



Introduction

Welcome to the November edition of our **Infrastructure Insights** newsletter which reviews a wide range of issues impacting the global infrastructure sector.

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We hope you find **Infrastructure Insights** an informative and useful read.

Should you have feedback or suggestions for future topics, please contact infrastructure@clydeco.com. Similarly, to hear more from our global projects & construction group, email us providing your area(s) and region(s) of interest.



How 'developing' is outpacing 'developed'

By Liz Jenkins and Charlotte Davey. First published in *Infrastructure Investor*

Traditionally, developed countries such as the UK have led the way in utilising private investment models to fund public infrastructure development. However, global investors are now looking further afield when considering which markets to invest in, including emerging markets.

There are a number of factors which influence investor decisions as to where to invest. The sophisticated investor will seek political and regulatory certainty, financial viability of government entities, a market where the risks involved are clearly understood and the availability of a long-term pipeline of infrastructure projects. Political certainty demands a stable political system that is supportive of private infrastructure investment from global investors and which has prudent fiscal and budgetary discipline.

Regulatory certainty requires a system which has a legislative and institutional framework that provides for and supports private investment in public infrastructure. Getting up to speed on which countries offer these attributes invariably requires a significant investment in time and money, so investors also seek markets where there is clear visibility of a long-term pipeline of infrastructure projects to invest in.

Impact of global financial crisis

While previously the UK and other developed markets offered all of these attributes, the Global Financial Crisis (GFC) and its aftermath has placed a large question mark over the continued presence of at least some of these elements. The UK provides a good example. The legacy of the coalition government's comprehensive spending review in 2010 was to slash the Building Schools for the Future programme, the GBP 1.8 billion (EUR 2.2 billion; USD 3.1 billion) social housing Private Finance Initiative (PFI) programme and a number of waste PFI and other schemes. On top of this, the elections next year and potential change in government creates uncertainty regarding long-term policy on – and the form of – private investment in UK public infrastructure. Although the UK government has gone some way to addressing the absence of a pipeline of infrastructure projects with the National Infrastructure Plan (NIP) – which sets out a long-term plan for UK infrastructure to 2020 – many have criticised the NIP for being a government wish list rather than a pipeline. The example of the UK is in strong contrast to a number of emerging markets with a long-term commitment to PPP projects and significant pipelines, such as Turkey, Chile, Colombia, the Philippines and Mexico.

Emerging markets often demonstrate a combination of significant infrastructure need with limited public finance resources and this gives rise to substantial opportunities for global investors. The Philippines and Mexico both provide good cases in point.

Philippines

In the Philippines, the country's inadequate infrastructure, resulting from low historic levels of public and private sector investment, has been identified as a critical constraint to economic growth. The government released the Philippine Development Plan 2011–2016, which focused on facilitating infrastructure development to ensure high economic growth, job generation and poverty reduction.

The huge investment requirements for infrastructure development, coupled with the government's need to observe fiscal discipline, led to a greater recourse to the private sector (and the PPP model) for financing, construction, operation, maintenance and rehabilitation of major infrastructure. The government therefore set about further improving the national environment for PPPs.

The Filipino government implemented a series of policy initiatives to encourage foreign investment in PPP projects, including an amendment to the BOT Law Implementing Laws and Regulations to promote the accelerated processing of PPP projects, increased transparency in the bidding and award of projects, and improved governance and accountability mechanisms.

Further to this, the Public-Private Partnership Centre (the PPP Centre) of the Philippines was instituted in 2010. The PPP Centre is the main driver of the government's PPP programme and serves as the central coordinating and monitoring agency for all PPP projects in the Philippines.

It provides technical assistance to national government agencies, government-owned and controlled corporations, state universities and colleges and local government agencies as well as to the private sector to help develop and implement critical infrastructure and other development projects. Since its institution, a series of PPP projects have been rolled out and its success was recognised in June when



it was awarded Best Central Government PPP Promoter at the 2014 Partnership Awards in London.

Seven PPP projects have been awarded under the current administration, the latest being the Mactan-Cebu International Airport Project, which was awarded to the Megawide-GMR consortium on 4 April. The project is for the expansion of an existing passenger terminal and the construction of a new passenger terminal that will address the growing influx of passengers to the country's second-busiest airport.

