despite significant opportunity, such developments in the near future appear to be unlikely.[21]

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England and Wales

A common law legal system.

Relevant law

As a matter of English law, the parties to a commercial contract are, broadly speaking, free to agree whatever they want to agree and the parties will be held to that bargain, provided that the intention of the parties is clear from the express words used.

Understanding this starting point is important when considering the way in which time bar provisions are construed under English law. It means that English law focuses on whether the parties, by express wording, clearly agreed that a failure to comply with a specific contractual time bar prevents a claim. The legal terminology for this concept is whether the time bar provision is a "condition precedent," i.e., a contractual requirement that **must** be complied with before a right comes into existence.

The English courts, or a tribunal applying English law, will give effect to a condition precedent, even if that prevents a party from presenting an otherwise valid claim. Put another way, if the language of a clause clearly demonstrates that the parties intended it to be a condition precedent, then the court or tribunal will hold the parties to that agreement, even if the consequences seem unfair or draconian. There are two main reasons for this approach. First, the English courts have historically been reluctant to interfere with a bargain freely made between two commercial parties. Second, the English courts accept that conditions precedent can serve a useful purpose, for example, by focusing attention on potential delay events at an appropriate stage of a construction project.

If the parties wish compliance with a contractual term to be a condition precedent, then the most straightforward and safest way to achieve that aim is to expressly use the words "condition precedent" when drafting the term. However, there is no hard rule that the words "condition precedent" must be used (though it is highly recommended to do so if that is the intention). Instead, it will suffice if it is clear that the subject of the condition precedent is contingent on the performance of certain obligations. For example, the words "subject to" may in certain circumstances establish a condition precedent. Context is crucial, because an alleged condition precedent will be construed in light of the contract as a whole, just like any other contractual term.

Importantly, if the intention is that failure to comply with a condition precedent will prevent an otherwise valid claim (such as a provision that a claim for additional time and money will be unavailable if there is no notice within a specified period) then express words to that effect are required. The English courts treat alleged condition precedent clauses as similar to limitation clauses, and this means that the same rules of contractual interpretation applying to those clauses will apply. This includes the principle that, if there is any doubt about the meaning of the clause, then the ambiguity should be resolved against the party seeking to rely on it (the so-called *contra proferentem* principle). For similar reasons, the courts will construe condition precedent clauses strictly; i.e., they will not extend their effect to situations that do not plainly fall within the language used.

The requirement for express words, the application of the *contra proferentem* principle and the strict interpretation of these clauses have a major impact on the approach adopted pursuant to English law. This is because, in practice, English courts or tribunals applying English law are often reluctant to prevent someone bringing an otherwise meritorious claim if the sole reason preventing that claim is the operation of an alleged time bar provision. This means that if the only reason that a contractor cannot claim additional time or money is because it failed to give appropriate notice, then it will often have the sympathy of the court or tribunal, which will be open to persuasion that the clause in question is not really a condition precedent and does not prevent a claim. This, of course, depends very heavily on the drafting of the particular clause in question.

Accordingly, if the drafting of the provision means that it is capable of being construed as something other than a condition precedent, then the court or tribunal will often take the opportunity to find that it is not in fact (when construed properly) a condition precedent. For this reason, it is highly desirable for the parties to use the words "condition precedent" (as explained above) if that is truly what they hope to achieve in the contract, as those words make it much harder for a court or tribunal to find that the clause was not in fact intended to act in that way, though simply using those words will not suffice if the clause does not in fact operate in the way that a condition precedent should.

Crucially, a condition precedent clause must set out both the requirement that must be met and the effect of the clause in order for it to be sufficiently contractually certain. English case law therefore specifically requires that a clause requiring the provision of notice within a specified time, failing which the right to bring a claim will be lost, must satisfy the following two requirements. First, the clause must state the precise time within which the notice is to be given. Second, the clause must state in express language that, unless the notice is given within that time, the party making the claim will lose its rights.[22]

English courts or tribunals applying English law accept that compliance with the notice requirements in clause 20.1 of the FIDIC form constitutes a condition precedent to recovery. By way of example, clause 20.1 of the FIDIC Yellow Book provides that in the event the contractor wants to claim an extension of time and/or any additional payment, it must "give notice to the Engineer, describing the event, or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after [the contractor] became aware, or should have become aware, of the event or circumstance" and also states that if the notice is not given then the contractor is not entitled to an extension of time or additional payment.

The most important English case in relation to clause 20.1 is *Obrascon Huarte Lain SA v. Her Majesty's Attorney General for Gibraltar* [2014] EWHC 1028 (TCC). In that case, the parties and the court accepted that clause 20.1 was a condition precedent. In fact, that point was considered so self-evident that the legal argument focused on what the specific requirements were under that clause. Prior to the decision in *Obrascon Huarte Lain*, it was often argued in relation to clause 20.1 that the 28 days commenced when the contractor became aware, or should have become aware, of the event or circumstance that would give rise to a delay.

However, the court in *Obrascon Huarte Lain* held that the contractor could give its notice **either** within 28 days after the contractor became aware, or should have become aware, of the event or circumstance (in that case, a variation) that would give rise to a delay; **or** within 28 days from when the delay resulting from the event or circumstance actually occurred. Contractors therefore welcomed the finding in *Obrascon Huarte Lain*, as it potentially extended the period in which they could give notice in respect of clause 20.1 (depending, of course, on the particular facts of their project).

Practitioner insights

Given the potentially draconian impact of the English approach to conditions precedent, parties should be keenly aware of potential arguments to the effect that a party has waived their rights to rely on the condition precedent, or is otherwise prevented from relying on it by some assurance that they have previously given (an estoppel). Depending on the particular circumstances, courts and tribunals applying English law may be persuaded that waiver and estoppel will assist a party which would otherwise be unable to bring a claim. From a practical perspective, this means that it is important for parties to be aware of any informal agreements that are entered into on site in relation to the provision of notices, and keep accurate records of what has been said by their respective project teams in relation to such issues.

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France

A civil law legal system.

Relevant law

Time bar provisions, as opposed to statutory limitations, are enforceable under French law provided that (i) the contractual provision qualifies as a contractual time bar (and is preferably identified as such) not as a limitation period (i.e., it is aimed at sanctioning a party for failing to act), and (ii) the provision is not relied upon in breach of due process. Ultimately, the decision to dismiss claims on the basis of a failure to comply with a time bar provision rests with the court or arbitral tribunal applying French law.

The relevant provisions of the French Civil Code are found in articles 1103 and 1104 on freedom of contract and article 2219 *et seq.* on limitation periods. The single most important provision supporting the validity of time bar provisions under French law is article 2220, which provides that the provisions applicable to limitation periods (*délai de prescription*) are not applicable to time bar provisions (*forclusion contractuelle*). This provision is particularly important since, under French law, limitation periods cannot be less than one year. By contrast, as time bar provisions are subject to a different regime, they **can** provide for a time period of less than one year. The main question which then arises is as follows: is the contractual provision a limitation period which cannot be less than a year, or is it a time bar period which is enforceable even if it is shorter than a year?

There are few decisions which address time bar provisions in international construction contracts governed by French law. This is because disputes arising under such contracts are typically referred to confidential arbitration. This means that there is very little publicly available information on the treatment of time bar provisions subject to French law by arbitral tribunals. Guidance can however be found in other cases even if not directly related to construction.

Time bar provisions differ from limitation periods because they serve a different purpose. This is essential in assessing whether a time bar provision can actually be enforced. Critically, time bar provisions act as a sanction when a party fails to follow a contractually agreed upon mechanism.

The French Court of Cassation confirmed this in 2016 when it held that "a clause which sets a time limit on the creditor's right to act establishes a prescriptive time period."[23] In this case, a bank entered into two loan agreements with a company. Under the loan agreements, the company was required to repay the loans by a set date. The loans were guaranteed by way of collateral security provided by an individual for the entire duration of the loans plus two years (under which arrangement the validity period expired on September 30, 2008). More than two and a half years after the duration of the collateral security had elapsed, the bank requested seizure of the individual's bank account under the terms of the collateral guarantee. The individual protested, claiming that his obligation as a guarantor ended on September 30, 2008. The Court of Cassation enforced the time bar provision, considering that its intended effect was to require the bank to take action against the individual **before** expiry of the validity period. The expiry date was to act as an "end date" to the bank's right to enforce the security. The bank's failure to do so before the agreed date resulted in it being barred from enforcing its right.

When enforcing a time bar provision, consideration should be given to the intention of the parties when they entered into the contract. However, the intention of the claimant party is irrelevant if it has failed to strictly comply with the claim mechanism/conditions agreed upon between the parties. This means that a party cannot fail to comply with the time bar provision on the one hand, and argue that it implicitly did not waive its intention to rely on it, on the other. In a decision dated December 21, 2017, the Court of Cassation[24] ruled that claimant parties had to follow the procedure set out in a time bar clause to submit a claim, regardless of their intention, or they would lose their claim entitlement.

In that case, a property investment company had engaged two contractors for woodwork using a French standard form of contract ("*Cahier des clauses administratives générales (CCAG) applicable aux travaux de bâtiment faisant l'objet de marchés privés*"). The time bar provision in the contract was as follows: "[t]he contractor shall have 30 days from the date of notification to submit any observations in writing to the project manager and to concomitantly notify the employer. After that period, he is deemed to have accepted the final account statement. Upon completion, the property investment company accepted the works but listed defects to be remedied before it could issue a final acceptance certificate. Pending the remedying of the defects, the property investment company made partial payment for the works. On January 11, 2011, the contractors filed a motion for the payment of the contractual balance. A final statement of account was issued on January 14, 2011. The contractors instead initiated court proceedings against the property investment company for payment of the balance claimed.

The Court of Appeal granted the two contractors' claims for payment on the basis that the request for payment notified by them on January 11, 2011 and the ensuing interim proceedings after the receipt of the final account, demonstrated their disagreement with the final account statement. The Court of Cassation overruled the Court of Appeal's decision and enforced the contractual time bar provision, noting that the contractors had not expressed their disagreement in accordance with the time bar provision.[25]

While French law generally upholds the sanctity of the contract, there are two reasons why a time bar provision may not be enforceable. The first arises out of the underlying French legal principle of good faith. If a party does not rely on a time bar provision in good faith, the courts may decide not to enforce the contractual provision. An example of this relief is where an employer informs its contractor that it does not intend to rely on the time bar provision but subsequently does so. Thus, French law offers a form of estoppel from the obligation of good faith that applies in all contracts.

The second reason is due process and the right to a fair trial enshrined in article 6.1 of the European Convention on Human Rights (the ECHR). In a decision dated March 30, 2016,[26] the Court of Cassation appears to have recognized that time bar provisions must comply with article 6.1 of the ECHR.[27] In this case, company A had instructed company B to compute its accounting for the period June 24, 2009 to June 30, 2010. Pursuant to the contract, the time bar provision required that a party submit its claims for compensation within three months of having knowledge of the loss/damage. Company A initiated court proceedings against company B on the grounds of gross negligence in the performance of its contractual obligations. Company A appeared before the Court of Cassation claiming that the three-month period provided for in the time bar provision was too short and had the effect of preventing it from claiming losses. Company A relied on article 6.1 of the ECHR to argue that the time bar period was insufficient to effectively enable it to bring its claims before a court while seemingly accepting that article 6.1 could be invoked to defeat a contractual time bar. The Court of Cassation agreed that article 5 of the General Terms and Conditions in question did not violate the principle of due process provided for in article 6.1 of the ECHR; i.e., the party had reasonable time to go to the courts as agreed upon in the contract.

Practitioner insights

Under French law, time bar provisions are enforceable. However, in order to ensure that your provision **will be** enforced, appropriate steps should be taken, not only when drafting the clause but also when relying on it.

In particular, the drafting of the time bar clause should reflect that the provision itself and the time period identified in the clause are intended to act as a sanction. It should be clear when reading the clause that, by failing to comply with the conditions and time period set out in the clause, the party forfeits its right to bring a claim. To avoid further interpretation by an arbitral tribunal in the event of a dispute, the clause should be as clear as possible. Although not sufficient in and of itself under French law, it could be useful to identify the clause in its title as a "time bar provision" ("*clause de forclusion contractuelle*"). Under French law, the title of a document or clause is not binding but can be considered as illustrative of the parties' intentions.

As noted above, when drafting the time bar provision, consideration should be given to the time period provided in the clause. If the time period is too short, there is a risk that the other party will be able to argue that it was not provided with a reasonable opportunity to submit its claim. There is a particular risk of this in circumstances where any contractual requirements for submission of claim strictly require the submission of voluminous or detailed documentation, which may be time-consuming to collate. The test when assessing the reasonableness of the time period is: can the other party effectively submit its claim within the agreed time period? If the answer is no, then the other party may have a good case to challenge the time bar provision down the line.

Regarding the operation of the time bar provision, the underlying principle of good faith will apply. A party should submit its claim as per the contractual requirements within the time period specified in the clause. Most importantly, the parties should ensure, when they enter into the contract, that they have fully understood the contractual requirements for submitting a claim while also being compliant with the time bar during performance.

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Germany

A civil law jurisdiction.

Relevant law

Under German law, the principle of **freedom of contract** applies to private contracts. This means that parties are free to agree upon the inclusion of time bars in their contracts should they desire, subject to certain requirements.

This article will examine a number of these requirements, which merit significant attention from all practitioners in the construction industry, given the potential consequences they may have on the efficiency of time bar provisions.

Time bars and individually negotiated contracts

When determining these requirements, a key distinction must be made between individually negotiated contracts and standard form contracts or general terms and conditions.

The use of bespoke and negotiated contracts will afford the parties even greater flexibility when including a time bar in the form of a condition precedent. By contrast, if the parties use general terms and conditions within the meaning of section 305 ***et seq.*** of the German Civil Code (i.e., contractual terms which have been provided by one contracting party to the other party, and which have not been individually negotiated but have been drafted for repeated use), there is less scope for the inclusion of time bars.

Despite the greater flexibility afforded by individually negotiated contracts, as time bars typically have similar legal consequences to limitation periods under German law, they are required to meet the same minimum requirements. For example, even an individually negotiated contract cannot provide for a time bar in cases of liability resulting from an intentional act or intentional breach of a contractual obligation (section 202 of the German Civil Code). In these cases, an agreed time bar will be invalid and the claim may be brought at any time during the relevant statutory limitation period.

Time bars and standard form contracts or general terms and conditions

As a general rule, general terms and conditions presented by one party will be deemed ineffective if, inter alia, they unreasonably disadvantage the other party.

Such an unreasonable disadvantage may be held to apply if the content of a clause is not compatible with the essential principles of the statutory provision from which it deviates, or if it serves to limit essential rights or duties inherent in the nature of the contract so as to undermine the purpose of the contract (section 307 para. 2 of the German Civil Code). In particular, an unreasonable disadvantage may result from overly restrictive provisions regarding time limits and procedure.[28]

In this context, it is crucial to assess whether the clause can be genuinely justified, or whether it merely serves to unreasonably disadvantage one of the parties.

The timely determination of claims under a contract is recognized as a valid reason for the inclusion of a time bar. Nevertheless, German statute demands that any time bar provision include certain mandatory exceptions – for example, if the party failing to notify the claim within the time period acted diligently or without negligence. If such exceptions are not included in the wording of the clause, the time bar will be considered unjustified and therefore completely invalid. As a result, the statutory requirements shall apply (German law prohibiting a reduction to the permissible extent).

