Global construction update

The sustainability issue

June 2022

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through partnership

Construction news

- Reed Smith is delighted to be named "United Arab Emirates Construction Law Firm of the Year" in the Chambers Middle East Awards 2022.
- On March 31, 2022, Reed Smith's Houston office hosted an Energy and Commodities Conference focusing on today's energy demands that are tied to the domestic and international trade of nonrenewable and renewable resources.
- Paris partner and construction authority Peter Rosher was recently appointed as the new head of Reed Smith's International Arbitration practice. Peter was honored to chair the Global Arbitration Review (GAR) Live Construction Disputes Conference in Paris on March 31, 2022.

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The sustainability issue

Welcome to this edition of Reed Smith's Global Construction Update.

This edition looks at several topical issues affecting the construction and engineering industry from the perspective of the increased global focus on sustainability and renewables.

Contractors and developers alike face unprecedented opportunities and challenges as the world moves toward a more sustainable environmental future and attempts to make "net zero" a reality by 2050.

How effectively contractors, developers and construction professionals respond to the "sustainability challenge" will define their success over the next decade.

We are here to help guide you through the swiftly changing legal landscape so that your business can fully benefit from the green revolution.

In this edition:

- Alison Eslick (senior associate. Dubai office) puts a spotlight on how recent legal developments in the Middle East will impact the construction industry's sustainability concerns.
- Brendan McNallen (partner, San Francisco office), Antoine Smiley (partner, Houston office) and Justin Leonelli (associate, Pittsburgh office) discuss contracting in the United States' offshore wind market.
- Liam Hart (senior associate, London office) looks at liquidated damages regimes in wind energy projects.
- Nicolas Walker (partner, Paris office) and Vanessa Thieffry (senior associate, Paris office) explain how France's new Climate and Resilience Law imposes significant new obligations in relation to land use, project design, impact assessment and the treatment of waste construction materials, and foreshadows increased regulatory powers to enforce those new sustainability requirements.
- Antoine Smiley (partner, Houston office) discusses his practice, which includes a strong element of renewables work, and offers insights into what is keeping his clients up at night in 2022.

Is there a topic that you would like to see covered in future editions of this update? Please let us know.

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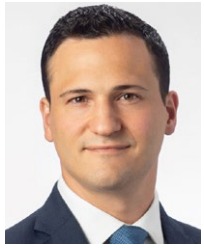

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Key legal issues for 2022 in Middle East

Spotlight on the Middle East

It is an exciting time for the construction industry in the Middle East, not least in three of the most prominent players in the Gulf Cooperation Council countries: the United Arab Emirates (UAE), the Kingdom of Saudi Arabia (KSA), and the State of Qatar. While the UAE has just successfully completed Expo 2020, Qatar looks forward to hosting the FIFA World Cup in November 2022, with both events requiring ambitious infrastructure development against the backdrop of the COVID-19 pandemic. Meanwhile, KSA is forging ahead with various so-called “giga-projects.” In recent years, there have been important changes to labor laws, occupational health and safety standards, and green building regulations, which all affect the construction industry. Following is a snapshot of some of the changes.

UAE

1. Landmark changes to the Federal Labour Law

On February 2, 2022, Federal Decree Law No. 33 of 2021 (the New Labour Law) took effect in the UAE, repealing and replacing the previous labor law from 1980. The New Labour Law applies to the construction industry, and contractors and developers alike must heed its new provisions. A major change is that unlimited contracts have been abolished, with every onshore employment contract in the UAE now required to be limited to a maximum term of three years. The New Labour Law also introduces a range of new protections for employees, including express prohibition against sexual harassment, bullying, verbal, physical or psychological violence of employees by their employers, managers, or colleagues. Employers are also expressly prohibited from forcing employees to work against their will, including by threatening them with a penalty.

2. Force majeure and COVID-19

The COVID-19 pandemic affected global construction production almost immediately because of drastic trade, travel, and transport restrictions. Contractors contemplating reliance on force majeure clauses within contracts, or provisions of UAE law in order to terminate contracts or absolve themselves from particular contractual obligations need to take note. While UAE courts have determined COVID-19 as a force majeure event in a few recent judgments, it remains to be seen whether this will be successful in relation to construction contracts. In this context, a contractor would have to satisfy the local courts that its obligations were "impossible" to perform (either totally or partially) due to an "unforeseeable and avoidable" event at the time it entered into the contract. A recent judgment of the Abu Dhabi Court of Cassation also ruled that force majeure must be the sole reason that makes performance impossible.