Other projects already awarded include two expressways, two programmes for classroom construction nationwide, the modernisation of the Philippines Orthopaedic Centre and the implementation of an automatic fare collection system for Metro Manila's LRT and MRT Lines.

The PPP Centre has publicised a total of 56 projects that are in the pipeline. On 8 August it issued an Invitation to Prequalify to Bid for the Laguna Lakeshore Expressway Dike Project, a 47 km flood control dike on top of which will be a six-lane expressway. On September 3 a Pre-Qualification Conference was held for a 4 billion Philippine Peso transport terminal to be constructed south of Metro Manila, to include a passenger terminal building, arrival and departure bays, public information systems, ticketing, baggage holding facilities and park-ride facilities.

The success of the governmental initiatives in respect of PPPs and the PPP Centre is demonstrated both by the number of projects awarded in a relatively short period of time and the number of further PPP projects in the pipeline.

Mexico

Mexico's National Infrastructure Plan was launched in 2007 under the administration of President Calderon with the recognition that infrastructure development was essential to increase economic development. The main challenge was to increase private investment as public funds alone could not resource the planned development. A Public-Private Partnership Law was published on 16 January 2012 covering a number of aspects of PPPs, including the risk allocation in PPP contracts.

In July 2012, Enrique Pena Nieto was elected President and he again emphasised the importance of infrastructure development to Mexico's wider economic development. On 15 July 2013, Nieto announced his own government's National Infrastructure Plan for 2013–2018. The plan will invest about USD 320 billion of public and private funding in roads, rail, ports and airports. This includes the completion

and maintenance of a road network that connects the country's strategic regions, renewal of public transport, the building of strategic railroads, maintenance of four world class ports, an increase to the ports' capacity, a resolution to the overcapacity issues at Mexico City International Airport, promotion of regional connections and expansion of the coverage of telecom networks.

A large proportion of this infrastructure is expected to be funded by PPPs. Mexico's National Infrastructure Fund Fonda Nacional de Infraestructura (Fonadin) is the Mexican government agency set up to manage the development of national infrastructure in Mexico via PPPs. Fonadin provides support in relation to the financing, planning, construction and transfer of projects developed by the private sector. These initiatives have together led to significant private sector investment in Mexico, from Europe, the US, Japan and South Korea.

Restoring confidence requires commitment

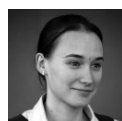
Increasingly, emerging markets are demonstrating a long-term commitment to the PPP model and a significant pipeline of infrastructure projects. This is in contrast to a number of developed economies which have demonstrated a wavering and unpredictable commitment and absence of a significant pipeline. In the UK, in addition to the National Infrastructure Plan, fully restoring confidence in the long-term availability of private investment opportunities in UK public infrastructure, will require:

1. Confirmation of the UK's commitment to private investment in public infrastructure after the next election
2. A wider government economic plan containing significant investment opportunities, including opportunities for social infrastructure such as housing, health, education and regeneration, which are not currently included in the NIP.



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Pit to port infrastructure projects: The story in Australia

By David McElveney and Carine Cruse

In recent years, the economic growth and success of Australia has been inextricably linked to a boom in the mining and resources sector. Minerals are Australia's largest export. Apart from the rise of oil and gas mining and production, onshore mining in the form of iron ore, coal and other metals and minerals has grown exponentially. In particular, Australia now holds the title as the world's largest exporter of iron ore and black coal respectively. This briefing explores the issues surrounding the location of these resources and the export of ore, the ownership and control of the logistics chain, the feasibility of the infrastructure and what infrastructure may be required. We also consider some leading pit to port projects in Australia.

Location of deposits and the export of resources

Most of the country's iron ore deposits and coal basins are located in remote areas far from major population centres.

According to the Bureau of Resources and Energy Economics, 93% of the country's identified iron ore resources (totalling some 64 billion tonnes) occur in Western Australia, with the major deposits found in the Hamersley Province in the Pilbara (Northwest of the State), making it one of the world's major iron ore provinces.