The inclusion of different time bars for each party (without proper cause) may also lead to time bars being considered unjustified.[29]

There are also more specific statutory provisions that prohibit certain time bar clauses regarding employers' warranty rights: in particular, a contract cannot contain a time bar for claims regarding latent construction defects that fall short of the relevant statute of limitation, i.e., a time bar that is shorter than five years (sections 309 no. 8 lit. b) ee), ff) and 634a para. 1 no. 2 of the German Civil Code). This general rule applies not only to consumers but also entrepreneurs within the meaning of section 14 para. 1 of the German Civil Code (meaning a natural or legal person or a partnership with legal personality who or which, when entering into a legal transaction, acts in exercise of their trade, business or profession), pursuant to a ruling of the German Federal Court of Justice dated October 28, 2004.[30]

For example, in one case concerning a prefabricated house, the Higher Regional Court of Coblenz[31] refused to accept a contractual duty to give notice of a claim regarding an obvious defect within a certain period of time on the basis that the clause was not compatible with the essential principles of the statutory rules for such contracts. According to the reasoning of the court, it would be unfair to impose a notice obligation falling short of the statutory limitation period as the German law on contracts for work and services (*Werkvertragsrecht*) does not provide for an obligation to give notice of obvious defects within a certain period. Consequently, notification of a claim remains possible until the end of the statutory period.

In any case, it is important that time bars give the other party sufficient time to assess a potential claim and decide on possible next steps. Otherwise, the clause might be regarded as unjustified and creating an unreasonable disadvantage for the other party, leading to invalidity of the respective time bar.

Practitioner insights

German case law requires that time bars be subject to certain requirements, including the inclusion of mandatory exceptions where a claiming party has acted diligently and without negligence. Furthermore, a number of German courts seem to imply exceptions into contracts through their assessment and interpretation of time bars even if they are not explicitly mentioned in the respective clause.[32] This is the case, for example, if a strict time bar is agreed on in connection with a claim for additional compensation. In this particular situation, German case law will imply an exception regarding applicability of the respective clause in cases where the contractual partner was or should have been aware of potential additional compensation. Nevertheless, for the sake of clarity and to avoid any dispute, any exceptions should be clearly noted in writing in the clause covering the time bar itself.

Furthermore, a German court might interpret a contractual duty to give notice within a certain period of time not as a condition precedent leading to the claimant losing their claim in case of violation, but rather as an obligation of the claimant to prove that the extent of damage was not affected by their delayed assertion to confirm a completely enforceable claim.[33] In other words, instead of facing a strict time bar, the claimant might only be obliged to prove that the contractual party would not have been in an advantageous position if the notice had been given in due time. Therefore, we recommend explicitly stating the consequence of a failure to meet the time bar in the respective wording.

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Hong Kong

A common law jurisdiction.

Relevant law

Construction contracts governed by general law of contract

Construction contracts are governed by the general law of contract under Hong Kong law. Much of the law relating to construction contracts is the result of the interpretation of the provisions of the relevant construction contract, applying general contractual principles, and therefore the terms of each construction contract should be examined closely.

Statutory and contractual time bars

Under the Limitation Ordinance (cap. 347 of the Laws of Hong Kong) (the Limitation Ordinance), the statutory time limitation for bringing a claim in contract is usually six years from the date of breach of contract, or 12 years if the contract is made by deed. Time limitations prescribed in the Limitation Ordinance apply to arbitrations as they apply to actions in the Hong Kong courts, by virtue of section 14 of the arbitration ordinance (cap. 609 of the Laws of Hong Kong).

However, parties may agree that any claim must be made within a shorter time period than that provided for in the Limitation Ordinance, or that a certain act be completed within a specified period; otherwise the claim or the ability to commence an arbitration will be barred. This position follows the well-known English case of *Atlantic Shipping and Trading Co Ltd v. Louis Dreyfus & Co* [1922] 2 AC 250.

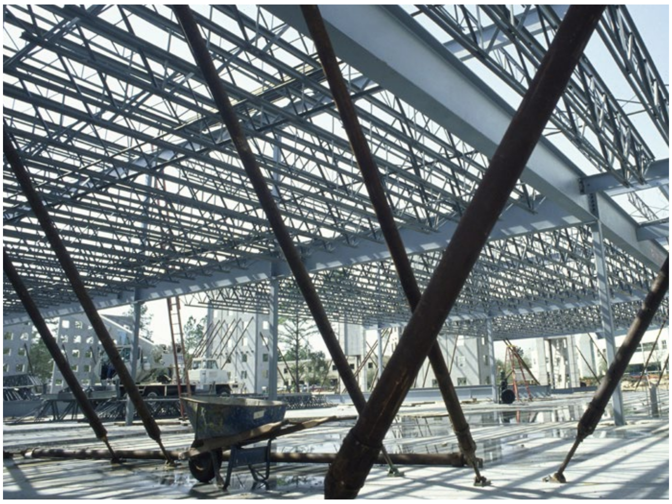
Contractual time bar clauses operate in a similar manner to a statutory time bar. If the act required by the clause is not performed, even though the claimant may still commence an arbitration pursuant to the arbitration agreement, which is not rendered null and void by the time bar, the time bar will, if raised, provide a defense to the substantive claim (see *Tommy CP Sze & Co v. Li & Fung (Trading) Ltd* [2003] 1 HKC 418; *Grandeur Electrical Co Ltd v. Cheung Kee Fung Cheung Construction Co Ltd* [2006] 4 HKC 423), unless, in the case of statutory time bars, the time limitation is rendered inapplicable pursuant to Part 3 of the Limitation Ordinance (regarding the extension or exclusion of limitation periods in certain cases).

Interpretation of time bar provisions in construction contracts

Recent discussion in Hong Kong turns on the claim notice requirements in time bar clauses following an important Court of Appeal decision on this issue.

In some cases, the Hong Kong courts have been prepared to "allow some latitude" in relation to the enforcement of the notice requirements set out in contracts, unless the wording was clear (see *W. Hing Construction Ltd v. Boost Investments Ltd* [2009] HKCU 221). In the commodities trading context, a Hong Kong court has also held that a clause which did not clearly specify that a claim made out of time would be barred, would not take effect as a time bar clause (see *Enertec Co Ltd v. Gold Hill Hong Kong Holdings Ltd* (unreported) HCA 2328/2012; January 21, 2014; [2014] HKEC 230). Furthermore, as may be seen in the recent case considered below, some arbitrators have also been reluctant to enforce time bar clauses too strictly, given the potential draconian consequences for the contractor or subcontractor.

However, a recent Court of Appeal decision adopted a literal approach to the interpretation of a time bar clause and held that it was not permissible to interpret a provision "in such a manner as to re-write the plain language of the provision": *Maeda Corporation and China State Construction Engineering (Hong Kong) Limited v. Bauer Hong Kong Limited* [2020] 5 HKLRD 328.



Maeda v. Bauer concerned the construction of tunnels for the Hong Kong to Guangzhou Express Rail Link. The joint venture of Maeda and China State Construction Engineering entered into subcontracts with Bauer for the excavation for and installation of diaphragm wall works for the tunnels. Due to the ground conditions, Bauer discovered that it had to excavate additional quantities of rock and there were greater difficulties in excavation. Bauer issued a notice of claim, referring to the additional works as a "variation" under the subcontract, which would entitle it to claim additional payment. However, in the arbitration, Bauer also put forward an alternative ground – a "like rights" claim – in reliance on the same notice of claim, which did not specify this ground.

The key issue was whether Bauer could rely upon the original claim notice to pursue a claim in the arbitration on a basis which was different from (but arising out of the same facts as) that specified in the claim notice. The relevant clause required the subcontractor to state the contractual basis of its claim, together with full and detailed particulars, within 28 days after giving notice and further provided that the subcontractor shall have "no right" to additional payment unless the notice provisions had been "strictly complied with."

While the arbitrator considered that the contractual basis relied on in the arbitration did not have to be the contractual basis of the claim stated on the claim notice "as a matter of sympathy and as a matter of construction," the Court of First Instance, affirmed by the Court of Appeal, overturned the arbitrator's decision and gave effect to the "plain and clear language" used in the notice provisions, which were regarded as conditions precedent to the making of the relevant claim. It was thus held that if the subcontractor did not specify the contractual basis of the claim in the claim notice in accordance with the terms of the subcontract which it later relied upon in the arbitration, its claim would be barred.

Circumventing the application of contractual time bars

Section 58 of the arbitration ordinance (cap. 609 of the Laws of Hong Kong) applies to an arbitration agreement which provides for a claim to be barred, or for a claimant's right to be extinguished, unless the claimant, before the time or within the period specified in the agreement, takes a step to commence arbitral proceedings or to commence any other dispute resolution procedure that must be exhausted before arbitral proceedings may be commenced. In those situations, an arbitral tribunal may make an order extending the time or the period if it is satisfied that (a) the circumstances were such as to be outside the reasonable contemplation of the parties when they entered into the arbitration agreement and it would be just to extend the time or period, or (b) the conduct of any party makes it unjust to hold the other party to the strict terms of the agreement.

This provision would be applicable, for example, where the construction contract required disputes to be referred to, and determined by, the architect and allowed either party to refer the matter to arbitration after a prescribed time period if they were dissatisfied with the decision of the architect, or the architect failed to give a decision, within a prescribed time period, but the relevant party did not commence arbitration within the prescribed period.

As a matter of general principle, waiver of a contractual time bar or estoppel (for example, arising from a representation and detrimental reliance), depending on the circumstances, may also apply to prevent a party from relying on a time bar. In addition, an arbitration clause may be expressly drafted to confer a discretion on the arbitrator to extend the time bar period.

Practitioner insights

Following the Court of Appeal decision in *Maeda v. Bauer*, we expect to see arbitrators or courts adopting a more stringent and robust approach to the interpretation of time bar provisions, resulting in potentially significant legal and commercial consequences for the contractor or subcontractor. As a matter of commercial reality, *Maeda v. Bauer* may also lead to more parties requiring the contractor or subcontractor to state the contractual basis of the claim in notice provisions, thereby raising the threshold for valid claims. In order to avoid the same outcome as the subcontractor in *Maeda v. Bauer*, claiming contractors or subcontractors going forward may also seek to include more than one valid basis in the claim notice (or in the alternative) to avoid any dispute at a later stage.

Lastly, as it is now clearer that the content and timing requirements of notice provisions may be strictly enforced in Hong Kong resulting in a potential time bar, parties should be careful, before entering into agreements, to review and negotiate these requirements and be alert to them whenever any claim situation arises.

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Singapore

A common law legal system.

Relevant law

It is common for construction contracts (both standard form and bespoke) to include express procedures for a contractor to submit claims against the project owner. Such claims are usually for an extension of time to complete works and/or for additional payment. It is also common for these procedures to provide relatively short and strict time periods for the contractor to notify the owner of its claim. Short and strict time bars improve the administration of construction contracts, allowing contractors' claims to be dealt with swiftly as and when they arise, instead of accumulating until the end of a project. Where the contractor fails to submit a claim within the stipulated time period, the owner can seek to rely on this failure to reject the claim. Under Singapore law, whether an owner can do so will turn on the construction of the relevant contract clause.

Time bar clauses in standard form EPC contracts are usually drafted as conditions precedent to a claim (see, for example, clause 20.1 of the FIDIC Contracts for Major Works or clause 61.3 of the NEC3). Specifically, they: (a) indicate a time period within which the contractor must notify the owner of a claim; and (b) expressly state the consequences of the contractor's non-compliance, i.e., the loss of its right to claim.

The Singapore courts have confirmed that a contractor's failure to comply with a condition precedent will prevent its claim. In *Lian Soon Construction Pte Ltd v. Guan Qian Realty Pte Ltd* [1999] 3 SLR (R) 518 (*Lian Soon*), the High Court considered clause 23(2) of the Singapore Institute of Architects Building Contract, which provides that as a condition precedent, a contractor must notify the architect of an event which it considers entitles it to a time extension, within 28 days of the event. Although the contractor had notified the architect of frequent delays caused by changes and discrepancies in drawings and details, it did not submit a formal request for an extension of time until after the 28 day timeframe. The High Court therefore found that the contractor had failed to comply with the condition precedent.

Similarly, in the more recent case of *Ho Pak Kim Realty Co Pte Ltd v. Revitech Pte Ltd* [2010] SGHC 106, the High Court upheld the plain meaning of a clause, stating that "it shall be a condition precedent to an extension of time … that the Contractor shall within 28 days notify the Architect in writing of any event or direction or instruction which he considers entitles him to an extension of time …."

Where the clause does not expressly state that the time bar is a condition precedent to the contractor's claim, the normal rules of contractual construction will apply to determine whether the time bar does indeed constitute a condition precedent. Given the effect of such provisions would be to disentitle a party from its rights if it failed to comply, such provisions are construed strictly (in the same way as are limitation of liability clauses).

Notice requirements in construction contracts are not, by default, considered conditions precedent to a claim, unless the contract expressly and plainly states that non-compliance will deny the contractor of its claim. See the English case of *Bremer Handels GmbH v. Vanden-Avenne Izegem PVBA* [1978] 2 Lloyd's Rep. 109, which forms part of, and has been regularly considered in, subsequent Singapore case law. Although the words "condition precedent" are not strictly required, it must be clear from the wording of the clause that the contractor's claim will be time-barred if it is not presented within the prescribed time. In short, time bars will rarely be implied in construction contracts, and time bar clauses are often interpreted quite restrictively so that they only apply to cases that fall squarely within the scope of the clause.

Even where a time bar is expressed as a condition precedent to a contractor's claim, the owner may in certain circumstances nonetheless be prevented from relying on it. The owner may have waived the time bar where it has repeatedly accepted or approved, expressly or by its conduct, the contractor's non-compliance with the time bar. This issue was considered in *Lian Soon* where, after establishing that the contractor had failed to comply with the condition precedent time bar, the court found that the contractor could nonetheless bring its claim. It was clear in the circumstances that the architect had waived this requirement. The issue was also considered in *Lojan Properties Pte Ltd v. Tropicon Contractors Pte Ltd* [1991] SLR 80 (CA).

In a recent construction adjudication review in Singapore it was found that "compliance with a condition precedent can be waived, and for that matter we also think that a party who relies on a condition precedent may, on the facts of the case, be estopped from doing so" (*AVW Pte Ltd v. AVX Co Ltd* [2016] SGSOP 23).

Time bars can sometimes cause extraordinary difficulties to contractors, particularly where an event is negligible at first but ends up lasting for an extended period of time and/or escalates. An event or its cause may also be latent and the contractor may be unaware of it for some time. Where a short time bar is drafted such that it starts from when the contractor should have become aware of the event, it can often be very harsh on the contractor. In practice, however, where a contractor has done its very best to comply with its notice requirements, an arbitral tribunal may be sympathetic to its difficulties in complying with a very restrictive time bar, and, for example, adjust the commencement of the time period for notification.