3. Launch of ambitious green building standards

In February 2022, the UAE's Minister of Energy and Infrastructure, Mr. Suhail Bin Mohammed Al Mazrouei, launched an optional national set of terms, conditions, and specifications for sustainable green buildings in the UAE, which are mandatory for government buildings and institutions. This announcement was made during a session at the Sustainability Pavilion at Expo 2020 in Dubai. It follows Dubai's launch of its first unified building code in 2020, Al Sa'fat, which emphasizes green building practices for both residential and commercial buildings that are "resource efficient in terms of energy, water, and materials whilst reducing building-related impacts on human health and the environment." It will be essential for contractors and developers to be well versed in the mandatory requirements for all new buildings.

KSA

1. Changes to KSA employment law

The Saudi Labour Reform Initiative (Saudi Labour Reform) came into effect in March 2021 and updates the Kafala System regulating the relationship between foreign workers and employers in Saudi Arabia. Contractors and developers can no longer withhold their consent without justification to stop a foreign worker from changing employers in the Kingdom, provided certain conditions are satisfied. Foreign workers now have greater flexibility and choice over their movements in and out of the country independent of their employer's approval and subject to meeting particular requirements. Accordingly, employers should seek employment advice to ensure that their practices and procedures comply with the Saudi Labour Reform.

2. Ambitious Saudization plans

In December 2021, updates were made to the Nitaqat initiative, which was launched by the Saudi Ministry of Human Resources and Social Development to further encourage the private sector to employ Saudi nationals. The update includes a new equation for calculating a company's Saudization percentage, which places companies into particular ranges. Each range offers privileges and limitations, including far-reaching implications on an employer's ability to recruit new foreign staff. The changes make it vital for developers and contractors to improve their Saudization classification.

3. Saudi's green future

Royal Decree No M/165 of 19 Dhul Qada 1441 Hejra (the Environmental Regulation), came into force on January 13, 2021 and regulates all activities that are "expected to have environmental impacts." The regulation includes higher penalties for environmental violations and the obligation for developers to undertake environmental impact assessments on construction projects. If the assessment produces a negative environmental impact, the developer will be required to eliminate or reduce the negative impact by implementing contingency plans. The Environmental Regulation aligns with Saudi's Vision 2030 to reach environmental sustainability and the Kingdom's 2035 recycling and waste management strategy.

Qatar

1. Changes to Qatari labor law

Employers across the construction industry in Qatar must now pay all laborers no less than the new non-discriminatory minimum wage that came into force in March 2021 by virtue of Law No. 17 of 2020 (Qatari Labour Law). The minimum wage is subject to annual ministerial review. There has also been an increase to the minimum notice period required by an employer and employee. Employers and employees who fail to adhere to the relevant notice requirements will be obliged to compensate the other. In addition, if a foreign worker leaves the country before serving the applicable notice period, they may be subject to a one-year labor ban.

2. New health insurance law

Qatari Law No. 22 of 2021 takes effect in May 2022 and makes it mandatory for all visitors and non-Qatari employees to have private health insurance while staying and working in Qatar. Employers are required to enroll their non-Qatari employees in basic health insurance policies, offered by registered insurance providers with the Ministry of Public Health. Employers, including those in the construction industry, must now show that their workforce is covered by appropriate health insurance as a prerequisite for applying for or renewing any work permits and visas. Fines will be imposed on employers who fail to register their staff for health insurance.

3. Limiting air pollution and carbon offset

Historically, Qatar already had environmental laws in place dealing with limits on air pollution. This commitment to environmental concerns has intensified over recent years by Qatar's Supreme Committee joining forces with the Qatar Environment and Energy Research Institute (QEERI) to monitor the air quality in preparation for the FIFA 2022 World Cup. This forms part of Qatar's wider objective to deliver a carbon-neutral tournament. Notably, Qatar has also produced the first dismountable and recyclable stadium built for a World Cup competition, with repurposed shipping containers originally used to transport materials to Qatar being used for the stadium's construction. It remains to be seen whether a legacy of the FIFA World Cup will be Qatar's further regulation of the construction industry's sustainability practices.