As for black coal, over 96% of these resources occur in New South Wales (Hunter Valley and Newcastle coalfields) and Queensland (Bowen, Callide, Surat, Moreton and Galilee Basins).

Most of the minerals and metals mined in Australia are destined for export. The largest importers of Australian minerals and metals are China, Japan, South Korea and India, but coal is also exported to Europe and the Americas.

Given that resource deposits are generally located many kilometres inland, extensive rail infrastructure is required to deliver those commodities to ports efficiently for bulk export.

Given the distance from major cities, there are generally no existing rail networks or port facilities, which can be utilised by prospective miners. Accordingly, mining companies have had to invest in their own pit to port infrastructure to support the export of their commodities.

In the case of both iron ore and coal, dedicated ports or berths have been developed or expanded. Most iron ore exports currently take place through Port Hedland, Dampier and Cape Lambert, with smaller quantities exported through Geraldton and Esperance in Western Australia. In the case of coal, most exports take place through Newcastle and Port Kembla in New South Wales, and Hay Point, Gladstone and Abbot Point in Queensland.



Ports Australia

Ownership and control of the logistics chain

The large capital investment required for such an undertaking means that a company will only undertake the construction of pit to port infrastructure if there is no other feasible alternative or there are overwhelming benefits associated with the ownership and control of its own logistics chain.



Quite apart from the mining and mineral processing infrastructure, the logistics chain may involve the construction of access roads, air strips, mining camps, a power plant, water treatment plants, railway or rail spurs with train loaders and unloaders, and a port or port expansion in the form of new berths or terminals, all to support one or more mines.

Many a court challenge has been mounted by new entrants to the market seeking to gain third party access to the closely guarded rail and port infrastructure of established players. This course of action has not proved successful in Western Australia to date.

Major miners want the certainty of control of the logistics chain, with only their rolling stock and freight being carried on their privately owned railways in what are 24 hour/day operations. This ensures that there are no impediments to their ore reaching the market, no demurrage payable and that maximum returns are achieved.

Where miners are operating under State Agreements, are subject to the Railways (Access) Code in Western Australia or the laws governing access to infrastructure in other states, there may be a requirement for those parties to facilitate third party access to their rail infrastructure.

Rail owners can be required to accommodate proponents on existing infrastructure, but only insofar as capacity constraints allow. In the case of the Code, proponents may request a rail owner to undertake an extension or expansion of an existing railway if it can be done in a technically and economically feasible way and the expansion is consistent with the carrying on of safe and reliable rail operations on the route.

What has tended to happen is that capacity constraints on the railways of the largest miners have denied third parties the opportunity of access. In limited instances, those companies will freight ore on behalf of smaller miners (for example, FMG for BC Iron), but the process is controlled by the rail owners and is managed to fit around their own operational requirements.

If access cannot be negotiated with an existing rail owner, the only alternative for prospective market entrants is to build their own rail infrastructure. However, with tightly held tonnage allocations or berths at major ports, new or expanded port facilities may also be required.

The feasibility of pit to port infrastructure

The feasibility of such an undertaking is a major concern. An assessment of the commercial viability of mining a deposit must take into account the value and market potential of the mined ore, the full costs of developing the mine including geology, mine planning, and processing and the cost of associated plant and infrastructure, together with the cost of finance to undertake the project. Where a new railway and port is required, or even just a rail spur to an existing railhead or a new berth within an existing port, the costs are likely to be measured in the hundreds of millions, if not billions, of dollars.

The supply of equipment and the transport of ore make up some of the biggest outlays for a mining company. As deposits are being exploited hundreds of kilometres inland, the percentage of development costs associated with transport, power and water infrastructure is likely to far exceed the costs of mining plant, equipment and machinery, which have traditionally made up the bulk of mine development costs. Where distance is involved, rail haulage will be a cheaper option than road haulage in the long-term.

The economics of the construction and operation of pit to port infrastructure are central to the viability of many large resource projects.

What infrastructure will be required?

The construction project will be a complex one involving multiple sites and interfaces between the mining operations, rail, port facilities and shipping vessels.