Practitioner insights

The approach to be taken to notification requirements will differ depending on whether one is an owner or the contractor. As the primary burden of notification falls on the contractor, the contractor ought to structure its processes so that delaying events are promptly detected within the organization and correspondingly notified. If there is a two-tier notification requirement (notification within 28 days followed by full details of impact within the next 28 days, for example), should the contractor not be able to provide full details of the impact because the impact of the delaying event is continuing, notifying the owner of that inability would assist the contractor greatly in demonstrating compliance with the condition precedent. If notification deadlines have indeed been missed because a formal notification has not been sent, contractors can investigate whether notification of delays (or the impact of those delays) has been given in meetings (which are minuted) or progress reports. These sources of notification are particularly useful where the contract does not require any particular form of notification.

An owner, on the other hand, should be very careful in preserving its ability to rely on a time bar to a contractor's claim. It may not be sufficient for the owner to simply "reserve all rights" now and again; it should ensure that it does not adopt a pattern of conduct which neglects or overlooks time bars, deadlines and timeframes. The owner should also adopt conscientious and consistent record-keeping of its interactions with the contractor to evidence its diligence.

An owner should also seek to clarify information it receives from the contractor which is ambiguous as to whether it should be treated as a claim notice. It is preferable for the owner to clarify the issue upfront rather than having a protracted dispute down the line as to how or when it was notified of the contractor's claim. This is particularly so if, as we indicated above, the content of a "notification" may be found in documents other than a formal letter notifying delay.

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The United Arab Emirates

A civil law legal system.

Relevant law

Federal Law No. 5 of 1985 concerning the issuance of the civil transactions law of the United Arab Emirates (as amended) (UAE Civil Code) is silent on the enforceability of contractual time bars. They are not addressed in the chapter dedicated to *Muqawala* (the Arabic word for "contracts of work or services"), nor in the general provisions relating to contracts. Enforceability of time bars in construction contracts governed by UAE law is a hotly contested legal issue. Much will depend on the precise language of the contractual provisions, the surrounding factual matrix and the applicability and interplay of various provisions of the UAE Civil Code. Adding a further legal dynamic, article 2 of the UAE Civil Code also provides that Islamic jurisprudence shall inform the understanding, construction and interpretation of the UAE Civil Code.

Freedom of contract

There are multiple provisions of the UAE Civil Code that emphasize parties' freedom of contract and the enforceability of clear contract terms.[34] Employers will typically point to all these provisions to argue that unequivocally worded time bars in standard form construction contracts must be upheld.

On the other hand, where a contractual time bar is not clearly drafted, a contractor will have scope to resist its enforcement. Under article 265 of the UAE Civil Code, where contract terms are ambiguous, a court or arbitral tribunal must enquire "into the mutual intentions of the parties beyond the literal meaning of the words" and be guided by "the nature of the transaction, and the trust and confidence that should exist between parties in accordance with the custom current in such dealings."

Sharia law and time bars

The UAE Civil Code contains a 15-year time bar for commencing contract claims. Contractors frequently rely on this to argue that shorter time bars in construction contracts are void for public policy reasons or, alternatively, that strict enforcement of the same is unlawful.

Specifically, article 473 of the UAE Civil Code provides that:

"**A right shall not expire by the passage of time** but no claim shall be heard if denied after the lapse of fifteen years without lawful excuse, but having regard to any provisions relating thereto." (emphasis added)

Further, article 487(1) of the UAE Civil Code states that:

"It shall not be permissible to waive a time-bar defence prior to the establishment of the right to raise such defence, **nor shall it be permissible to agree that a claim may not be brought after a period differing from the period laid down by law**." (emphasis added)

Contractors may support this argument by reference to the Islamic Sharia principle that "no Muslim's claim shall be annulled even though it is old," which has been referenced by the Federal Supreme Court.[35]

Proportional for liability

The UAE Civil Code provides broad discretion for courts to apportion liability between parties, commensurate with their degree of responsibility for harm caused. In particular, article 290 provides that:

"It shall be permissible for the judge to reduce the level by which an act has to be made good or to order that it need not be made good if the person suffering harm participated by his own act in bringing about or aggravating the damage."

Further, article 291 provides that:

"If a number of persons are responsible for a harmful act, each of them shall be liable in proportion to his share in it, and the judge may make an order against them in equal shares or by way of joint or several liability."

Where an employer has caused delay and/or additional cost, contractors may therefore argue that a contractor's claim cannot be rejected merely for failure to comply with a contractual time bar. To do so would be contrary to public order and principles of proportionality enshrined in the UAE Civil Code.

Good faith and abuse of rights

Contractors will often argue that an employer's attempt to block an otherwise valid claim for non-compliance with a contractual time bar is a breach of the employer's statutory duty of good faith, or an abuse of the contractor's rights.

Article 246(1) of the UAE Civil Code provides that a "contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith," while article 106 precludes a party from relying on a legal right where it would cause disproportionate harm to the other party.

Good faith is a nebulous legal principle and whether the duty has been breached is a question of fact. A court or arbitral tribunal will require evidence of an employer's conduct when deciding whether to enforce a time bar. For example, an employer who was fully aware of a contractor's intent to raise a claim (but later rejects it for reasons of delay) might be considered to be acting contrary to the duty of good faith.

Practitioner insights

Contractors have more latitude under UAE law to escape the harsh consequences of non-compliance with contractual time bars than in common law countries. Absent a binding system of judicial precedent, arbitrators also have considerable discretion to decide each case on its unique merits.

Given the strong uptake of confidential arbitration to resolve UAE construction disputes, most decisions on time bars remain secret, preventing development of a comprehensive body of jurisprudence on the topic. However, matters which may "tip the balance" in favor of an employer's time bar defense might include claims that are grossly late, or made in flagrant disregard of the contractual notice provisions or where a contractor's non-compliance has caused discernible prejudice to the employer. Matters which may "tip the balance" in favor of a contractor might include claims submitted within a reasonable period (albeit late), a poorly drafted notice clause, an employer's actual knowledge of the claim's substance, and disproportionate harm to the contractor if the time bar defense succeeds.

There is certainly no room for complacency when asserting or countering time bar defenses in UAE construction arbitrations. Arbitrators will closely scrutinize the facts of the case and may expect to hear submissions from local UAE legal counsel. Suffice to say, UAE contractors who diligently comply with contractual notice provisions will always be best placed to avoid a successful time bar defense.

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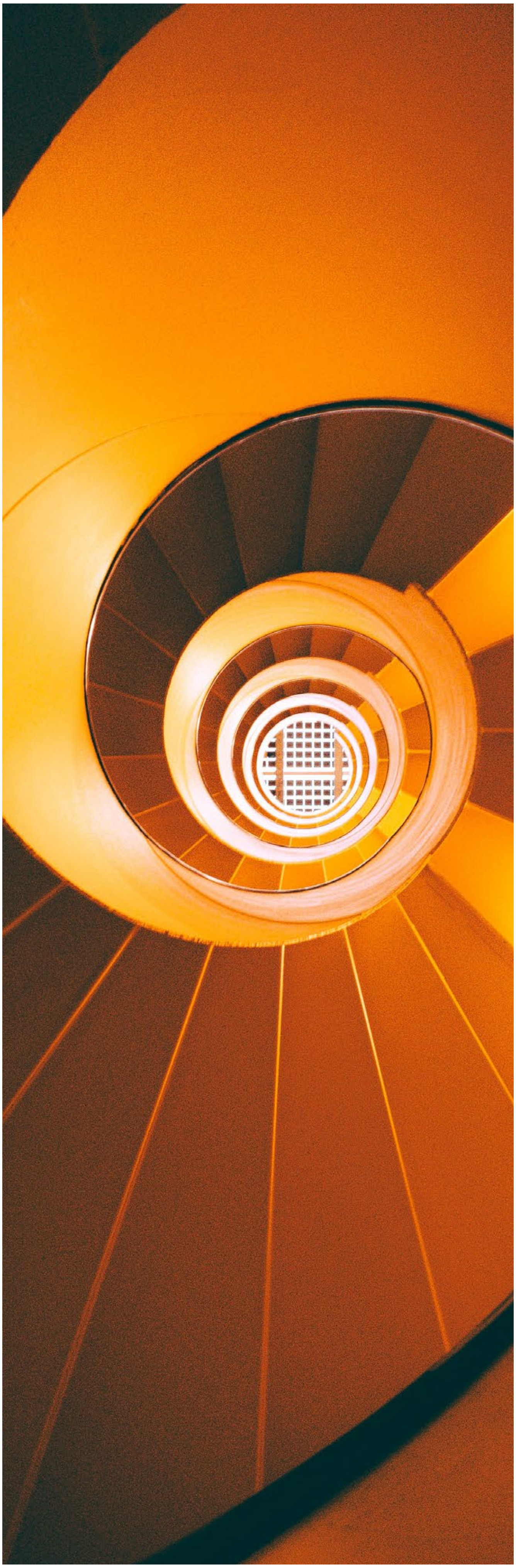

The United States

A common law legal system.

Relevant law

In the United States, notice requirements are defined by contract law and sometimes by statute, although in the event of a conflict the contractual notice provision will often prevail.[36]

Interpretation of notice requirements

Rules regarding the enforcement of notice provisions in standard form industry contracts and private construction contracts can vary from state to state.

Unlike other common law jurisdictions, like England and Australia, where time bars for notifying a construction claim are treated as a form of exclusion clause, in the United States time bars are treated like any other condition precedent. Accordingly, the strict rules that apply to exclusion clauses will not apply to time bars.[37] While it is widely the case that exclusion clauses are construed strictly against the parties seeking to rely on them,[38] a condition precedent, such as a notice requirement in a construction contract, is construed in the ordinary way.

Freedom of contract is a widely accepted principle, and most states will construe time bars based on an objective reading of the contract. If the language of the contract is unambiguous, effect will be given to its plain meaning and the courts will not consider whether the agreement was fair or what the parties may have subjectively intended at the time of formation. Strict compliance with claim notice provisions is therefore typically required, subject to some exceptions referred to below.[39] Some jurisdictions, such as New York, California, Washington, and Maryland, are known for requiring such strict adherence if the notice requirements are clearly expressed.[40] Some states, however, have adopted a more lenient approach to overcome unduly harsh outcomes.[41]

Giving of notice hindered by owner

An owner cannot rely on a contractor's non-compliance with a claim notice requirement if the owner has frustrated or prevented the contractor from giving that notice.[42] In practice, this defense is unlikely to arise except in rare circumstances.

Actual knowledge

One of the more common defenses to an inadequate notice claim in the United States is that the owner had actual knowledge of the claim, or the event giving rise to the claim.[43] In addition to the timeframe for providing notice of a claim, notice provisions typically specify the format for submitting the claim and the required supporting documents. In addition, the notice provision typically designates the recipient for the notice. Applied in its strictest sense, failure to adhere to any of these requirements could bar entitlement to a claim. However, the defense of "actual knowledge" may be raised when the owner is apprised of the events giving rise to the claim, such that giving notice would be a mere formality. Contractors should be cautious, however, and the owner's actual knowledge will not necessarily be sufficient if the contractor's failure to provide notice prejudices the owner.[44]

The "no harm, no foul" doctrine

An exception to the "strict compliance" doctrine is the "no harm, no foul" doctrine, which holds that rejection of claims based on untimely notice is only justified when the recipient is materially prejudiced by the failure to receive timely or formally written notice.[45] Determining prejudice is a fact-specific inquiry that can be avoided if strict compliance with the contract is followed.[46] Government contracts often incorporate change clauses from the Federal Acquisition Regulation (FAR)[47] and the United States government often adopts a "no harm, no foul" approach when administering its own contracts by looking to the purpose of the notice requirements rather than whether formalities have been satisfied.[48] Although it is always advisable for the contractor to comply with the notice provisions, historically these notice requirements are not strictly enforced in practice.[49]

Substantial compliance

Some courts have held that substantial compliance with claim notice provisions is sufficient. In these cases the courts will essentially ignore technical deficiencies in the content of the notice, provided it was given and received.[50] Even in a jurisdiction that more typically requires strict adherence to claim notice provisions, such as New York, it has been held that: "Substantial Compliance will be found when there is sufficient correspondence between the parties to give the owner actual knowledge of the claims."[51]

First material breach

The doctrine of first material breach has, in rare circumstances, been applied to excuse a party's failure to comply with a claim notice provision.[52] Under this doctrine, when a party materially breaches an agreement, the breaching party loses its ability to enforce the contract and the non-breaching party is relieved of its contractual obligations, including any requirement to submit notices to pursue subsequent claims.

Waiver

A time bar, and other notice provisions, may be avoided if a contractor can demonstrate that the owner waived the right to enforce the provision. A waiver can only be made by the party benefitting from the provision and it must be knowing and intentional. Absent a waiver in writing, a waiver by conduct requires "unequivocal acts of conduct evidencing an intent to waive."[53] Evidence that the owner authorized, permitted and directed the contractor to perform work has been considered a waiver of a provision requiring extra work to be approved in writing by the owner.[54]

Estoppel

Similarly to waiver, a contractor may avoid the consequences of failing to adhere to notice provisions if it can demonstrate that the owner should be estopped from relying on the provision. The contractor must show both reliance and detriment, and prove, by clear and cogent evidence: "1) a statement or act inconsistent with the owner's right to rely on the time bar as a condition precedent to entitlement; 2) action by the contractor in reasonable reliance on that statement or act; and 3) injury to the contractor if the owner is allowed to contradict or repudiate its statement or act."[55] When a contractor agrees to cooperate with a subcontractor to prepare change orders for costs incurred, the contractor is estopped from later relying on the failure to comply with notice provisions.[56]

Practitioner insights

Overall, while the enforcement of time bars is robust in the United States, it is less so by comparison to other common law jurisdictions due to the number of potential defenses that might apply. Even a well-drafted claim notice provision can be vulnerable to defenses by the contractor based on post-contractual conduct and the circumstances of the claim. The particular criteria and rules that a court will apply to such defenses can vary depending on the governing jurisdiction within the United States. State-specific research is therefore recommended to ensure full awareness of the particular nuances that might apply under state law. Taking New York State as an example: while it has historically demonstrated strict enforcement of notice provisions, a more lenient approach has been adopted in recent decisions.[57]

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International subcontracting: A French perspective on the consequences and unforeseen risks of the heightened complexity of international construction contracts

Introduction

Large construction projects usually operate in an international arena, bringing together multiple parties from different countries, cultures and traditions. Although no two international construction projects are the same, substantive involvement of subcontractors is quite common.

Out of all the complexities and challenges arising in disputes concerning international construction projects, one deserves specific attention – statutory based direct claims by subcontractors against employers, with whom they have no contractual relationship. The importance of this issue is exacerbated by the ongoing COVID-19 pandemic and related government measures and lockdowns, which have increased the pressures on liquidity for a large number of contractors. In order to deal with this accrued risk, it stands to reason that subcontractors – whether operating on active construction sites or in the process of contract negotiation – will seek to avail themselves of any protective provisions they can, contractual or otherwise. One example of such protective provisions is French Law no. 75-1334 on subcontracting dated December 31, 1975 (the 1975 Law).

The provisions of this exceptional, and typically French, law – which are a matter of public policy and cannot be contracted away – are intended to protect subcontractors against the situation they may be currently facing due to the pandemic: non-payment by the main contractor. They do so by providing subcontractors with a number of statutory avenues to claim against employers.