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U.S. renewables

European contracting practices present challenges to U.S.-based offshore wind

Until recently, offshore energy development in the United States has been exclusively dominated by oil and gas exploration and production. However, the winds have officially shifted with the much-anticipated arrival of offshore wind, backed by a government target of an additional 30 GW of energy production by 2030. The New York Bight – some 480,000 acres of ocean between New Jersey and Long Island – just made its mark as the highest-grossing competitive offshore energy lease sale in history, according to the U.S. Department of the Interior. Currently, there are 24 lease areas allocated to offshore wind development along the eastern seaboard of the United States, and the rest of the country is following suit. The Bureau of Ocean Energy Management recently identified new areas off the coasts of California, Oregon, and the Central Atlantic, which will boost offshore wind capacity even further.

One challenge to harvesting wind along U.S. coastlines is the lack of U.S. based industries that build the installation vessels, foundations, towers, blades, nacelles, turbines, and other key aspects that work together to create an offshore wind farm. As a result of these supply constraints – and the experience of European owners, contractors, and vendors on offshore wind projects over the last two decades – many of the players involved in the nascent U.S. offshore wind development will inevitably journey from Europe. Given the involvement of European stakeholders, we have seen and expect to continue to see U.S. offshore wind projects influenced by established European contracting practices. In this regard, offshore projects throughout Europe have most commonly used the “Yellow Book” base form developed by the International Federation of Consulting Engineers (FIDIC). The use of the FIDIC Yellow Book as a base form for U.S.-based offshore wind projects presents a variety of challenges and adjustments of which all project participants should be aware.

Generic drafting

The FIDIC Yellow Book's General Conditions are drafted for general application to a range of different projects. That general application has the advantage, theoretically, of reducing transaction costs and streamlining negotiation on commonly accepted terms and conditions. However, in order to achieve that objective, the General Conditions are necessarily overly broad and do not accurately describe the interfaces or customary allocation of risks and responsibilities for a wind project, which require owners and contractors to significantly modify the FIDIC form to accurately describe the terms of the relationship. In negotiation, each party will have an incentive to show that they are remaining consistent with FIDIC to the extent possible, which has the perverse effect of the parties leaving inapplicable provisions in the contract to avoid deviating too far from the original FIDIC form. The result can lead to a mishmash of terms and conditions that (a) are drafted specifically for the offshore wind project and (b) have a number of residual and largely inapplicable FIDIC provisions left in to show good faith. In a dispute situation, this presents risk, as tribunals will seek to accord meaning to all provisions of the contract.

EPC-like obligations

The FIDIC Yellow Book is better suited to a project that is a single facility that requires project-specific design work to meet specified owner requirements and whereby the contractor will undertake full-wrap contractor obligations. However, in the context of offshore wind, that approach is incompatible with the nature of wind projects and their contract framework. A wind facility is comprised of numerous generating units spread over a large area. Each wind turbine is separately constructed, commissioned, and tested. Also, the wind turbine generators are not specifically designed for the project, but are instead designed to meet off-the-shelf specifications and power curves based on the model of wind turbine selected. Additionally, offshore wind transactions are distinguished by disaggregation – owners do not typically engage a single contractor to provide a full-wrap engineering, procurement, and construction (EPC) contract covering all obligations, but rather, the owner separately engages a foundation contractor, a turbine supplier, and a cable supplier, and often charters the vessels for use by the contractors. The result is that the parties need to unwind and renegotiate a number of the provisions from the FIDIC form related to design, owner requirements, permitting, completion milestones, testing, and contractor interface obligations. Additionally, because of the inherent risks associated with maritime construction, subsea construction, and installation, contractors will not be expected to have fully inspected and examined the site before contract award and are unwilling to take on risk for geological and subsurface conditions. This is another departure from the risk allocation in the Yellow Book that needs to be addressed.

Engineer

The FIDIC Yellow Book assumes that there will be a person or entity appointed by the owner, referred to as the "Engineer," who will act as an on-site arbiter and decision-maker for the parties. This is not a concept or role that is customary in U.S. wind projects. While this role is sometimes negotiated out of offshore wind projects, it results in the owner being vested with powers to make determinations on how to interpret specifications, rules, and standards – which is also not customary in U.S. wind projects. In the absence of an Engineer, the FIDIC form requires substantial re-alignment of the obligations of the parties so that the terms and conditions state objective standards of performance, without vesting one party with discretion over how to resolve disputes arising between the parties. Alternatively, drafting is needed to ensure that the owner's decisions are at the owner's risk and interim only, with the contractor's or supplier's objective rights being preserved to resolution through third-party dispute resolution, such as a dispute adjudication board or arbitration.