Early construction work will generally involve the construction of access roads and an airstrip at the principal mine site. These will be extended to haul roads and site roads at both the mine and port and along the rail corridor.

As part of its mining infrastructure, a company will typically employ large haulage trucks and/or conveyors to haul ore or minerals to crushing, scrubbing, screening or treatment plants. The ore will then be transported by rail to port. In some instances the ore is further crushed, screened or blended at the port.

The railway will have to be planned and constructed to support heavy haulage trains of particular lengths and to accommodate particular scheduling. The ore freight trains used in Australia comprise some of the largest consists and tonnage loads in the world. The rail



works will typically include marshalling, service and maintenance yards, train loaders, rail loops and sidings, culverts, bridges, signalling and communications and train unloaders, conveyors and stackers at the port.

A port will have to be designed complete with shipping channel(s), marine structures such as wharves, jetties, load-out facilities, berthing dolphins, navigational aids and harbour walls. The onshore port or terminal facilities would include offices, water, power, lighting, communications and storage or stockpiles. Once again, the design will be influenced by many factors, including the proposed export volumes, size and frequency of export vessels to be accommodated and other logistics.

Heavy haul rolling stock will have to be designed and constructed, often overseas for shipment to Australia.

Leading examples of pit to port operations in Australia

The largest iron ore producers in Western Australia, BHP Billiton, Rio Tinto and Fortescue Metals Group, own and operate private pit to port infrastructure.

BHP Billiton operates the Newman Line (426km) and Goldsworthy line (208km) from its mines near Mount Newman and Mount Goldsworthy and along the route of those railways. Ore is transported by rail to Port Hedland. Rio Tinto and its wholly owned subsidiary, Hamersley Iron, operate the Hamersley and Robe River lines, which total more than 1,100km. Rio Tinto transports ore from its mines near Tom Price, Paraburdoo, Yandicoogina and Hope Downs to Dampier for export and from its Robe River and West Angelas mines to Cape Lambert for export.

Roy Hill Holdings (in which Hancock Prospecting owns a 70% share) is currently undertaking the construction of the new AUD 10 billion Roy Hill pit to port project, which will include a 344km railway and two new berths at Port Hedland.

Fortescue Metals Group operates a 310km long railway from its Chichester Hub (Cloud Break, Christmas Creek mines) to private berths at Anderson Point in Port Hedland. More recently a 129km rail spur has been constructed to connect FMG's Solomon Hub (Firetail, Kings Valley mines) to its main railway line to Port Hedland. These large scale expansions have cost many billions of dollars.

Other iron ore pit to port logistics chains involve Geraldton (including Oakajee) and Esperance Ports. The development of new rail and iron ore export facilities at Anketell Point some 30km east of Karratha and the existing port of Dampier is currently being planned.

According to the April 2014 "Resource and Energy Major Projects" report published by the Australian Government's Bureau of Resources and Energy Economics, iron ore projects with a combined value of over AUD 20 billion and coal projects with a combined value of over AUD 15 billion are in the Publicly Announced Stage. In addition, iron ore projects with a combined value of over AUD 29 billion and coal projects with a combined value of over AUD 50 billion are at the Feasibility Stage in Australia. This will lead to further pit to port developments or expansions over the coming years.



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Land premium disputes in Hong Kong – accelerated resolution via arbitration

By Gilbert Kwok, Rocky Chan and Adrian Tang

In the Chief Executive's January 2014 Policy Address, Mr. Leung Chun-ying outlined the Hong Kong Government's plan to streamline procedures for resolving land premium disputes in order to improve land supply for housing and other uses in the short to medium term. This involves the Government introducing a "Pilot Scheme for Arbitration on Land Premium" to facilitate swifter agreement with property developers on the issue of premiums payable for lease modification and land exchange. The Pilot Scheme was put forward for consideration by Hong Kong's Legislative Council (LegCo) in July 2014 and has since been launched by the government in late October 2014.