But what is the relevance of this typically French law to international projects that have nothing to do with the French mainland because the parties are incorporated or operate outside France and/or performance takes place outside France? The French courts have not limited the 1975 Law to domestic projects, having on occasion extended its application to international projects that have some connection to France.

It is therefore worth examining, after a brief summary of the main protective provisions of the 1975 Law, the various connecting factors that the French courts take into account when determining whether an international project should be subject to the overriding mandatory provisions of the 1975 Law. In particular, there appears to be a divergence in the courts' approach when it comes to contracts that have selected arbitration as the forum for disputes, as opposed to French courts. Arbitration is after all one of the most popular methods for resolving international construction disputes.[58]

The 1975 Law's key protective provisions

First and foremost, it is worth pointing out that the 1975 Law contains a number of protective provisions that apply to private and public procurement contracts alike.

Article 1 of the 1975 Law defines a subcontract as a "transaction whereby a contractor entrusts a Subcontractor, for whom he is responsible, with the performance of all or part of the works contract or part of the public procurement contract signed with the main contractor." The 1975 Law is therefore intended to apply in the context of multi-level relationships, between an employer and a contractor on the one hand, and the same contractor and a subcontractor on the other, without any contractual link between the employer and the subcontractor.[59]

Article 3 of the 1975 Law, which applies to both private and public procurement contracts, requires the main contractor to ensure that the employer approves each of its subcontractors and also approves the terms of payment contained within the subcontracts.[60] While this acceptance would typically be required at the time the contract is concluded, French law is particularly flexible when it comes to determining whether a subcontractor has been "accepted" by an employer – such acceptance can take place after conclusion of the contract,[61] and even tacitly to a certain extent.[62]

For public procurement contracts, article 6 of the 1975 Law offers subcontractors a right of direct payment, by introducing an obligation for the employer to pay a subcontractor directly where the amount of the subcontract exceeds a threshold set by the Council of State (currently €600). The subcontractor cannot waive this right of direct payment (article 7). In cases of sub-subcontracting, a subcontractor is required to either provide a joint and several personal guarantee to its own subcontractors, or delegate the payment obligation to the employer (article 6).

With regard to private contracts, article 12 of the 1975 Law offers subcontractors a right of direct action (rather than direct payment). This means that if the main contractor fails to pay the sums due under a subcontract, the subcontractor will be entitled to bring an action directly against the employer, provided that the main contractor has received one month's formal notice to pay (and the employer has received a copy of said notice). As with the right of direct payment for public procurement contracts, it is not possible for the subcontractor to waive its right of direct action in private contracts, which will persist even where the main contractor is in liquidation, receivership or provisional suspension of proceedings (article 12).

The direct action is not limited to sums due for services provided under the subcontract (of which the employer is the beneficiary), but also applies to sums that are owed to the main contractor by the employer on the date of receipt of the formal notice (article 13). It is also worth noting that the main contractor is required to personally guarantee the payment of sums due under the subcontract, under penalty of the subcontract being declared void. This may be done either through a joint and several personal guarantee from a qualified and approved establishment, or by delegating payment obligations to the employer (article 14).

The 1975 Law's international reach

The protective provisions of the 1975 Law set out above are a matter of public policy under French law,[63] meaning that it is not possible for parties to derogate from them. As such, all fully domestic subcontracting operations (i.e., between French parties, for a French employer, relating to a project in France) must comply with the protective provisions provided under the 1975 Law.

However, the application of the 1975 Law to international projects and contracts (i.e., where the parties are incorporated or operate outside France and/or where the performance takes place outside France) remains hotly debated.

Although the 1975 Law does not technically limit its scope of application to purely domestic operations, its very raison d'être – namely protecting subcontractors operating in France – assumes that all parties involved are located in France and subject to French law. However, in international construction projects, it is not uncommon for employers, contractors and subcontractors to all be established in different countries. Even if the contractor and subcontractor are French, the construction project they are working on may be located outside the confines of mainland France.[64] Further, the contract or subcontract may not be governed by French law. One can imagine a whole multitude of different situations that make a construction project international.

It is not surprising, therefore, that in such situations subcontractors may seek to benefit from the protective provisions of the 1975 Law. They may seek to rely on the French concept of "*lois de police*" and suggest that the 1975 Law is mandatory and compliance with it is crucial for safeguarding a country's public interests, regardless of the governing law.[65]

On the other hand, and quite understandably, main contractors and employers will be seeking to escape these provisions and argue that they do not apply to international contracts and projects.

Over the past few decades, the French Court of Cassation has ruled on various factors that could make an international project sufficiently closely connected to France so that the 1975 Law would apply. These rulings, which we examine in turn, provide some guidance on the likelihood of a French court or an arbitrator applying the 1975 Law to an international project.

Firstly, despite initial reluctance, the French Court of Cassation has regularly applied the 1975 Law to international projects (as a "*loi de police*"), where the parties are not incorporated or operating in France, but the project is located in France.[66] It is well-established case law that where a contract relates to works on French territory, the parties will be subject to the protective provisions of the 1975 Law, irrespective of their nationalities. There is therefore a strong likelihood that, if your project is based in France, the French courts will monitor compliance with the 1975 Law.

Second, the French Court of Cassation has held that the link between a project and France must be evaluated in light of the overarching aim of the 1975 Law to protect subcontractors.[67] The mere fact that a main contractor is domiciled in France or that the project is financed by French banks will not satisfy the connection requirements.[68] Consequently, an international project that has no other connection to France other than the place of establishment of the principal contractor and the banks financing the project, will not be subject to the protective provisions of the 1975 Law.

Third, it has been recently suggested by the French Court of Cassation that there could be other factors (not just that the project is located in France) which would make the 1975 Law applicable. However, what those factors are has not been clarified by the courts.

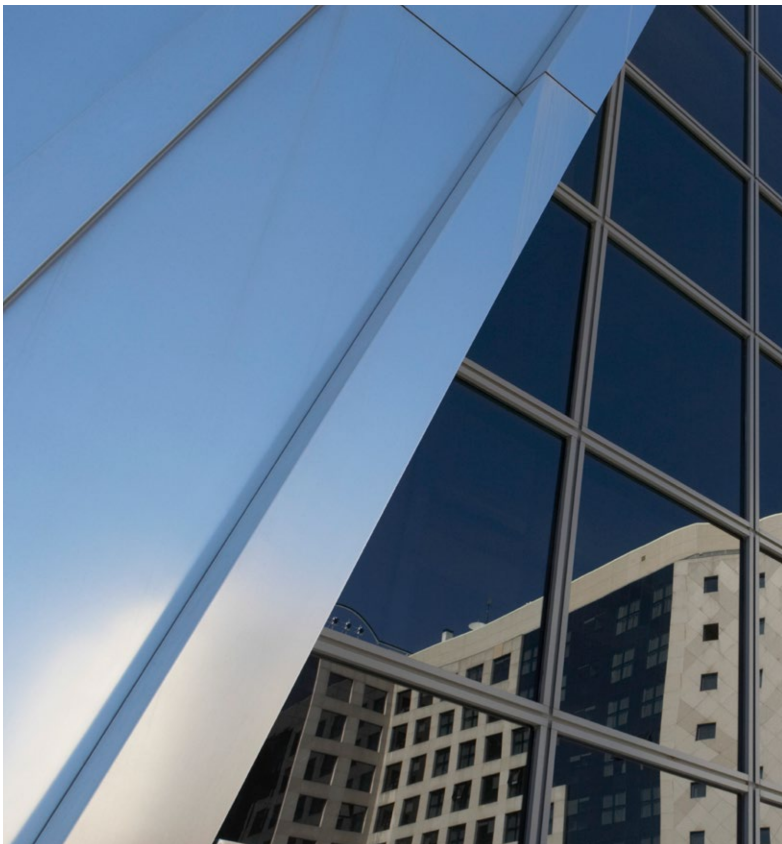
For example, in a 2017 decision, the Court of Cassation referred to (i) the place of establishment of the subcontractor, as well as (ii) the place of performance of the services or (iii) the final destination of the subcontracted products as "criteria for connection to France ... in connection with the objective pursued."[69] However, the court failed to specify whether these criteria taken on their own would justify the mandatory application of the 1975 Law to an international project, absent any other connection to France. As such, if faced with an international construction project where part of the work is subcontracted to a subcontractor established in France, or where the subcontractor will perform its work in France, it is possible that a French court would consider it crucial that the 1975 Law govern the relationship between the main contractor and subcontractor, in light of the overarching objective of protecting the subcontractor. However, the French Court of Cassation has yet to rule on this particular issue.

Finally, what is the position where the project is located outside France and has no connection with France, other than French law being the applicable law (either, by choice, as the applicable law of the subcontract, the main contract, or both, or by virtue of application of conflict of law rules where no applicable law has been provided for)?

It stands to reason that, where parties have agreed on the application of French law to their contract, French law should apply in its entirety, including the 1975 Law.

However, where French law is found to apply in the absence of a choice, would a court or arbitral tribunal consider the protective provisions of the 1975 Law as mandatory in the absence of a sufficient connection of the project and parties with France?

Some indication of the potential answer to this question was recently given by the Paris Court of Appeal, which held that restricting the application of the 1975 Law is not incompatible with a finding that French law applies. In this case,[70] a sole arbitrator ruled in a partial award that, by virtue of the applicable conflict of laws rules, French law was applicable to the contracts. In the final award, however, the arbitrator ruled out the application of the 1975 Law on the grounds that "the spirit of [the 1975 Law] confirms that its territorial scope is limited to works located in France." After noting that the works in question were based in Morocco, the sole arbitrator refused to apply the 1975 Law, relying on the advocate general's conclusion that "when work is performed on the national territory ... the 1975 Law must be applied, whether the subcontractor is French or foreign, as the purpose of this law is to ensure fair competition within the French territory."[71] After examining the final award, the Paris Court of Appeal refused to set it aside, noting that the arbitrator's finding that French law applied to the substance of the dispute did not mean that the 1975 Law automatically applied.



Notable is the fact that, having concluded that French law applied, the sole arbitrator set aside the provisions of the 1975 Law, which are, as a reminder, a matter of public policy. More surprising perhaps is that the Court of Appeal accepted the arbitrator's reasoning, leading to the territorial restriction of the scope of application of the 1975 Law to projects located in France, whereas the trend in recent years had been to extend protection to any project with a sufficient link to France, provided it fits within the overarching aim of protecting subcontractors. In this respect, this particular decision of the Court of Appeal would appear to go against the grain of the recent case law adopted by the French Court of Cassation, which – as discussed above – does not appear to limit the application of the 1975 Law to works performed exclusively in France.

Nevertheless, the measured approach of the Court of Appeal can be explained by the limited control it may exercise over arbitral awards. An award will only be set aside where there is a manifest violation of public policy. As a result, it is likely that arbitrators enjoy greater latitude in the application of French law than the French courts of first instance, which are subject to the full control of the Court of Appeal. As such, the award of an arbitral tribunal dismissing the 1975 Law after having invited the parties to discuss its application will more than likely survive any application for it to be set aside. This lighter review of awards may potentially encourage parties involved in international projects to insert arbitration clauses in their contracts in order to ensure this leeway. However, it obviously cannot be said with any certainty that arbitrators will systematically set aside the 1975 Law when the project in question is not located in France.

It is important to remember that in the case before the Court of Appeal, the arbitrator had to determine the applicable law in the absence of a choice by the parties. However, if the parties had decided by mutual agreement that French law would be applicable, it would be difficult to set aside the provisions of the 1975 Law without infringing the principle of foreseeability, regardless of the jurisdiction. Despite the latitude afforded to arbitrators, an arbitral award could be subject to annulment on the basis of violation of public policy if the tribunal deliberately set aside the mandatory provisions of the law chosen by the parties.[72]

It is apparent from the above that the French courts have taken different approaches over the years. It remains to be seen whether the French Court of Cassation will adopt the position of the Court of Appeal and restrict the international application of the 1975 Law to the sole criterion of performance of the works on French territory, seek to reinforce control on the basis of public policy and desire to protect subcontractors and the public interest, or perhaps distinguish the decision reached by the Court of Appeal on the basis that it was in the context of arbitrations where French law only applied through conflict of laws principles. What is clear is that there remains a degree of uncertainty surrounding the 1975 Law's international reach. In light of this uncertainty, all parties involved in an international construction project that may have a connection to France, however small or remote, should ask themselves "What does this typically French law have to do with my project?" and evaluate any associated risks accordingly.

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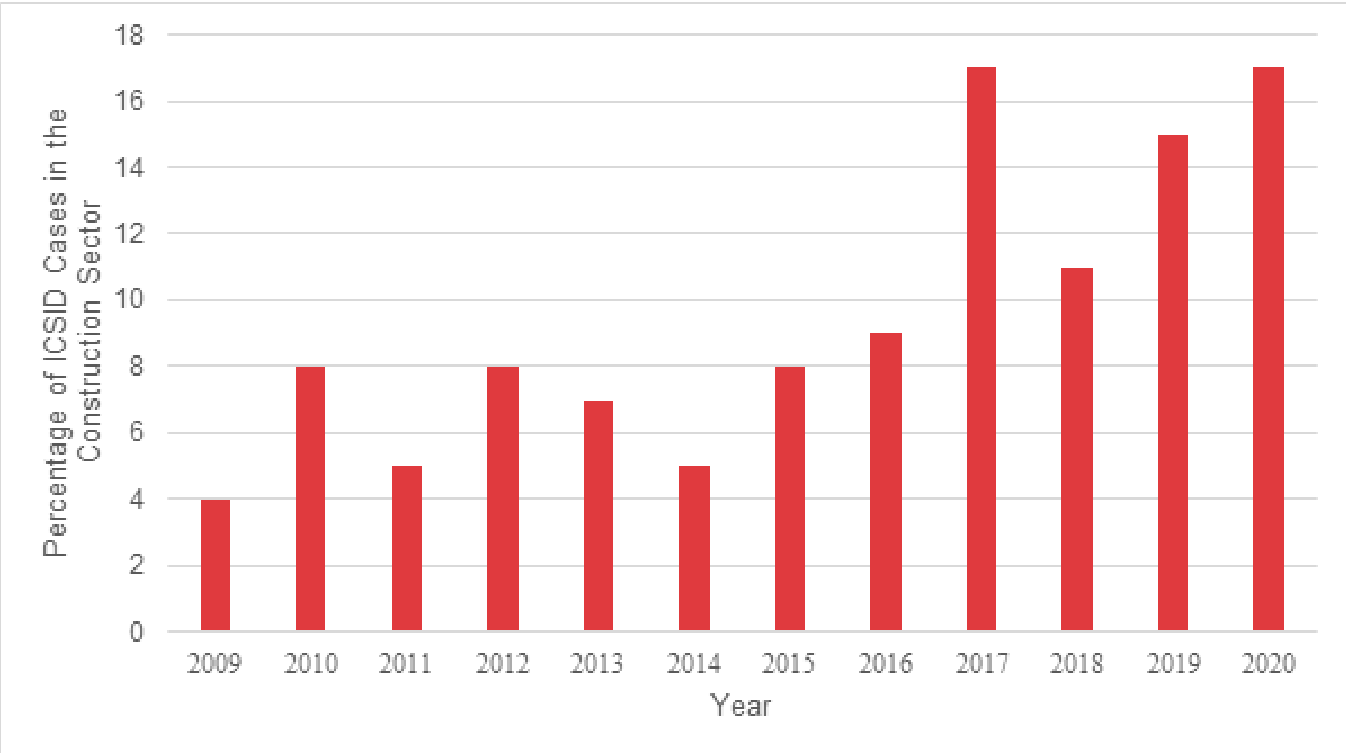
Investor-state arbitration in the construction sector: the example of Libya

Introduction

Investor-state arbitration is a mechanism by which foreign investors can sue states directly for unwarranted interference in their investments by submitting claims to international arbitration instead of local courts. Consent to investor-state arbitration can be found in applicable investment treaties, national law, or state contracts. Enforcement of resulting awards against state assets is facilitated by either the International Centre for Settlement of Investment Disputes (ICSID) Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) or the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

Investor-state arbitration in the construction sector is now commonplace and on the rise. The construction sector accounted for 17 percent of all cases registered with ICSID in 2020, making it the second most common source of investor-state disputes at ICSID after the oil, gas, and mining sectors.[73] This reflects an overall increase in the share of investor-state cases in the construction sector at ICSID over the last decade, as shown in the table below.[74]



The United Nations Centre for Trade and Development (UNCTAD) reports a total of 101 investment cases in the construction sector registered under the ICSID and UNCITRAL rules since 1994.[75]

Investor-state disputes can arise from isolated events, but they often arise in waves following significant political or economic upheaval in a particular state. For example, the arrival of the Arab Spring in Libya and the ensuing civil war yielded numerous investor-state cases in the construction sector. This article examines the decisions resulting from those cases in the broader context of investor-state arbitration, with a view to highlighting issues of general applicability to construction projects in other regions that might be affected by civil insurrection and other disturbances. In doing so, we consider how these decisions addressed issues of (i) choosing the proper respondent, (ii) attributing offending conduct to the state, (iii) establishing liability, and (iv) force majeure as an exception to liability.