U.S. law provisions

The FIDIC Yellow Book provides that the contract shall be governed by the law of the country (or other jurisdiction) stated in the Appendix to the Tender, giving the parties the flexibility to choose the governing law. However, for U.S. offshore wind projects, if the parties elect to use a U.S. governing law for the contract (such as New York law), several modifications will need to be made to conform with applicable U.S. laws and customs. A small sample of such provisions is described below.

Indemnity

In offshore wind projects, it is common for the parties to negotiate "knock-for-knock" indemnity provisions into FIDIC contracts. These provisions provide that each party is responsible for injuries to its employees and damages to its property or equipment. In other words, a contractor will not be held liable for damage to the owner's or another contractor's property, even if such damage was caused by the contractor's own negligence. In the United States, many states have enacted statutes outlawing clauses in a construction contract that require one party to indemnify the other party for claims and/or damages caused by the other party's sole negligence. Thus, there is a risk that such knock-for-knock indemnity provisions will be deemed unenforceable on U.S.-based offshore wind projects – depending on which state's law is applicable to the project. Notably, parties to U.S.-based offshore oil and gas projects have attempted to address this risk by applying English law or U.S. federal maritime law, which do not have any anti-indemnification statutes, or undertaking specific steps permitted by the relevant state laws to ensure that the contract falls within an exception under the anti-indemnity statutes. Given that the U.S. offshore wind industry is still in its infancy – and that many of the states where offshore wind projects are being built (the eastern seaboard of the United States) do not have significant prior experience with offshore oil and gas (like Louisiana and Texas) – the industry has not fully developed its approach to addressing this issue to provide the parties with confidence and clarity about the enforceability of methods to avoid the anti-indemnity statutes.

Time bars

By default, FIDIC contracts come with the requirement that notice of claims must be given not later than 28 days after the contractor becomes aware, or should have become aware, of the event or circumstances giving rise to the claim. Of course, this functions as an absolute time bar, meaning that if the contractor fails to give notice of a claim within that period, then it will not be entitled to an extension of time or any additional payment. While such time bars may be common in certain U.S. commercial contracts, they have not been customary in most turbine supply agreements. Thus, U.S. contractors familiar with contracting customs for U.S. onshore wind projects may be hesitant to incorporate any time bars into offshore turbine supply agreements.

Warranties

FIDIC contracts default to very broad warranties from the contractor, including warranties such as fitness for purpose that are almost universally excluded from U.S. onshore turbine supply agreements and balance of plant agreements. Parties will often replace the default warranty provision with a bespoke provision to provide for a defects warranty associated with design, materials, and workmanship, as well as tailored performance guarantees that more closely align with the power curve of the wind turbines.

Conclusion

The increased attention to offshore wind development in the United States will attract significant investment and involvement from specialist companies around the world and particularly from Europe. This is history in reverse. In the 1970s, North Sea oil companies benefited from the knowledge and experience of the American oil industry, with thousands of "roustabouts" flocking from places like Texas and Louisiana to help North Sea developments. Now, the United States is looking to North Sea offshore wind companies for their knowledge, experience, and technology to help it achieve its lofty climate-related aspirations. And with that will come the expectations and customs that have been applied for decades for European offshore wind projects and the contract terms with which they are accustomed, which largely originate from FIDIC-based contracts. Harmonizing these European contract forms with U.S. law, contracting traditions, and expectations will not be an easy task. However, with careful consideration and drafting, and a willingness and openness from both parties, project participants can adapt these sometimes conflicting traditions to create a suitable contract for U.S.-based offshore wind projects.

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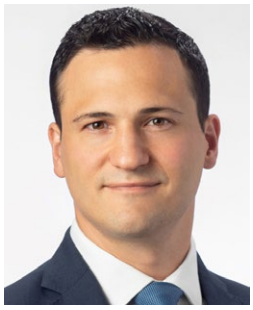

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Liquidated damages for delay and wind projects

Construction contracts commonly oblige the contractor to complete by a particular date, failing which liquidated damages are payable to the employer.

Liquidated damages clauses can provide a useful role for both employer and contractor. For the employer, liquidated damages avoid the necessity and expense of proving the actual loss suffered as a result of the contractor's delay. For the contractor, liquidated damages can potentially act as a limitation on liability, assuming that they were intended to provide an exclusive remedy for delay.