Premiums in dispute

In Hong Kong, land premiums are payable when a property developer wishes to seek lease modifications/land exchanges from the Government. Disputes over such land premiums tend to be quite prevalent since the sums demanded by the Government are generally not commercially acceptable to developers. While setting high premiums allow the Government to pre-empt any potential accusations of collusion with the private sector when the valuation assessment comes under scrutiny by LegCo, it also creates a strong disincentive for developers to pursue their development projects as it would mean their profits are eroded. As such, extensive negotiations and repeated appeals ensue. The failure of the parties to reach common ground often leads to stalled development projects and lands remaining idle for years until some commercial imperative provides impetus for the parties to agree. The introduction of an arbitration mechanism is therefore seen as a means to expedite the dispute resolution process and break the deadlock more readily.

The Government's Pilot Scheme at a glance

The Government's Pilot Scheme was officially launched on 27 October 2014 and will run for an initial period of two years. The arbitration mechanism will be subject to review over time and its application will be fine-tuned and broadened after the Government acquires the relevant experience. The general features of the Pilot Scheme include:

Trigger mechanism

Both the Government and the developer is entitled to refer a land premium dispute to arbitration after a substantial exchange of views (i.e. after at least two appeals by the developer) and no agreement could be reached. This allows for the issues in dispute to be crystallised following a substantive exchange of information.

Case priority

Should the land premium arbitration case load exceed the capacity of the Lands Department, the Department of Justice and the available arbitrator candidates, cases will be prioritised in accordance to higher yields (i.e. gains in flat numbers or non-residential gross floor area); wider premium gaps and lesser complexity of issues in dispute.

Scope of arbitration

The matters to be arbitrated will be confined to the amount of premium and any disagreement on fundamental issues such as lease interpretation (e.g. interpretation of "industrial" use) and government policies must be resolved by way of civil proceedings in court.



Tribunal composition and appointment

Land premium arbitrations will be decided by an Arbitral Tribunal of three arbitrators to be led by a nominated President to be agreed by the parties. Other members of the Tribunal are to be nominated by each of the parties respectively to be agreed by the other party. The President of the Tribunal must be a legal professional with at least 10 years post-qualification experience, while the other members should comprise of valuation professionals with at least 10 years of experience in land matters and professional valuation. The appointed arbitrators need not, however, hold any arbitration qualifications. The Hong Kong International Arbitration Centre (HKIAC) will be the Appointing Authority in the event of any disagreement.

Safeguards

Arbitrators will be required to make a written declaration as to their independence and impartiality, as well as being subject to an ongoing duty of disclosure for any conflicts of interest that may be relevant. Such declarations may be disclosed by the Government as its discretion. Anti-collusion provisions will also be included in the Arbitration Agreement to prohibit unauthorised discussions outside of the arbitral proceedings, and arbitrators will be deemed 'agents' in the context of Section 9 of the Prevention of Bribery Ordinance and will be liable for offences under the legislation in the event of misconduct.

Walk away provisions

To deter developers from walking away during the arbitration proceedings or after receiving an arbitral award, they will be required to execute a Deed of Undertaking which stipulates their agreement to restrictions on alienation of the subject lot and on transfer of shareholding (if the lot is held by a company) until the execution of the relevant lease modification/land exchange. The developers must also pay the Government 15% of the premium last assessed by the Government in the event the developer purports to discontinue the arbitral proceedings or fails to execute the lease modification/land exchange at the premium under the arbitral award.

Date of valuation and timeframe

The valuation date will be the date when the Arbitral Tribunal is first constituted. However, to prevent the assessed land premium to be too out of date, the parties will agree on a suitable timeframe for an award to be handed down on a case-by-case basis (i.e. generally expected to be around 10 weeks after constitution for 'documents only' proceedings but longer if hearings are required). Extensions

of time may be allowed by agreement of the parties, and the valuation date may be adjusted accordingly to reflect an unforeseen extension.

Arbitral award

The Tribunal is able to decide on a suitable land premium amount by consensus or majority vote and is not confined to any pre-determined upper or lower limits. The details of the arbitration will be kept confidential in view of the commercially sensitive nature of the information involved, although the Government reserves the right to disclose information to the public about concluded cases.

Costs

Each party will be required to bear their own legal and other costs while the costs of the arbitral proceedings (i.e. the fees and expenses of the Tribunal) shall be borne by the parties in equal shares unless the Tribunal within its discretion deems a different allocation is appropriate.