Choosing the proper respondent

Consent is a necessary requirement of any arbitral tribunal's jurisdiction. A state's consent to investor-state arbitration can be contained in a contract with the foreign investor, but is usually expressed in the form of a general offer to arbitrate in an applicable investment protection treaty or, in some jurisdictions, national legislation. For an arbitral tribunal to have jurisdiction in such cases, the investor must perfect consent by accepting the offer to arbitrate and proving that it meets the conditions for the state's consent to arbitration.

In investment treaty arbitration, these jurisdictional conditions usually include that, under the treaty's specific terms, (i) the investor is a protected "investor," (ii) the investment is a protected "investment," and (iii) the dispute falls within the temporal scope of the treaty's application. In investor-state arbitration under the ICSID Convention (which is not applicable in cases involving non-parties to the ICSID Convention such as Libya), the investor must also show that the requirements for jurisdiction under article 25 of the Convention are also met.

In all cases – whether under treaties, national legislation, or contracts – it must be established that each of the parties to the arbitration has given its consent to arbitrate. This fundamental requirement is of particular interest for construction and infrastructure projects, which typically involve multiple related contracts between different entities. The additional layer of state involvement only adds to the complexity of both these arrangements and determining the scope of consent to a particular arbitration.

Investors engaged in such disputes often face the choice of deciding whether to sue the state, the state entity that is party to the construction contract, or both the state and its entity. The investor-state arbitrations that arose against Libya in the context of its domestic difficulties provide an interesting case study in this regard, because investors sought in a number of cases to sue both the Libyan state and the Libyan state entity with which they were in contractual privity.

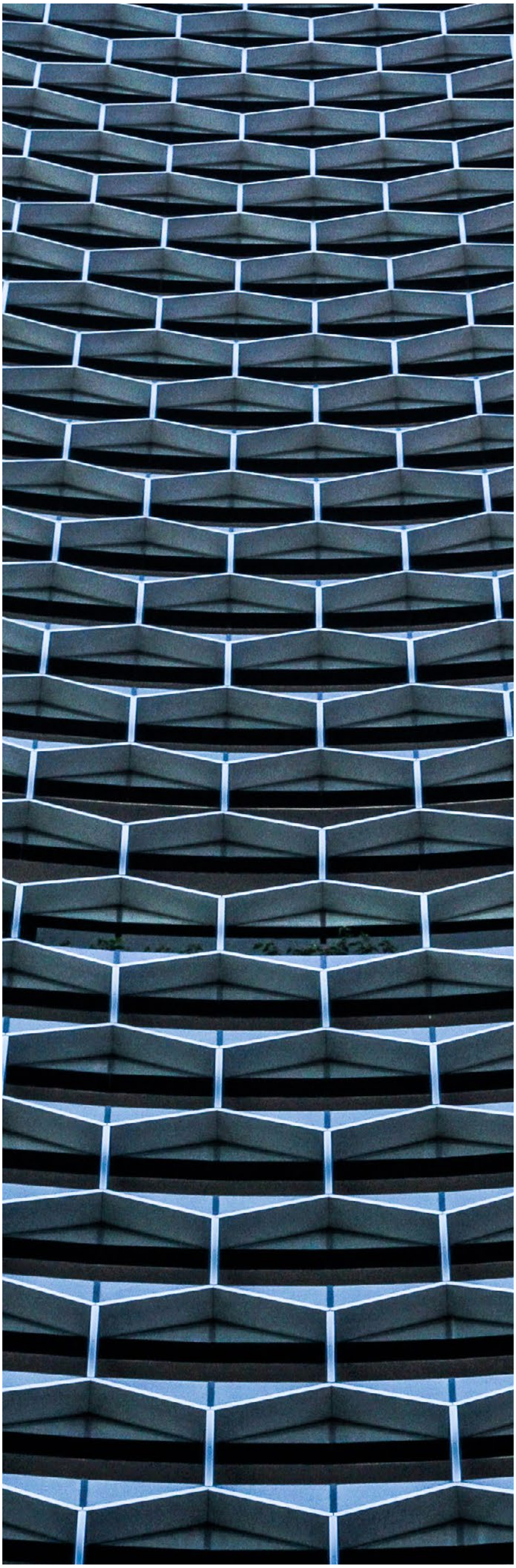
Some tribunals have declined jurisdiction over the state in such cases. For example, in ***Tekfen and TML v. Libya***,[76] joint venture investors initiated an International Chamber of Commerce (ICC) arbitration against both Libya and the Libyan Man Made River Authority, a state entity, for alleged breaches of a contract the joint venture entities had with the state entity. The tribunal declined jurisdiction over the state under the contractual arbitration clause, ruling that the Man Made River Authority (which had signed the underlying contract) was a separate entity from the Libyan state (which had not signed the contract) for jurisdictional purposes. This ruling led Tekfen to initiate related proceedings against the Libyan state under the Libya-Turkey bilateral investment treaty (BIT).

In other cases where investors have claimed against both the state and the state entity, tribunals have affirmed jurisdiction over the state and declined jurisdiction over the state entity. For example, in ***Öztaş Construction, Construction Materials Trading Inc. v. Libya***,[77] the investor and the Libyan Investment Development Company (LIDC) concluded a contract for the creation of a water supply and transport system in 2008. They then mutually terminated the contract through a termination agreement in 2013, which provided, among other things, for the payment of compensation to the investor. Neither the initial contract nor the termination agreement contained an arbitration clause. The investor initiated arbitration against both the Libyan state and LIDC under the Libya-Turkey BIT on grounds that the state-owned entity had failed to pay the agreed compensation, an obligation that the investor held was attributable to Libya in light of its failure to provide a stable framework in the context of the civil war. The tribunal declined jurisdiction over LIDC, noting that the arbitration agreement contained in the Libya-Turkey BIT referred to "disputes between a Contracting Party and an investor" that the state-owned entity was "not (on any view) 'one of the Contracting Parties' to the BIT." In other words, the tribunal concluded that it did not have jurisdiction over such a dispute in the absence of an arbitration agreement in the treaty that bound LIDC.

Likewise, in *Way2B ACE v. Libya*,[78] a Portuguese investor brought a €53 million claim against Libya and the Organization for Development of Administrative Centres (ODAC) in relation to two construction contracts for two university complexes that were razed during an uprising during the Libyan civil war. The investor claimed against both the Libyan state and ODAC under the Libya-Portugal BIT, alleging that the state-owned entity failed to perform its contract before the civil war and claiming compensation for losses incurred both during and after the civil war. The tribunal dismissed the claims against ODAC for lack of jurisdiction under the BIT, finding that ODAC was neither a party to the treaty nor a "subject of international law."

These cases demonstrate the importance of choosing the right respondent for jurisdictional purposes. They reflect a pattern of tribunals in cases arising out of contracts with state entities declining to attribute the obligations under those contracts, including the obligation to arbitrate, to states for purposes of establishing arbitral jurisdiction or otherwise. They also reflect a pattern of tribunals constituted under investment treaties, which are signed by and impose obligations upon states, declining jurisdiction over treaty claims against state entities when consent to claim against those entities is not present in the scope of the relevant treaty's arbitration provisions.

Investors will want to take note of these important distinctions. In some cases, it may suffice for the investor to sue only the state entity with which it has contracted, in particular where that entity has sufficient assets to satisfy any potential award, and in some cases to avoid antagonizing the state through a direct claim under an applicable investment treaty. In other cases, however, contractual remedies alone may not suffice (e.g., where the measures in question extend beyond mere contractual breaches or the state-owned entity is unlikely to honor an adverse award). In Libya, for example, some commentators have expressed concern about the ability of state entities to honor arbitration clauses signed before regime change took effect.[79]



Another related hurdle that investors may face relates to the co-existence of two rival governments. For instance, following the Libyan civil war, the competing classes of the Tripoli and Tobruk governments laid competing claims to power over the country. In that context, Libya argued in *Öztaş Construction* that the notice of dispute had not been properly served on the state, because it allegedly was served to the wrong party. The tribunal held that delivering the notice of dispute to the Libyan embassy in Paris was sufficient to bring the dispute to the attention of the state and rejected the inadmissibility claim.[80] However, the potential complications that rival governments pose for investor-state arbitration should not be overlooked.

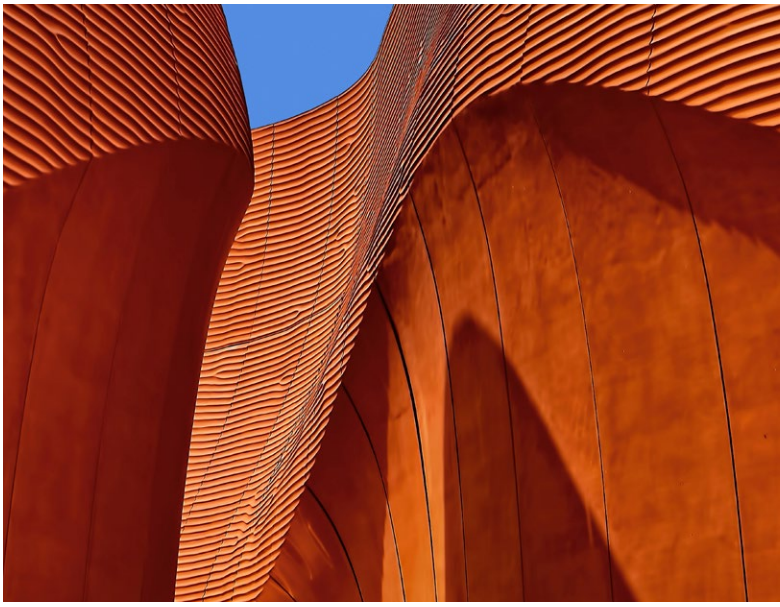
Attributing offending conduct to the state

Establishing that the conduct complained of is attributable to the state is an essential component of proving state responsibility under an investment treaty and international law more generally. As reflected in the International Law Commission's *Draft articles on Responsibility of States for Internationally Wrongful Acts* (the ILC articles), conduct can be attributed to the state as a matter of international law when that conduct belongs to a person or entity (i) that is an organ of the state (ILC article 4), (ii) that is legally empowered to exercise governmental authority (ILC article 5), (iii) that is acting under the instructions, direction, or control of the state (ILC article 8), or (iv) whose conduct is acknowledged and adopted by the state as its own (ILC article 11).

Given the structure of state-sponsored construction and infrastructure projects, which often are underpinned by contracts between foreign investors and state entities, rather than the state itself, the attribution of a state entity's conduct to the state is often a central issue in investor-state arbitrations arising out of the construction sector. The decisions resulting from recent investment treaty cases against Libya are an instructive example of this phenomenon in practice.

For instance, in *Güriş İnşaat ve Mühendislik A.Ş. v. Libya*,[81] after the tribunal dismissed the investor's treaty claims against ODAC, a Libyan state entity, for lack of jurisdiction to claim against that entity under the BIT, it nonetheless had to decide whether ODAC's conduct was attributable to the state, over which the tribunal did have jurisdiction under the treaty. The tribunal ruled that ODAC's conduct was not attributable to Libya based on any of the grounds of attribution identified above, in particular because the tribunal found that ODAC was an autonomous entity with independent legal personality whose conduct was not taken under the authority or control of the Libyan state.

In another case, *Cengiz İnşaat Sanayi ve Ticaret A.S. v. Libya*,[82] the investor had entered into two contracts with the Libyan Housing and Infrastructure Board to design and construct housing relating to infrastructure in a remote region of Libya. The project site was looted following evacuation of the area during the Arab Spring, and looting and security issues continued as Libya



descended into civil war. The tribunal concluded that the conduct of Libyan armed forces that had participated in attacking and looting the project site were attributable to Libya despite the fact that they were loyal to the previous regime.[83] It also concluded that the harm caused to the investment by insurrectionist forces that later came to occupy the project site was attributable to the state, because those forces eventually became state organs under the new government.[84]

This decision appears to differ from the result in *Güriş*, in which the tribunal also considered whether the conduct of actors other than the state party to the construction contract – e.g., the Amazon Guard, the Zintan Brigades, and the Misrata Militia – was attributable to the Libyan state. In that regard, the tribunal found that the investor did not "present a detailed analysis as to why the acts [of these entities] should be attributable to the Respondent." This finding underscores the importance of attention to evidence, which may often be scarce in disputes arising out of civil strife, in supporting arguments of state attribution before international tribunals.

Numerous other tribunals in investor-state claims against Libya analyzed similar issues of state attribution. This demonstrates the centrality of such issues in investor-state cases arising out of the construction sector, an importance which is compounded in cases where the offending conduct of state entities (or entities that eventually come to occupy that status) occurs during an armed conflict that leads to a regime change.

Establishing treaty liability in the Libyan construction cases

The claims brought against Libya in respect of damages suffered as a result of the Arab Spring and the ensuing civil war have been predominantly founded in alleged breaches of the full protection and security standard (FPS) and the "wartime clauses" contained in applicable investment treaties.

The FPS standard requires that host states exercise due diligence to protect investments from harm by both state and non-state persons and entities. In the civil disturbance context, tribunals have held that this duty entails adequate efforts to ensure that premises and personnel associated with an investment are adequately protected from political, military, and social rebellions, acts of violence, and similar threats.

Many treaties also contain a "wartime clause." These types of clauses come in two main forms: (i) one type promises non-discrimination in the treatment of losses incurred; and (ii) the second goes further and promises compensation for losses arising out of war and civil disturbance (subject to the fulfilment of certain conditions).