Construction contracts for wind projects are no stranger to that type of liquidated damages regime for delay.

However, employers and contractors must be astute to the specific challenges that arise when using liquidated damages clauses for wind projects.

Those challenges engage the following key issues:

- First, a wind farm contains numerous wind turbine generators (WTGs), each of which generates power. This differs conceptually from a conventional power plant generating power from far fewer, larger turbines. This conceptual difference means that the liquidated damages provisions for a wind project must take into account potential challenges to the proposed regime if significant liquidated damages can be levied when only a small proportion of the WTGs are incomplete. By way of example, and for argument's sake, let us imagine a hypothetical wind farm containing 100 WTGs, with an underlying construction contract providing that if there are any incomplete WTGs then liquidated damages will apply to the same extent as if all 100 WTGs were incomplete. Such a clause would potentially result in an employer levying liquidated damages in respect of the entire project in circumstances where in fact only one WTG was actually incomplete. This is important because in many common law jurisdictions, and depending on the specific facts, liquidated damages clauses may potentially be classified as penalties (and therefore unenforceable) if they do not constitute a genuine pre-estimate of loss or if they do not protect some other legitimate economic interest. Thus, in *Braes of Doune Wind Farm (Scotland) Ltd v. Alfred McAlpine Business Services Ltd* [2008] EWHC 426 (TCC), the English High Court refused an appeal on a point of law from an arbitrator's decision that a liquidated damages clause was a penalty where delay to a single WTG led to the application of liquidated damages in respect of the entire project. A similar risk to the enforceability of such a liquidated damages regime would potentially also arise in certain civil code jurisdictions that give courts or arbitral tribunals the power to amend liquidated damages provisions, including rates, if the sums are determined to be unduly harsh or unreasonable.
- Second, liquidated damages provisions that provide for sectional completion must be drafted with precision in order to avoid the argument that the sections are improperly or imprecisely defined, and that therefore the liquidated damages clause is inoperative and general damages should apply. Liquidated damages clauses that provide for sectional completion are one way of addressing the potential issue described above, and so this is a point to be particularly astute to on wind projects.
- Third, wind projects are often characterized by multiple contractors working on different work packages in order to deliver the project. That contracting structure is especially common on offshore wind projects. In such circumstances, contractors are often understandably nervous to agree to significant liquidated damages provisions if there is a risk that their work may be delayed by other contractors employed directly by the employer. The contracts for individual packages will often provide that delays caused by another directly employed contractor will not constitute delays for the purposes of assessing liquidated damages liability. However, and notwithstanding the inclusion of those kinds of caveats, there sometimes remains reluctance on the part of contractors to include liquidated damages provisions relating to the entirety of a project, especially because the offtake from a project will generally be significant.

- Fourth, it is important from a practical perspective for parties on wind projects (and indeed most energy projects) to ensure that the liquidated damages provisions are calibrated at a level giving adequate recompense for the employer if there is a delay that persists for a long time and adequate limitation of liability for the contractor in the event of extended delay. This is particularly important because wind projects are often built in difficult or isolated terrain, or offshore, in high-wind environments using cutting edge or novel technology that has been transported from distance. The conjunction of those factors means that delays to wind projects can sometimes be significant, as can the potential resulting losses given the offtake agreements that may have been entered into by the employer.
- Fifth, it is imperative to ensure that the liquidated damages clauses and the limitation of liability clauses properly dovetail with one another, particularly if the intention is to avoid arguments that the overall liability cap should not cover liquidated damages for delay. Generally, and depending on the circumstances, broad catch-all language in the overall cap on liability will apply to liquidated damages clauses. However, be cautious if there are specific carve outs.
- Sixth, employers and contractors should not take for granted the fact that a liability cap limits liability in all circumstances. Depending on the applicable law and the particular facts of a case, there may be arguments as to whether a deliberate or repudiatory breach of contract is captured by a limitation clause in the absence of express words addressing that possibility.
- Seventh, it is sensible to think about how liquidated damages clauses will be treated if the underlying contract is terminated. A recent UK Supreme Court decision, *Triple Point Technology Inc v. PTT Public Company Ltd* [2021] UKSC 29, found that liquidated damages will generally accrue up to the point of termination, even if the works were never completed by the contractor, and after termination general damages will be recoverable. However, before that decision it was unclear what happened to accrued liquidated damages if the contractor failed to complete the works before the contract was terminated, and there was some authority that suggested that the liquidated damages clause would apply until the replacement contractor achieved completion. It follows that, depending on the applicable law, it may be sensible to set out in your contract whether accrued rights survive termination.