Appeal

An arbitral award in a land premium dispute will be subject to the same court appeal mechanism as defined in the Arbitration Ordinance (Cap 609).

Comment

The Pilot Scheme will undoubtedly face a number of hurdles in the process of implementation. For example, there is the question of whether the Government will succeed in obtaining developer buy-in that arbitration represents a commercially viable solution to premium disputes. Also, the issue of enforcement and appeals to the arbitral award will certainly be matters of contention. While the performance of the Pilot Scheme is unknown at this stage, the first test case will be closely scrutinised by the industry and will shed more light on the actual effectiveness of the arbitration mechanism in practice. If the aforementioned complications could be overcome, it is anticipated that the mechanism could serve to expedite the resolution of less complex land premium disputes. For more complex cases, particularly those involving disputes over fundamental issues such as lease interpretation and government policies, the parties will nevertheless need to resolve the matters via court proceedings.

While the Domestic Arbitration Rules of the HKIAC are said to apply to arbitrations under the Pilot Scheme, the pro-forma Arbitration Agreement provided by the Government includes extensive modifications to these Rules. As a result, there may be some uncertainty as to precisely which of the other procedural rules will, by implication, be adopted.



Furthermore, since a List of Disputes is intended to be annexed to the Arbitration Agreement, parties should take care when setting out and agreeing the issues as this will determine the scope of the Tribunal's jurisdiction and it may be difficult to subsequently amend this list. Developers are advised to seek independent legal advice to better protect their interests.



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Road infrastructure in Tanzania

By Peter Kasanda

Tanzania has approximately 87,600 kilometres of public roads across an area almost as large as France and Germany combined. The ability of the country to upgrade and improve its road infrastructure will be one of the key factors in whether it can continue the impressive rates of economic growth achieved across various sectors in recent years.

This update examines the regulatory framework of roads in Tanzania and plans for improvement to the road network, such as the Dar es Salaam to Chalinze Expressway and the Dar es Salaam Rapid Transit Project.

Regulatory Framework

Since its establishment in 2010, the Ministry of Works (**MoW**) has been responsible for all road related activity in Tanzania, including the formulation of policies, the coordination of development programmes and oversight of the Tanzania National Roads Agency (**TANROADS**) and the Road Fund Board (RFB). According to section 12 of the Roads Act 2007 (the **Roads Act**), public roads in Tanzania are divided into two categories: national roads and district roads.

TANROADS was established in 2000 as an executive agency, now under the MoW, with responsibility for the maintenance and development of national roads in mainland Tanzania, which includes approximately 13,000 kilometres of trunk roads and 21,000 kilometres of regional roads.

In 1998 the Prime Minister's Office – Regional Administration & Local Government (**PMO-RALG**) took over responsibility for regional administration and local governance on the abolition of the Ministry for Regional Administration and Local Government, which includes responsibility for the development and maintenance of approximately 53,000 kilometres of district roads in Tanzania.

The RFB was established under the Road & Fuel Tolls Act 2006 (the **RFTA**) with the main function of managing the Road Fund, a fund into which fuel toll levies, transit fees, overloading fees and other monies are deposited. The RFTA prescribes that at least 90% of the Road Fund must be used for maintenance and repair of public roads, with the remaining 10% used for road development and administrative costs. The RFB also advises the MoW on new sources of road and fuel tolls, disburses funds from the Road Fund to TANROADS and other agencies and enters into corresponding performance agreements.