Although some tribunals have held that Libya failed to provide FPS to construction projects during the civil war, violation of a treaty's FPS clause has not necessarily been accompanied by a finding that the state violated the treaty's wartime clause. For example, in *Cengiz İnşaat Sanayi ve Ticaret A.S. v. Libya*, the tribunal found that the conduct of the armed forces and insurrectional movements (which was held to be attributable to Libya as described above) breached the FPS standard, but nonetheless rejected the claims brought pursuant to the treaty's wartime clause (which merely precluded discriminatory treatment, and did not extend to a right to compensation).[85]

By contrast, the tribunal in *Strabag SE v. Libya* concluded that it was "compelled to agree [that] in the circumstances prevailing in Libya during and since the Revolution, it was not reasonably possible for the Libyan authorities to take consistent and effective measures to protect Claimant's investment."[86] The tribunal accordingly declined to find that Libya had breached the FPS standard under the applicable treaty and instead awarded damages pursuant to the treaty's wartime clause.[87]

Similarly, the tribunal in *Öztaş Construction v. Libya* rejected claims for breaches of the FPS standard, noting that "the condition of civil war or uprising, if existent, constitutes an extraordinary situation that negates any negligence or lack of due diligence against the State of Libya."[88] The majority of the tribunal concluded that the only remedy available to the claimant in relation to losses suffered because of the civil war was the treaty's wartime clause. The claimant was unable to show that it had suffered comparably less favorable treatment than other investors, and its claims were accordingly dismissed.[89] However, in a partial dissent, the claimant's appointed arbitrator opined that the state's obligation to provide FPS extends to providing commercial and legal protection to investments in addition to physical protection. The dissenting arbitrator accordingly opined that Libya had breached the FPS protection by not providing a stable framework for investment in general, and that "the passive attitude of the State of Libya, against [the] unstable political and economic situation is not acceptable under the BIT."[90]

With their focus on the FPS standard and wartime clauses, the investor-state cases arising out of the Arab Spring in Libya and subsequent Libyan civil war are relatively unique in the broader context of investment treaty case law, in which liability is most commonly found under the applicable treaties' fair and equitable treatment and expropriation standards. In that sense, the cases are heavily context dependent, but nonetheless constitute a valuable body of jurisprudence for reference when considering the impact of civil strife on foreign investments in the construction sector and other sectors of foreign investment.

Force majeure as an exception to liability

Force majeure is a defense that is often invoked to excuse performance in the context of construction arbitration, and the COVID-19 pandemic has only increased the frequency of such invocations. The standard of force majeure that applies in such disputes typically arises from the underlying construction contract or the law applicable to that contract. In the investor-state arbitration context, force majeure defenses may also be considered as a matter of international law.

In international law, a force majeure event may excuse liability for non-performance, provided that the supervening event is unforeseeable, uncontrollable, and makes the performance of an obligation impossible. Force majeure does not include circumstances in which performance of an obligation has become more difficult, or less economically viable due, for example, to a political or economic crisis, nor to situations brought about by the party's own neglect or default.

Force majeure is not typically defined as a specific term or excuse for non-performance in relation to any investment treaty obligation. Rather, ILC article 23 defines force majeure as "the occurrence of an **irresistible force or of an unforeseen event**, **beyond the control of the State**, making it **materially impossible** in the circumstances to perform the obligation" (emphasis added), being the three elements that the party seeking to invoke force majeure must prove. States cannot invoke force majeure if the circumstances preventing performance are due to their own conduct or if they assumed the risk of that situation in question.

Force majeure events considered by ISDS tribunals in investor-state arbitration have included natural disasters or man-made constraints such as **war**, **coup d'état**,[91] or **civil unrest**.

The incidence of force majeure under international law being invoked in investor-state arbitration more generally is relatively infrequent.

In *Autopista v. Venezuela*,[92] a contractual investor-state arbitration but the only known investor-state arbitration to consider the defense of force majeure under international law, Venezuela failed in its attempt to invoke force majeure to defend a claim related to road tolls. Venezuela argued that it was unable to comply with its contractual obligation to increase toll fees due to civil unrest in the country. The tribunal held that the force majeure event must make the obligation impossible to perform, which was not the case.

Some investment treaty tribunals have addressed the force majeure defense under international law in passing. For example, the tribunal in *CMS v. Argentina* remarked with respect to the Argentine financial crisis that "the crisis in and of itself might not be characterized as catastrophic and … there was therefore not a situation of force majeure that left no other option open."[93] The tribunals in *Enron v. Argentina* and *Sempra v. Argentina* confirmed that ILC article 23 required the prevailing circumstances to be "beyond the control of the State, making it materially impossible under the circumstances to perform the obligation."[94] Those tribunals went on to quote the commentary to ILC article 23 for the proposition that "[f]orce majeure does not include circumstances in which performance of an obligation has become more difficult, for example, due to some political or economic crisis."[95]

As these cases show, the threshold for invoking force majeure is high and the proper law applicable to force majeure in any particular investor-state case must be carefully considered. As a general rule, however, tribunals have repeatedly emphasized that the event must be unforeseeable and make performance of an obligation impossible, rather than just more difficult, with no other possible alternative to achieve performance. This means that force majeure has proven to be a difficult defense for states seeking to defeat claims by foreign investors. The investor-state cases in which force majeure has been invoked successfully are the exception rather than the rule.

Conclusion

The spate of investor-state arbitrations in the Libyan construction sector following the Arab Spring and Libyan civil war has produced a range of instructive precedent for investors and states alike. As highlighted above, lessons that can be taken from this case law include instructive examples in choosing the proper claimant in both treaty and contract arbitrations involving the conduct of states and state entities, attributing the conduct of state entities and other actors to the state, establishing liability in investment treaty claims during periods of civil unrest or national emergency, and defenses to the performance of legal obligations such as force majeure.

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The future of construction arbitration in the Kingdom of Saudi Arabia

Introduction

Notwithstanding the impact of COVID-19 on the construction industry globally last year, in the Kingdom of Saudi Arabia (KSA), construction activity accounted for 6.7 percent of the country's GDP in Q3 of 2020,[96] an increase from 5.5 percent recorded in 2019[97] and 5.1 percent recorded in 2018.[98]

A driving force behind the expansion of KSA's construction industry is Vision 2030, the blueprint for KSA's ambitious development program. This has resulted in large scale government investments and an increase in demand for residential development. The significance of construction in KSA is underpinned by its portfolio of "giga" projects (generally considered to be huge scale, billion dollar projects, many of which have achieved international recognition and are of generational significance), energy megaprojects and large scale transport developments. In recent years, KSA has announced major projects including The Red Sea Project and Amaala resort, urban living giga projects such as NEOM, which encompasses "The Line" (a proposed "smart" city), and infrastructure and transport developments such as the Riyadh Metro and Riyadh Rapid Bus Transit System. The energy sector has also benefited from significant projects, including state-owned Saudi Aramco's increment programs at the Berri and Marjan oilfields, where 34 contracts were awarded in 2019, with a total value of $18 billion for the engineering, procurement, and construction of the two programs.

Many of the major projects are slated to complete in the next five to eight years. In line with its Vision 2030, KSA has actively sought to strengthen its dispute resolution offering to attract foreign investors. In this article, we consider KSA's recent legislative reforms, developments within the Saudi Center for Commercial Arbitration (SCCA), and the impact these might have on international arbitration in KSA's construction sector.

The changing legislative landscape for arbitration in Saudi Arabia

The last decade has seen a continued push toward modernization of KSA's arbitration framework. As discussed in detail below, the New Arbitration Law and the Enforcement Law have together created a more arbitration-friendly environment and provided several key developments, including the introduction of specialized enforcement judges, the reduced role of the KSA courts in the conduct of arbitral proceedings, and increased party autonomy, thereby bringing KSA arbitration practice more in line with international arbitration norms.

The Executive Regulations are also a significant addition to the suite of arbitration legislation in KSA, providing welcome clarification on procedural matters and bringing further reassurance to foreign investors who have opted to resolve disputes in KSA by recourse to arbitration.

The New Arbitration Law

The new arbitration law[99] came into force on 9 July 2012 (the New Arbitration Law). By modeling the New Arbitration Law broadly on the United Nations Commission on International Trade Law (UNCITRAL) Model Law and codifying a comprehensive arbitration policy, KSA has embraced international standards in its arbitration regime. The New Arbitration Law replaced in its entirety its predecessor, the 1983 Arbitration Law, which had been subject to criticism over perceived limitations. Its enactment nearly a decade ago brought KSA into line with many other countries in the region and was a move welcomed by the legal community.

Enforcement Law

The New Arbitration Law was complemented by the enactment of the Enforcement Law,[100] which came into effect in March 2013, pursuant to which the old system of enforcement proceedings, before the Board of Grievances (the Board), was abandoned. Exclusive jurisdiction for the enforcement or setting side of arbitral awards, both domestic and foreign, under the Enforcement Law now rests with specialized enforcement judges in KSA.

Prior to its implementation, parties had to bring applications for the enforcement of foreign judgments and arbitration awards before the Board, which would undertake a full review on the merits to ensure compliance with Sharia law, requiring all relevant documents from the arbitration to be submitted to the Board in Arabic. This was a relatively burdensome process and caused significant delays to enforcement. It also created uncertainty for parties seeking to enforce foreign awards, as the award could be subject to an examination on the merits.

The Enforcement Law covers the enforcement of domestic and foreign judgments, as well as arbitral awards. Pursuant to article 11, a foreign arbitral award may be enforced based on the principle of reciprocity (i.e., a Saudi court may refuse to enforce arbitral awards from jurisdictions that would not enforce Saudi judgments or awards), provided the party seeking to enforce the award demonstrates the following:

- the Saudi courts do not have jurisdiction to hear the dispute;
- the arbitral proceedings were carried out in compliance with due process;
- the award is final (as per the law of the seat of arbitration);
- the award does not contravene a judgment or order issued on the same subject by a judicial authority of competent jurisdiction in KSA; and
- the award does not contravene KSA public policy or *Sharia* law.

The Enforcement Law greatly simplified the procedure for enforcing foreign judgments and arbitral awards and was hailed as a further move toward reaching international standards.

Executive Regulations

On June 9, 2017, the Executive Regulations of the Arbitration Law (the Executive Regulations) came into force. These regulations sought to clarify key provisions of the New Arbitration Law, providing some comfort to parties in Saudi-seated arbitrations. In particular:

- article 2 of the Executive Regulations now clarifies that the Competent Court for the benefit of the New Arbitration Law is the Saudi Court of Appeal. Pursuant to article 8 of the New Arbitration Law, the Saudi Court of Appeal has jurisdiction to consider an action to nullify an arbitration award and in the case of international commercial arbitration, within the KSA or abroad, the Court of Appeal located in Riyadh has jurisdiction unless the parties agree otherwise;
- article 13 of the Executive Regulations introduces a new provision whereby an arbitral tribunal may agree to the joinder of a third party in the arbitration proceedings, provided that the parties to the arbitration and the third party all consent; and
- article 17 of the Executive Regulations clarifies the process for challenging arbitral awards. The New Arbitration Law provides that if the competent court (the Saudi Court of Appeal), decides to set aside the award, the parties can appeal its decision to the Saudi Supreme Court within thirty days following the date of notification of the decision.

Procurement Law

According to national statistics, the value of government owned construction projects achieving completion in 2018 was in excess of SAR 163 billion (approximately $43.47 billion).[101] In December 2019, the new Government Tenders and Procurement Law (the Procurement Law),[102] along with the Implementing Regulations of the Government Tenders and Procurement Law (the Implementing Regulations),[103] came into force reforming the requirements for KSA government bodies to enter into arbitration agreements.

Under the previous legislation,[104] government bodies were only permitted to enter into arbitration agreements in exceptional circumstances. Pursuant to article 92(2) of the Procurement Law, government bodies may now enter into an arbitration agreement after obtaining the approval of the Minister of Finance and complying with the procedures under the Implementing Regulations.

Article 154 of the Implementing Regulations sets out the following conditions under which government bodies may be permitted to enter into an arbitration agreement:

- arbitration can only be undertaken in respect of contracts which exceed SAR 100 million (approximately $26.6 million) in value (subject to amendment of this limitation by the Minister of Finance);
- the laws of KSA apply to the subject-matter of the dispute and arbitral proceedings cannot be conducted under rules of arbitration centers located outside of KSA. In accordance with Royal Decree 28004 of January 24, 2019,[105] KSA government bodies and state-owned companies intending to resolve disputes with foreign investors through arbitration must conduct arbitration at the SCCA or other arbitration centers licensed by the Standing Committee for Saudi Arbitration Centers established in accordance with KSA Cabinet Resolution No. 107.[106] This effectively prevents parties from choosing other established institutions located in the region, such as the Dubai International Arbitration Centre or institutions with global reach, such as the International Chamber of Commerce; and
- the arbitration agreement and its terms must be set out in the contract which forms the subject matter of the dispute.

The Procurement Law also introduces a number of other reforms, which will impact construction contracts with government bodies in KSA, of which contractors need to be aware. We mention some of the key ones below by way of example:

- article 68 limits the circumstances in which the contract price may be adjusted to the following:
    - changes in the prices of main items or services covered by the tender, as specified by the Implementing Regulations;
    - adjustment of tariffs, fees, or taxes; or
    - unforeseen financial difficulties arising in the course of contract performance;
- article 69 expressly provides that a government body may issue variation orders, which increase the contract value by no more than 10 percent, or decrease the contract value by no more than 20 percent;
- article 72 sets the limit for penalties (including liquidated damages) that can be imposed for delay at:
    - 6 percent of the contract value for supply contracts; and
    - 20 percent for any other contracts (previously set at 10 percent of the contract value under the previous law). The above percentages may be increased, subject to the Minister of Finance's approval and to notification being provided to tenderers prior to submission of their proposals;
- article 73 provides for a similar maximum penalty of 20 percent for a contractor's default (also previously set at 10 percent), subject to certain exceptions;
- article 76 provides that contracts may only be terminated in limited circumstances, such as a delay to commencement of the works; and
- article 77 provides that a government body is entitled to terminate a contract if doing so would be in the public interest or if termination is agreed with the contractor, subject to the Minister of Finance's approval.

The Procurement Law and the Implementing Regulations undoubtedly reinforce the commitment of the KSA government to facilitate a pro-arbitration environment for foreign contractors looking to invest in the major public infrastructure programs in KSA over the coming years.

The Saudi Center for Commercial Arbitration

The SCCA was established by Royal Decree in 2014[107] and became operational in 2016. Whilst the SCCA is still in its infancy, it has made continued efforts to establish its presence. According to its January 2020 newsletter, a number of major national and international companies in various sectors have incorporated the SCCA's model arbitration clause into their contracts, and cases have begun to flow to the SCCA from national and foreign parties.[108]

In a move aimed to increase trust in the SCCA and align with pro-arbitration legislative reforms in 2019, in April of that year, the Saudi Center for Commercial Arbitration Regulation (the SCCA Regulation) was issued, outlining the regulatory framework for the SCCA's work. Article 5 of the SCCA Regulation expressly provides that the tribunal shall be independent from the SCCA board of directors in the exercise of its work managing proceedings for pending cases and shall receive no instructions from the SCCA board of directors with regard to its work in those cases.[109] The SCCA Regulation provides for a financially and administratively independent legal personality for the SCCA and ensures independence in the respective functions of the tribunal and SCCA board of directors, bringing the SCCA into line with the administrative workings of other regional arbitration centers.