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Circular economy obligations for constructors and project owners in France

Building greener is an essential part of driving a decarbonized, circular economy. According to the World Green Building Council, this includes, *inter alia*, taking an intelligent approach to energy consumption, using fewer, more durable materials and generating less waste, as well as accounting for a building's end of life stage by designing for demolition, waste recovery and reuse. It also means recognizing that our urban environment should preserve nature, and ensuring wildlife diversity and land quality are protected or enhanced by remediating existing structures and building on polluted land.

In line with these aims, France's Climate and Resilience Law[1] imposes significant new obligations on constructors and project owners in relation to land use, project design, impact assessment and the treatment of waste construction materials. It also foreshadows a major redraft of the French Construction and Housing Code, to increase the powers of the regulator to audit compliance with these new requirements. This legislation builds on earlier reforms enacted by France's Circular Economy Law of February 2020.[2]

In short, constructors and project owners in France need to navigate an increasingly complex regulatory environment when it comes to approving, planning and costing their projects, with a heightened focus on sustainability.

Here are some of the key reforms:

Zero net artificialization.

One of the key measures of the Climate and Resilience Law is to introduce into French planning law an objective of "zero net artificialization," i.e., a halt on any net increase in the total amount of artificial surfaces created by new development. Artificialization is defined as "the lasting alteration by occupation or use of all or part of the ecological functions of the soil, in particular in its biological, hydraulic and climatic functions, as well as its agronomic potential." The Climate and Resilience Law makes a number of significant amendments to how French planning law will zone, plan and assess future development applications over non-artificialized ("greenfield") land. The legal mechanics of these reforms are complex, but broadly, the key point to note is that French town planning rules will become increasingly restrictive – and by 2026 will, in some cases, forbid outright any development of non-artificialized land. This will have major impacts on where project owners site their projects.

Projects on brownfield or projects with exemplary environmental credentials.

Projects sited on "waste" ("brownfield") land, and projects designed to an exemplary environmental standard, will be eligible for exemptions from town planning rules that restrict the size of the building envelope. In other words, larger development will be possible on land that cannot be used productively without some form of rehabilitation. The same will be true for projects designed with high environmental credentials. Moreover – on an experimental basis for three years, following the publication of implementing regulations (which is imminent) – brownfield projects will be able benefit from certain town planning reforms aimed at streamlining and accelerating development approvals. These provisions will apply from January 1, 2023.

1 Loi n° 2021-1104 du 22 août 2021 portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets.

2 Loi n° 2020-105 du 10 février 2020 relative à la lutte contre le gaspillage et à l'économie circulaire.

Heightened impact assessment requirements.

Under EU Directive 2014/52, most large construction projects trigger a requirement for some form of environmental impact assessment. This assessment must now include (subject to the project meeting certain technical triggers under existing law): (1) a feasibility study on the potential for the development of renewable energy initiatives in the area, in particular the potential for energy (heating or cooling) recovery; (2) an optimization study on the density of constructions in the project area, taking into account general amenities and the preservation and restoration of biodiversity; and (3) an assessment of the impact of land artificialization (in line with the objective of zero net artificialization, discussed above).

Demolition restrictions.

Before certain construction and demolition works can be undertaken, the project owner must perform a study investigating the potential for a change in building use for any existing structures. This measure is intended to promote the renovation of existing structures and avoid unnecessary demolition. The intention here is that demolition should be the "last resort" when optimizing the use of land. Doubts were raised during the parliamentary process about the effectiveness of this measure. It was pointed out that this is a heavy obligation for project owners and would create a backlog of studies for the planning authorities to assess. This requirement will come into force on January 1, 2023, pending publication of implementing regulations that will define the categories of constructions in scope, the content of the study, the accreditations required for performing the study, etc. No specific sanction has been created, but we anticipate that this will be addressed in the regulations.

Management of construction waste.

During demolition or significant renovation works, constructors must perform a comprehensive diagnostic study concerning the management of materials and waste from these works, with a view to their re-employment or recovery, accompanied by certain traceability and disposal records. The information contained in the diagnostic must be transmitted to a certified body designated by the relevant administrative authority. This is a pre-existing obligation introduced by the earlier Circular Economy Law and mistakenly abrogated before it could enter into force. The diagnostic must occur before the building permit application, if applicable, or before signing the demolition works contract. This obligation came into force on January 1, 2022. Failure to comply attracts a fine of up to €225,000 for corporations, which can be levied against land users, beneficiaries of works, architects, contractors or any other person responsible for the execution of works.