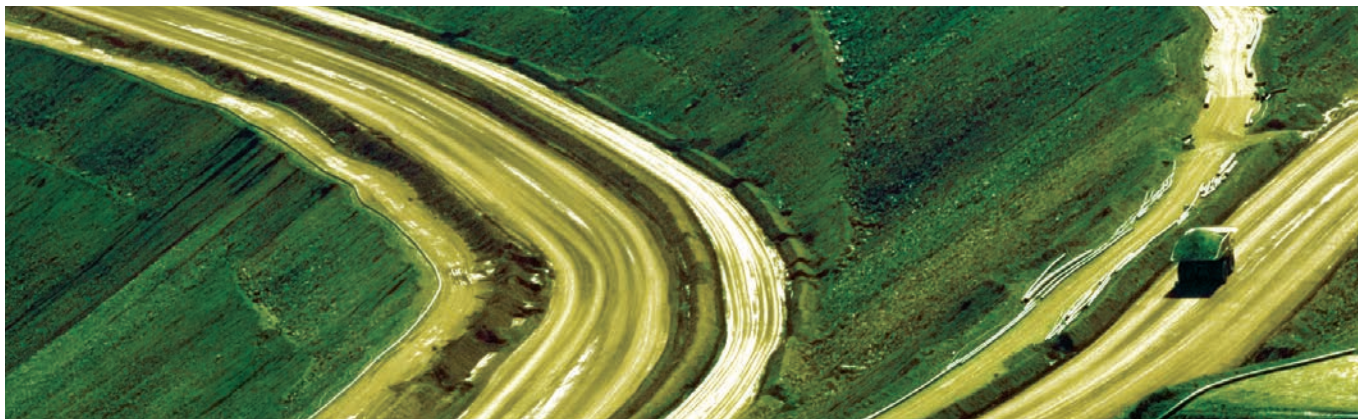
Improvements

The latest government statistics in Tanzania reveal that 19% of national roads and just 2% of district roads were paved in 2013. The poor condition of existing roads is a major factor in the severe congestion often experienced by drivers both in Dar es Salaam and on major trunk roads leading to and from the city. Congestion has been estimated to cost the Dar es Salaam economy alone as much as 411 billion Tanzanian Shillings (approximately USD 250 million) every year, with projections that this figure will rise without significant investment in road infrastructure, due to the ever increasing number of vehicles on the roads.

In the 2014/15 budget, the MoW has been allocated 1.2 trillion Tanzanian Shillings (approximately USD 730 million) and a significant proportion of this will be allocated to maintaining and improving the road network in Tanzania.

Dar es Salaam – Chalinze Toll Road

The government of Tanzania has announced plans for the upgrade of a significant portion of the Dar es Salaam to Morogoro trunk road to expressway standard. The plans involve the upgrade of approximately 100 kilometres from Dar es Salaam to Chalinze in order to ease traffic congestion along the route. This project is of national importance to Tanzania, given that it is the main westbound arterial route from the main commercial hub and port, Dar es Salaam, and serves much of mainland Tanzania in addition to the neighbouring landlocked countries of Malawi, Zambia, the Democratic Republic of Congo, Rwanda and Burundi. It is estimated that the road carries up to 70% of the freight from the port of Dar es Salaam. Chalinze is also the point at which the main Dar es Salaam to Morogoro road meets the Tanga road, which links Dar es Salaam to Mombasa in Kenya.



The project, which is estimated to cost USD 535 million, will involve the construction of a six lane expressway for the first 50 kilometres from Dar es Salaam, reducing to a four lane expressway for the remainder of the way to Chalinze, with grade separated junctions and service roads on both sides in addition to toll collection facilities and amenities for road users. It will significantly improve the safety, speed and reliability of journey times along the route.

TANROADS has so far advertised tenders for contracting financing proposals (February 2013) and preliminary design work (June 2014), both of which have now closed. In its tender documents, TANROADS has indicated that it is flexible with regard to the structure of the tender, be it design and build; design, build and operate; build, operate and transfer; or other similar arrangements.

It is envisaged that a second phase of this project will upgrade the section of this road continuing from Chalinze to Morogoro at some point in the future when funding and priorities allow.

Dar es Salaam Rapid Transit Project

In an effort to relieve pressure on the road network by improving the public transport system in Dar es Salaam and encouraging large numbers of citizens to choose this over private cars, the government of Tanzania is in the process of constructing phase 1 of the Dar es Salaam Rapid Transit System (**DART**) along a 20.9 kilometre stretch of the Morogoro Road from the city centre. The system being put in place is a bus rapid transit system, which has been successful in several cities in other developing countries, notably Curitiba (Brazil), Quito (Chile) and Bogota (Colombia), with construction costs approximately 5 – 10% of the investment required for a corresponding metro or light rail system and operational costs of approximately half.