In addition, in late 2019, the creation of the SCCA Advisory Committee (the Committee) was announced. The Committee's role is described by the SCCA as providing the SCCA with "technical counsel and industry insights" through the expertise of its members, to enable the SCCA to continue to develop and upgrade its services.[110] Given the timing of the establishment of the Committee, just prior to the pandemic, evidence of its influence or effect is, to date, limited.

The publicly available data for the SCCA indicates that from founding to December 2018, the largest share of cases registered at the center, some 38 percent, related to construction disputes.[111] No indication of the volume of case referrals has yet been provided. Therefore, it is not yet possible to evaluate whether referrals (either in general or specifically in the construction sector) increased over this period. It further remains to be seen whether the SCCA will enjoy the same level of success as other regional centers in terms of referrals for construction disputes (for example the Dubai International Arbitration Centre, which received 208 referrals in 2019 and 161 referrals in 2018).[112] These statistics do, however, go some way to demonstrating confidence within the construction sector in referring disputes to the SCCA.

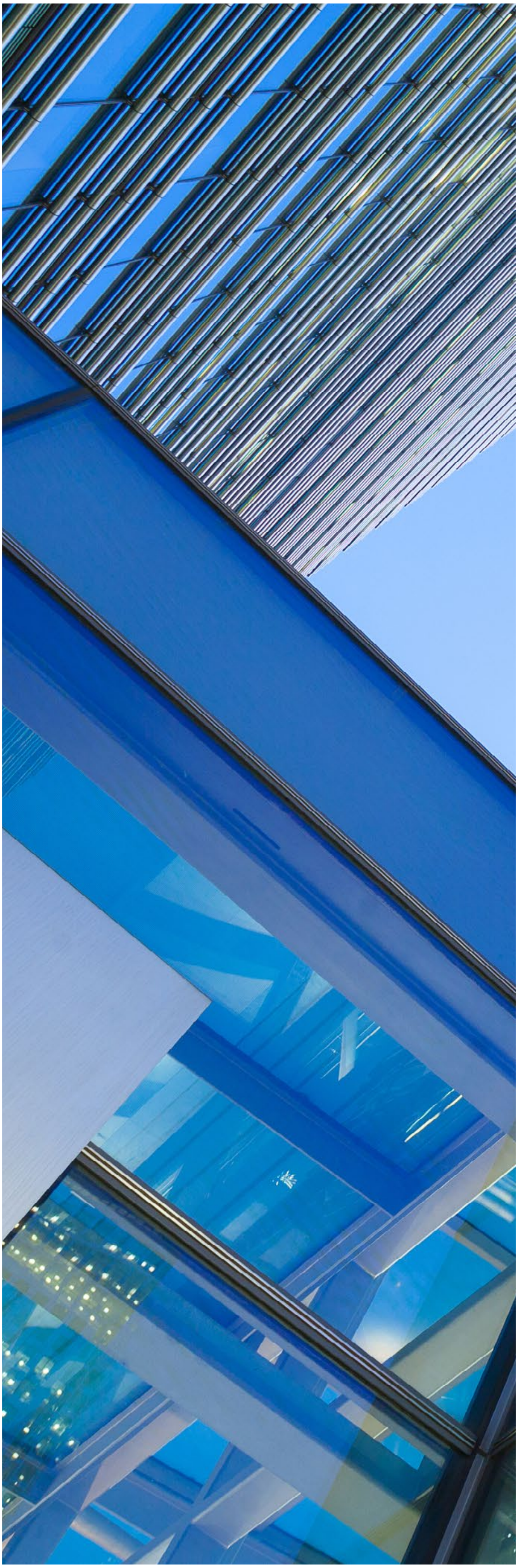
Given the enactment of the Procurement Law and the sustained efforts of the KSA government to increase the attractiveness of arbitration as a preferred method of dispute resolution, it seems likely that government bodies will start to include SCCA dispute resolution provisions in their construction contracts with third parties (as opposed to the previous default position of litigating before the KSA courts). However, it is too early to predict how the SCCA might cope with a possible influx of referrals arising out of the major construction projects underway in KSA.

Challenges to international arbitration in the construction sector in KSA

Requirement for Sharia compliance

Despite these strides toward modernization, there remain challenges to overcome. For international parties to construction contracts, a matter of particular concern arises out of the ability of local enforcement judges to set aside awards during enforcement proceedings, if the award is considered not to be Sharia-compliant[113] or to violate the public policy of KSA. Interest-bearing awards or awards that provide for punitive or exemplary damages are particularly problematic.

In addition, parties ought to bear in mind that any arbitration seated in KSA must be conducted in a manner which is considered Sharia-compliant.[114] Absent compliance, the award may be subject to review in enforcement proceedings. Due to these issues, parties intending to conduct an arbitration in KSA or enforce a foreign award in KSA, need to ensure that the arbitration is conducted, and the award drafted, in a Sharia-compliant manner. In such instances, parties are well advised to seek legal advice in advance of commencing or defending arbitral proceedings.



Enforcement of arbitral awards

Enforcement of arbitral awards in KSA has in previous years been viewed as a somewhat thorny issue, particularly in relation to the enforcement of foreign arbitral awards. The starting point is that the New Arbitration Law confirms that arbitral awards are not subject to appeal, except on grounds of invalidity.[115] Therefore, the only recourse available against an arbitral award in KSA is an action to have the award set aside by the competent court, which for international commercial arbitrations is the Court of Appeals in Riyadh, unless otherwise agreed by the parties. Pursuant to article 50 of the New Arbitration Law, such an action is only available in limited circumstances, for example, if no arbitration agreement exists or the arbitration agreement is null and void, the legal incompetency of one of the parties, or where the award touches on matters which are not subject to the arbitration agreement.

Notwithstanding the above, in order for an enforcement judge to enact enforcement, they will need to be satisfied that the award does not contradict any previous ruling or decision by the KSA courts and that it does not conflict with any principle of Sharia or KSA public policy. In such cases, the merits of the award may be assessed by the enforcement judge. Whilst the potential for judicial interference remains a threat, the data published by the Ministry of Justice in its February 2021 newsletter,[116] states that enforcement of local and international arbitration awards has increased by over 880 percent in the past five years, indicating increased confidence in the enforcement of foreign arbitral awards in KSA.

Other issues for consideration

There are other issues, which ought also to be considered by construction professionals in light of the legislative reforms. For example, the New Arbitration Law does not expressly provide for overall confidentiality of the arbitral proceedings. Whilst article 39(1) of the New Arbitration Law, sets out that deliberations of the arbitral tribunal are confidential and article 43(2) prevents publication of awards, in whole or in part, absent the written consent of the parties, there is no express provision in the legislative framework which provides that evidence and pleadings submitted in an arbitration are protected by confidentiality. In relation to the major construction projects ongoing in KSA, it would in many cases not be in the parties' best interests for the pleadings or evidence prepared for the purposes of an arbitration to be made public. Accordingly, parties to construction contracts may wish to seek advice when drafting an arbitration agreement to ensure confidentiality for all documents prepared for or submitted in the arbitration.

Conclusion

Historically, arbitration has not been a popular method of dispute resolution in KSA. However, the continued legislative reforms demonstrate KSA's commitment to creating an arbitration hub which attracts global recognition and meets international best practice standards. These positive developments should boost stakeholder confidence to engage in KSA's rapidly developing construction industry. Sustaining this confidence will be vital for continuing to attract major international construction companies to execute KSA's ambitious plans for tourism and infrastructure development.

It remains to be seen whether the SCCA will receive the level of arbitration referrals that other institutions in the region attract. However, the implementation of the new legislative framework for government bodies to resolve disputes by arbitration would suggest that more construction disputes will be referred to the SCCA in the coming years.

Parties entering into business relationships with KSA entities will need to be confident that an arbitral award rendered by a tribunal outside of KSA will be enforced expeditiously and without the need for re-assessment of the merits of the award. The substantial growth in the number of foreign enforcement applications in the last five years, indicates that parties remain willing to rely on enforcement in KSA, perhaps suggesting that the enactment of the Enforcement Law and the reforms to the procedures brought in as a result of this legislation have been successful. Further case law and data will be required over the coming years to fully evaluate this position. However, in the meantime, international construction professionals can take comfort that international parties continue to enforce their foreign awards in KSA.

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Endnotes

Australia

1 Port Jackson Stevedoring Pty Ltd v. Salmond & Spraggon (Australia) Pty Ltd (1978) 39 CLR 231, 238-239 (Barwick CJ).

2 Ibid.

3 Etlis v. New Age Constructions (NSW) Pty Ltd [2005] NSWCA 165 (Etlis) at [30].

4 Etlis at [31]; see also Wormald Engineering Pty Ltd v. Resources Conservations Co International (1988) 8 BCL 158 (Wormald), 161 (Rogers CJ).

5 Bremer v. Vanden Avenne [2004] EWHC 1748 (TCC); Lal, H., "The Rise and Rise of Time-Bar Clauses: The Real Issue for Construction Arbitrators," ICLR 118, 123, 2007.

6 John Goss Project Pty Ltd v. Leighton Contractors Pty Ltd (2006) 66 NSWLR 707 at [66]; Jennings Construction Ltd v. QH&M Birt Pty Ltd (1986) 8 NSWLR 18 at [22].

7 Wormald, 161 (Rogers CJ); Opat Decorating Service (Aust) Pty Ltd v. Hansen Yuncken (SA) Pty Ltd (1995) 11 BCL 360.

8 Etlis.

9 Re J W Armstrong Constructions Pty Ltd v. Council of the Shire of Cook [1993] BC9404386. Notice was required "forthwith" and "where possible before the physical conditions are disturbed" – clause 12.2 AS2124-1986.

10 CMA Assets Pty Ltd v. John Holland Pty Ltd [No 6] [2015] WASC 217.

11 Davenport, P., "Andrews v ANZ and Penalty Clauses," 147 ACLN 32, 2012; Easton, P., "Penalties percolating through the construction industry: Andrews v Australia and New Zealand Banking Group Ltd," 29 BCL 233, 2013.

12 Bond SC, J., "Contrary to What You Might Have Heard, a Properly Drafted Contractual Time Bar Will Not Attract the Penalty Doctrine," The Arbitrator & Mediator 69, June 2013.

13 Interstar Wholesale Finance Pty Limited v. Integral Home Loans Pty Limited [2008] NSWCA 310 at [94] (Allsop, P).

14 Turner Corp Ltd (in liq) v. Co-ordinated Industries Pty Ltd (1994) 11 BCL 202 (Turner), 217.

15 CMA Assets Pty Ltd v. John Holland Pty Ltd [No 6] [2015] WASC 217 at [863] to [865].

16 Turner Corporation Ltd (rec and mgr apptd) v. Austotel Pty Ltd (1994) 13 BCL 378, 384 to 385; Turner, 221; Adyard Abu Dhabi v. SD Marine Services [2011] EWHC 848 (Comm) at [243].

17 Lian Soon Construction Pte Ltd v. Guan Qian Realty Pte Ltd (No.2) [2000] 1 SLR 495; [1999] SGHC 259.

18 Corbett Court Pty Ltd v. Quasar Constructions (NSW) Pty Ltd [2008] NSWSC 1163; Civil Mining & Construction Pty Ltd v. Wiggins Island Coal Export Terminal Pty Ltd [2017] QSC 85.

19 Update Constructions Pty Ltd v. Rozelle Child Care Centre Ltd (1990) 20 NSWLR 251 (Update).

20 Update, 276.

21 As to the potential appetite of the common law to apply the doctrine of relief against forfeiture more widely and to the exercise of non-proprietary rights, see Mineralogy Pty Ltd v. Sino Iron Pty Ltd (No 6) [2015] FCA 825 at [978] to [990].

England and Wales

22 Bremer Handelgesellschaft mbH v. Vanden-Avenne Izegem PVBA [1978] 2 Lloyd's Rep. 109.

France

23 Commercial Chamber of the Court of Cassation, decision dated January 26, 2016, no. 14-23.285.

24 Third Civil Chamber of the Court of Cassation, decision dated December 21, 2017, no. 16-25.665.

25 Article 1134 of the French Civil Code: "Agreements lawfully entered into have the force of law for those who have made them. They may be revoked only by their mutual consent, or for causes allowed by law. They must be performed in good faith."

26 Commercial Chamber of the Court of Cassation, decision dated March 30, 2016, no. 14-24.874.

27 For those not familiar with it, article 6.1 of the ECHR provides that "[i]n the determination of their civil rights and obligations or of any criminal charge against them, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Germany

28 Bonke, F. and Stumpf, N., NZBau 2018, 449 (454).

29 Thomas, D., QC, Time-bars revisited, December 8, 2014.

30 German Federal Court of Justice, decision dated October 28, 2004, no. VII ZR 385/02.

31 Higher Regional Court of Coblenz, decision dated March 2, 2017, no. 2 U 296/16.

32 German Federal Court of Justice, decision dated May 25, 1995, no. VII ZR 245/94; Higher Regional Court Düsseldorf, decision dated November 21, 2014, no. I 22 U 37/14.

33 German Federal Court of Justice, decision dated May 25, 1995, no. VII ZR 245/94.

The United Arab Emirates

34 Article 257 provides that "the basic principle in contracts is the consent of the contracting parties and that which they have undertaken to do in the contract," while article 258(2) states that "the primary rule is that words have their true meaning." Article 259 provides that "[t]here shall be no scope for implications in the face of clear words" and article 243 provides that "each of the contracting parties must perform that which he is obliged to do under the contract."

35 Federal Supreme Court Nos. 721 & 815/26, decision dated January 22, 2006.

The United States

36 MLB Industries, Inc. v. East Greenbush Cent. School Dist., 33 A.D.3d 149 (N.Y. App. Div. 2006) (ruling that the claim notice provisions in a modified American Institute of Architects contract awarded by a school district, which required notice and submission of claims to the architect, took precedence over statutory claim notice and audit procedures).

37 A.H.A Gen. Constr., Inc. v. New York City Hous. Auth., 92 N.Y.2d 20, 21 (1998) ("The Appellate Division held that the notice and reporting provisions are exculpatory clauses. Exculpatory clauses immunize a party from liability for its own misconduct. However, unlike the 'no damage for delay' exculpatory clauses … [notices of claim] are not intended to absolve or exculpate the Housing Authority from liability, nor do they provide any rule of substantive contract liability. Rather, they require the contractor to promptly notice and document its claims made under the provisions of the contract governing the substantive rights and liabilities of the parties. They are therefore conditions precedent to suit or recovery, not as the Appellate Division held exculpatory clauses.")

38 Shalman v. Board of Educ., 31 A.D.2d 338, 342 (N.Y. App. Div. 1969) ("Whether or not the supposed exculpatory clause reaches the present situation is open to doubt. But, in any event, such clauses are strictly construed against the person seeking exemption from liability.")