Low-carbon and bio-sourced materials for public projects.

From January 1, 2030, the use of bio-sourced or low-carbon materials will be required in at least 25 percent of major renovation and construction work carried out under public procurement contracts. Further implementing regulations will define the types of projects in scope, likely by reference to financial and technical thresholds.

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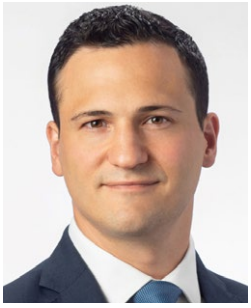
Q&A with Antoine Smiley



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Introduction to your practice

Q - What types of disputes and projects are you involved in?

I am involved in a mix of domestic and international construction arbitrations and some transactional and project counsel work. The disputes I am handling involve typical construction and industrial risks – catastrophic failure, delay, defects, changes, etc., but also a lot of force majeure claims arising from recent major events. As for the types of projects, since the beginning of my career, I have been focused in oil and gas, and energy and infrastructure disputes, such as LNG, power plants, offshore mining, pipelines, rail, dams, and roads, among others. However, the landscape for major projects has changed in recent years as a result of significant investments in renewable energy. My practice is now just as much focused on renewable energy projects, such as solar and onshore and offshore wind.

Q - What is the "sweet spot" in your international construction practice?

Clients tell me that it is my ability to process very complex technical and engineering issues related to design, engineering, construction, and delay analysis. Through my past work as in-house counsel for construction and engineering companies, I recognize the importance of understanding the technical and commercial underpinnings of a project. This helps to craft precise terms for transactional work, and is pivotal to advising on and winning cases.

Q - Being based in Texas, are your biggest clients oil and gas players or others?

My biggest clients are in oil and gas, but many of the firm's traditional oil and gas clients are now diversifying into renewables, and Texas is very much an important nerve center for this burgeoning industry. To the surprise of many, Texas has a huge amount of wind power – more than the UK and all other countries in the world other than China, India, and Germany. The world's demand for fossil fuels is still rising, however, and demand will remain for several decades to come. Texas will continue to be home to the biggest oil and gas companies.

Q - Are you involved in any cross-border disputes?

When I practiced in London, everything was a cross-border dispute. However, the U.S. energy and capital projects market is an immense market unto itself. The cross-border work I handle nowadays generally involves U.S. companies that are investing overseas, or they are foreign owners, contractors, or suppliers working on projects based in North or South America.

Construction law/disputes-related questions

Q - What are your clients most concerned about as 2022 rolls on (i.e., what is keeping them up at night)?

There is definitely a level of uncertainty for my clients. Energy projects rely on global supply chains, and essentially every major project has been affected by COVID-19-related disruptions over the past 24 months. I am seeing a lot of formal notices of force majeure events and increasingly detailed contract terms dealing with the same. Even if an issue arose prior to COVID 19, cases have been delayed – in some cases up to two years. In a similar vein, the damage and disruption from Winter Storm Uri intensified the existing strain on Texas-based projects, and clients are now starting to feel the effects flowing from the conflict in Ukraine, which has impacted the pricing and supply of labor and materials.

Q - Being based in the United States, what arbitral institutions are most popular with your clients?

In domestic construction arbitration, I most frequently see parties selecting the American Arbitration Association (AAA) or JAMS. Both have specific construction arbitration rules and panels of arbitrators that specialize in construction or mega-projects. The international institutions that I see chosen most frequently are the AAA-ICDR and ICC.

The sustainability issue

Q - Sustainability is a hot topic for the construction industry. What are your clients saying and doing in this space?

The hot topic in the United States right now is offshore wind. As of 2021, the United States had less than 50 MW of offshore wind, but by 2030, the United States aims to have 30 GW (30,000MW). 2030 is less than eight years away, so offshore wind is set to see the most exponential growth of any energy source in the United States, both in terms of additional power production and additional capacity.

All the major owners, developers, contractors, and suppliers will be involved in this investment, including a significant number of foreign players who have many years of expertise in this area.

Clients in the United States are now actively looking for firms that have experience in Europe with offshore wind. Reed Smith has been doing onshore wind for 25 years in the United States and has the same amount of experience for offshore wind in Europe (both transactional and disputes work). We are primed to help clients in this area.

Q - Reed Smith signed the Green Pledge (Campaign for Greener Arbitrations) in March 2021. Do your clients in the United States still prefer remote hearings over in-person hearings?

I had one in-person hearing in 2021, but otherwise, everything has been virtual. Even now that the COVID 19 pandemic restrictions have eased up, many clients and arbitrators still prefer virtual hearings in arbitration. In terms of litigation, jury trials are commonplace in the United States, and for these, plaintiffs prefer in-person hearings. But the courts have seen the virtues of online hearings in terms of efficiency – especially for motions practice and procedural issues, and I think many courts will retain this virtual practice. Arbitration has always been conducted virtually – except for the final hearing – but I think parties will be more willing in the future to agree to virtual merits hearings and depositions.

Q - Tell us your prediction for how sustainability will impact construction disputes over the next five to 10 years.

There has been a huge amount of investment in renewables in a short period of time, driven by concerns over climate risk and energy independence.

History tends to repeat itself. Soon after the LNG boom began, there was an immense number of high-value disputes, and unless lessons are learned, there could be a similar pattern with renewables projects. Self-evidently construction disputes tend to align with the market conditions and areas of investment.

With the level of investment expected in the short- and mid-term, and as a result of increased difficulties surrounding regulatory approval and compliance, stressed labor markets, and heavy competition for increasingly scarce resources, there will be inevitable pressure on owners, contractors, and suppliers. These conditions create challenges for projects, and disputes are likely to arise as part of the industry's "growing pains."

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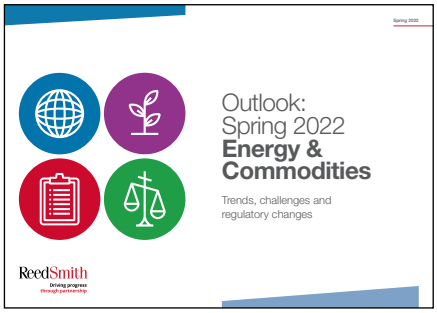
NEW Reed Smith Energy and Natural Resources LinkedIn page

We are pleased to announce the launch of the Reed Smith Energy and Natural Resources LinkedIn page. Join us as we share with you updates from our Energy and Natural Resources Group and thought leadership directly from our lawyers relevant to your business and wider industry. Feel free to ask questions and engage with us as you navigate through your business challenges and legal needs.



Outlook: 2022 Energy & Commodities

The war in Ukraine has hit the energy sector and destabilized the transition to carbon-free energy. At the same time, investors increasingly require that their investments go toward environmental, social and governance ends. Reverberations of COVID-19 include an expansion of nonperformance in energy-related contracts, and we expect to see new kinds of litigation around that.

Reed Smith lawyers and a Eurasia Group executive contribute these and other insights to give you an updated picture of a rapidly evolving situation. The report outlines key themes discussed at Reed Smith's flagship Energy & Commodities Conference held in Houston on March 31. Read the report and reach out to our authors to discuss what these issues mean to you and your enterprise.

Viewpoints

Where we share timely commentary written by our lawyers on topics relevant to your business and wider industry. Browse to see the latest news and subscribe to receive updates on topics that matter to you, directly to your mailbox.

Trading Straits podcast

Trading Straits provides legal and business insights at the intersection of shipping and energy. This podcast series is hosted by Reed Smith's market-leading team of shipping and energy lawyers. Join us to hear key developments across the industry, including on emissions, sanctions, LNG and shipbuilding.

Design and workmanship defects – whose problem is it anyway? Key takeaways from our Middle East Construction Breakfast Briefing

As part of Reed Smith's *Construction Breakfast Briefing* series, on 22 March 2022 we invited industry experts to join a panel alongside members of our Middle East Construction team to discuss where liability falls when design and workmanship defects arise in the industry, and ways to mitigate these risks at the outset of a project. Read the report.

Have a question?

If you have questions or would like additional information on the materials covered in this newsletter, please contact one of the authors – listed below – or the Reed Smith lawyer with whom you regularly work.

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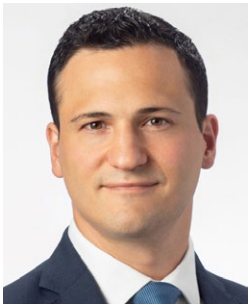

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