39 Travelers Cas. and Sur. Co. v. Dormitory Auth. State of New York, 735 F. Supp. 2d 42 (S.D.N.Y. 2010) ("Under New York law, express conditions precedent, which are those agreed to and imposed by the parties themselves must be literally performed … New York courts regularly dismiss lawsuits where it is apparent that a contractor seeking extra payment on a contract failed to comply strictly with contractual notice requirements.").

40 Greg Opinski Constr. Inc. v. City of Oakdale, 199 Cal. App. 4th 1107 (Cal. Ct. App. 2011); Diontech Consulting, Inc. v. New York City Hous. Auth., 2009 N.Y. Misc. LEXIS 6772 *11-12 (N.Y. Sup. Ct., Mar. 16, 2009) (plaintiff's claim was time barred for failure to file notice of its claim within 10 days in compliance with section 23(a) of the Trade Contract General Conditions – "The filing by the Contactor of a notice of a claim … within the time limited herein, shall be a condition precedent to the settlement of any claim …"); Mike M. Johnson, Inc. v. Cnty. of Spokane, 150 Wn.2d 375 (Wash. 2003); David A. Bramble, Inc. v. Md. State Highway Admin., 2015 Md. App. LEXIS 737 (Md. Ct. Spec. App., Sept. 25, 2015).

41 Friends of the Columbia Gorge v. Energy Fac. Siting Coun., 365 Ore. 371, 389 (2019) ("As this court has previously observed, '[t]he doctrine of substantial compliance has previously been used to avoid the harsh results of insisting on literal compliance with statutory notice provisions where the purpose of these requirements has been met.'") (citing Brown v. Portland School Dist. #1, 291 Ore. 77, 81 (1981)).

42 Kooleraire Serv. & Installation Corp. v. Board of Educ., 28 N.Y.2d 101, 106 (1971); see also Amies v. Wesnofske, 255 N.Y. 156, 163 (1931); Patterson v. Meyerhofer, 204 N.Y. 96, 100-101 (1912).

43 South County Post & Beam, Inc. v. McMahon, 116 A.3d 204 (R.I. 2015) (upholding a subcontractor's claim for extra work against a homeowner, because the homeowner had knowledge that the subcontractor was performing extra work at the time the work was being performed); Procon Corp. v. Utah Dept. of Transp., 876 P.2d 890 (Utah Ct. App. 1994) (ruling that the contractor had satisfied its burden of proving that notice had been given to the state, even though the state denied that the contractor had ever given oral or written notice of claim because the contractor produced a notice letter and proved that the letter, together with other documents, was sent to the state); Whitmyer Bros., Inc. v. State, 63 A.D.2d 103 (N.Y. App. Div. 1978) (citing Amadeus, Inc. v. State of New York, 36 A.D.2d 873 (N.Y.App. Div. 1971) – "in cases where the State is apprised of the contractor's claim that extra work beyond the contract was being performed, the State has been precluded from insisting upon strict compliance with the notice provisions").

44 Eggers &. Higgins v. United States, 403 F.2d 225 (U.S. Ct. Cl. 1968) (holding that the government was prejudiced by plaintiff's unreasonable delay in furnishing notice of a claim).

45 Bruner & O'Connor on Construction Law, chapter 4, section 4:35.

46 Id.

47 See FAR section 52.243-4.

48 Id. citing Nova Grp./Tutor-Saliba v. United States, 125 Fed. Cl. 469 (2016) (rejecting the government's untimely written notice defense to a constructive change claim, because the government had actual knowledge of the conditions upon which the constructive change was based); District of Columbia v. District of Columbia Contract Appeals Bd., 145 A.3d 523 (D.C. 2016) ("We hold that [the contractor's] delay claims are not procedurally barred by the contract because the District was on notice of the circumstances giving rise to the claims, and therefore was not prejudiced by delay claims.").

49 https://www.lrrc.com/Preserving-Contractor-Rights-Under-Changes-Clauses-08-01-2005.

50 Milovich v. Los Angeles, 42 Cal. App. 2d 364 (Cal. Ct. App. 1941); Okee Indus. Inc. v. National Grange Mut. Ins. Co., 623 A.2d 483 (Conn. 1993); James Constr. Group v. Westlake Chemical Corp., 594 S.W.3d 722 (Tex. App. 2019).

51 See Peter Scalamandre & Sons, Inc. v. FC 80 Dekalb Assoc., LLC, 129 A.D.3d 807 (N.Y. App. Div. 2015) (citing Abax, Inc. v. Lehrer McGovern Bovis, Inc., 8 A.D.3d 92, (N.Y. App Div. 2004)); G. De Vincentis & Son Constr., Inc. v. City of Oneonta, 304 A.D.2d 1006 (N.Y. App. Div. 2003); Clifford R. Gray, Inc. v. City Sch. Dist. of Albany, 277 A.D.2d 843, 846 (N.Y. App. Div. 2000).

52 U.W. Marx, Inc. v. Koko Constr., Inc., 124 A.D.3d 1121 (N.Y. App. Div. 2015) (contractor terminated roofing subcontractor for failing to provide notice before stopping work, but court found contractor's failure to pay subcontractor despite repeated requests for payment was a material breach of the contract that relieved the subcontractor from his notice obligations under the contract); see also New Pueblo Constructors v. State, 696 P.2d 185 (Ariz. 1985).

53 Absher Constr. Co. v. Kent Sch. Dist. No. 415, 77 Wn. App. 137 (Wash. Ct. App. 1995).

54 Am. Sheet Metal Works v. Haynes, 67 Wn.2d 153 (Wash. 1965); see also Gilmartin Bros., Inc. v. Kern, 916 S.W.2d 324 (Mo. Ct. App. E.D. 1995) (concluding that oral notice of claim was effective because the requirement for written notice had been waived by the parties through their established "practice of communicating changes or additions to the contract informally").

55 Wash. Constr., Inc. v. Sterling Sav. Bank, 2011 Wash. App. LEXIS 2125 (Wash. Ct. App. Sept. 13, 2011)

56 Holber v. Suffolk Constr. Co. (In re Red Rock Servs Co, LLC), 480 B.R. 576 (U.S. Bankr. 2012).

57 Bruner & O'Connor on Construction Law, chapter 4, section 4:35.

International subcontracting: A French perspective on the consequences and unforeseen risks of the heightened complexity of international construction contracts

58 2020 Arcadis Global Construction Disputes Report.

59 In addition, article 2 of the 1975 Law extends its scope to the various degrees of subcontracting to which construction projects may give rise (multi-layer chain subcontracting). In such cases, the subcontractor is considered to be the main contractor in relation to his own subcontractors (second-tier subcontractors).

60 Where the project involves multi-layer chain subcontracting, all subcontractors must be accepted, and their terms of payment agreed, by the client. It is then the responsibility of the first-tier subcontractor to declare the second-tier subcontractor to the client, and so on, subject to the prior approval of the main contractor.

61 Paris Court of Appeal, decision dated July 7, 1981.

62 Third Chamber of the French Court of Cassation, decision dated July 18, 1984, no. 83-11401.

63 Article 15 of the 1975 Law provides that: "Clauses, stipulations and agreements which would have the effect of defeating the provisions of this Law are null and void, whatever their form."

64 Paris Court of Appeal, decision dated March 14, 1989, RTD com. 1991.575.

65 See articles 9(1) and (3) of the Rome I Regulation.

66 Mixed Chamber of the French Court of Cassation, decision dated November 30, 2007, no. 06-14.006. See also Third Civil Chamber of the French Court of Cassation, decision dated January 30, 2008, no. 06-14.641; and Third Civil Chamber of the French Court of Cassation, decision dated February 25, 2009, no. 07-20.096.

67 First Civil Chamber of the French Supreme Court, decision dated 27 April 2011, no. 09-13.524.

68 Commercial Chamber of the French Court of Cassation, decision dated April 20, 2017, no.15-16.922, handed down in the same case as the decision dated 27 April 27, 2011..

69 Ibid.

70 SAS CMO v. Société Lavalin International, Paris Court of Appeal, decision dated October 23, 2018.

71 Ibid, paras. 295-296 of the final award cited in the Court of Appeal's judgment.

72 First Civil Chamber of the Riom Court of Appeal, decision dated September 15, 2020, no. 19/00137.

Investor-state arbitration in the construction sector: the example of Libya

73 ICSID Caseload Statistics (2021-1 Edition), p. 25.

74 ICSID Caseload Statistics.

75 UNCTAD, Investment Dispute Settlement Navigator (last accessed March 25, 2021).

76 Peterson, L.E., Libya Wins One and Loses One, as New Bilateral Investment Treaty Awards are Rendered, IA Reporter, February 18, 2020, available at https://www.iareporter.com/articles/libya-wins-one-and-loses-one-as-new-bilateral-investment-treaty-awards-are-rendered/ (last accessed March 25, 2021).

77 See Öztaş Construction, Construction Materials Trading Inc. v. Libya (ICC Arbitration No. 21603/ZF/AYZ), award dated June 14, 2018, para. 94; Peterson, L.E., Analysis: in Heretofore-Confidential Award, Majority of ICC Tribunal Rejected BIT Claims of Turkish Contractor Oztas: Result Contracts with Outcome of Parallel Etrak Case, IA Reporter, February 24, 2020, available at https://www.iareporter.com/articles/analysis-majority-of-icc-tribunal-rejects-bit-claims-of-turkish-contractor-oztas-result-contrasts-with-outcome-of-parallel-etrak-case/ (last accessed March 25, 2021).

78 See Peterson, L.E., Glick, Hanotiau and Douglas Dismiss Claims of Contractor in Libya, Finding that Actions of Sate Construction Agency Cannot Be Attributed to Libyan State for Purposes of BIT, IA Reporter, January 8, 2019, available at https://www.iareporter.com/articles/glick-hanotiau-and-douglas-dismiss-claims-of-contractor-in-libya-finding-that-actions-of-state-construction-agency-cannot-be-attributed-to-libyan-state-for-purposes-of-bit/ (last accessed March 25, 2021).

79 Ross, A., Libya: Insurrection and Arbitration, Report on a Milan Chamber of Arbitration roundtable hosted on February 24, 2011, GAR, March 16, 2011.

80 Öztaş Construction, Construction Materials Trading Inc. v. Libya (ICC Arbitration No. 21603/ZF/AYZ), award dated June 14, 2018, para. 88.

81 See Charlotin, C., Analysis: Tribunal in Guris v. Libya Award Draws Contrast with Cengiz Award on FPS Interpretation and Sides with Majority of Prior Libya Awards with Respect to War Losses Clause, IA Reporter, March 5, 2020, available at https://www.iareporter.com/articles/analysis-tribunal-in-guris-v-libya-award-draws-contrast-with-cengiz-award-on-fps-interpretation-and-sides-with-majority-of-prior-libya-awards-with-respect-to-war-losses-clause/ (last accessed March 25, 2021).

82 See Peterson, L.E., Revealed: in Cengiz v. Libya BIT Award, ICC Tribunal Saw Dual-Faceted Failure of State to Provide Basic Security During War, But Frowned on Bid for Lost Profits, IA Reporter, September 9, 2019, available at https://www.iareporter.com/articles/revealed-in-cengiz-v-libya-bit-award-icc-tribunal-saw-dual-faceted-failure-of-state-to-provide-basic-security-during-war-but-frowned-on-bid-for-lost-profits/ (last accessed March 25, 2021).

83 Cengiz İnşaat Sanayi ve Ticaret A.S. v. Libya (ICC Case No. 2153/ZF/AYZ), final award dated November 7, 2018, paras. 424-428.

84 Id., paras. 429-434.

85 See for instance, Cengiz İnşaat Sanayi ve Ticaret A.S. v. Libya (ICC Case No. 2153/ZF/AYZ), final award dated November 7, 2018, para. 659, in which the tribunal found that the state was liable for a breach of the FPS standard but not for a violation of the war clause.

86 Strabag SE v. Libya (ICSID Case No. ARB(AF)/15/1), award dated June 29, 2020, para. 236.

87 Id., para. 257.

88 Öztaş Construction, Construction Materials Trading Inc. v. Libya (ICC Arbitration No. 21603/ZF/AYZ), award dated June 14, 2018, para. 162.

89 Id., para. 167.

90 Id., paras. 25 and 28.

91 Liberian Eastern Timber Corporation v. Republic of Liberia (ICSID Case No. ARB/83/2), award dated March 31, 1986 (in which the tribunal noted (obiter) that a coup d'état and subsequent political and economic confusion reigning in the country gave rise to a political-economic situation that could well qualify as force majeure within the meaning of the Concession Agreement).

92 Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/00/5), award dated September 23, 2003, para. 83.

93 CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), award dated May 12, 2005, para. 356.

94 Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic (ICSID Case No. ARB/01/3), award dated May 22, 2007, para.217; Sempra Energy International v. Argentine Republic (ICSID Case No. ARB/02/16), award dated September 28, 2007, para. 246.

95 Id. (both citing Crawford, J., The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries, (ed., Cambridge University Press), 2002, p. 171).

The future of construction arbitration in the Kingdom of Saudi Arabia

96 Total GDP was recorded at SAR 668.1 billion in Q3 of 2020 according to statistics published in the Gross Domestic Product Third Quarter 2020 Report, General Authority of Statistics, Kingdom of Saudi Arabia.

97 Gross Domestic Product 2019 Report, General Authority of Statistics, Kingdom of Saudi Arabia.

98 Gross Domestic Product: National Accounts 2018, General Authority of Statistics, Kingdom of Saudi Arabia.

99 The Arbitration Regulation issued under Royal Decree No. M/34 dated 24/5/1433H (corresponding to April 16, 2012 in the Gregorian calendar).

100 Saudi Arabia's new Enforcement Law was issued through Royal Decree No. M/53 of 13 Sha'ban 1433 Hejra (July 3, 2012).

101 Survey of Construction Activity 2018, General Authority of Statistics, Kingdom of Saudi Arabia.

102 Enacted by Royal Decree M/128 on 13/11/1440H (July 16, 2019).

103 Issued by resolution of Minister of Finance No. 1242 on 21/3/1441H (November 19, 2019).

104 The Government Tenders and Procurement Law, enacted by Royal Decree M/58 on 4/9/1427H (September 27, 2006).

105 This will remain in effect until at least January 2024.

106 Dated 08/04/1437 AH (January 19, 2016).

107 It was formally established by KSA Cabinet Decree No. 257 dated 14/06/1435 AH (March 15, 2014).

108 The Saudi Center for Commercial Arbitration Newsletter, January 2020 – Issue 3, p. 7.

109 The Saudi Center for Commercial Arbitration Newsletter, January 2020 – Issue 3, p. 5.

110 The Saudi Center for Commercial Arbitration Newsletter, January 2020 – Issue 3, p. 10.

111 The Saudi Center for Commercial Arbitration: Institutional Arbitration in Saudi Arabia: A National Vision – a report on the work and activities of the Saudi Center for Commercial Arbitration from founding to December 2018, p. 25.

112 http://www.diac.ae/idias/archiveevents/CASESTATIC.

113 Pursuant to article 55 of the New Arbitration Law as affirmed by articles 11 and 12 of the Enforcement Law

114 Pursuant to article 2 of the Arbitration Law

115 Pursuant to article 49 of the Arbitration Law

116 The Saudi Ministry of Justice Newsletter, February 2021, available at www.moj.gov.sa.

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