The design involves constructing segregated bus lanes in either direction in the centre of the carriageway with raised platforms in the centre of the road for passengers to embark and disembark. Either side of the bus lanes will be two lanes of private traffic, a cycle lane and a footpath. The rapid transit buses will be extended tram-like buses. Feeder services on conventional buses will be used to transport passengers to and from areas not served directly by the service.

The PMO-RALG, which oversees the implementation of DART, has plans for 6 phases of DART, covering all of the main arterial routes into Dar es Salaam in addition to several radial routes.



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Solar Energy in South East Asia: recent developments and regulatory landscape

By Glen Warwick and Tia Starey. First published in Eco Business

With subsidy cuts, policy uncertainty and funding gaps characterizing Europe's clean energy landscape, it is not surprising that interest in the Asian renewable market is growing. One area that is continuing to attract a lot of attention is solar energy. Indeed, Bloomberg recently reported that almost all new investments in clean energy in Thailand have been in solar power projects. This article will look at the changing regulatory landscape for commercial solar power projects in South East Asia and explore some of the key legal and regulatory challenges that may be encountered in this burgeoning market.

There are two main types of solar power systems used in commercial operations: photovoltaic ("PV") and thermal solar power systems. These systems can be defined by the way they convert solar energy into other forms of energy. In PV systems, sunlight is converted directly into electricity through the use of panels made up of photovoltaic cells. The PV panels are usually placed on the roofs of residential and commercial buildings, or on large areas of land (known as "ground mounted" systems). When sunlight hits the panels, electric fields are created due to the semi-conductive nature of the cells. Thermal solar power usually takes the form of concentrated solar power ("CSP"). Under a CSP system, lenses or mirrors track and reflect sunlight onto solar towers that heat fluid and create steam which turn generators, thereby producing electricity. An advantage of this type of technology is that the heat can be stored, whereas under a PV system the electricity must be used immediately.

Renewable targets in South East Asia

While coal, the most affordable but environmentally unfriendly fuel, continues to dominate the Asian power market (it fuels around 60% of Asia's electricity), the growing interest in renewable energy is undeniable. This is reflected in the targets that many countries in the region have set. Like Europe, where the 2009 Renewable Energy Directive requires the EU to source 20% of its energy from renewable energy by 2020, many countries in South East Asia have set targets in the renewable energy sphere as well. In Indonesia, an ambitious target of 25% by 2025 has been set (referred to as "Vision 25/25"), in Thailand a similar target of 25% by 2021 is in place, while Vietnam has a more modest target of 5% by 2020. Malaysia's target forms part of the National Renewable Energy Policy and Action Plan and is 11% by 2020, while the Philippines aims to triple its renewable energy usage by 2030 to 15,000MW.

Unlike the EU, there is no organisation in South East Asia with authority to monitor compliance with the targets and penalize failure. Within the EU, each Member State is legally bound to contribute to the target, with each country's contribution linked to its current energy mix (for example, the target is 15% in the UK and 23% in France by 2020). Each Member State is required to provide the EU Commission with regular reports, and enforcement action may be taken in the event of non-compliance. Countries in South East Asia are also free of sanctions being imposed under the Kyoto Protocol. While all ASEAN countries are members of the Kyoto Protocol, as developing countries there are no ramifications in the event that greenhouse gas emissions are not reduced.

Feed-In Tariffs

Renewable energy targets in South East Asia have the potential to remain just that – targets – without proper incentive schemes in place to support them. Currently, the cost of generating solar power in the region is about twice that of fossil fuels. Absent incentives, it is difficult for solar to compete with traditional forms of energy, and electricity companies may find little reason to adopt such measures. In order to address this gap in grid parity, incentives in the solar world traditionally take the form of feed in tariffs ("FiT"), which offer small scale producers of clean energy a fixed price for generating electricity and selling it to the grid for a fixed duration. Other incentive schemes for solar power include net metering, panel subsidies, tax breaks, soft loans and preferential grid access.



A country in the wider Asia region that has been very successful in encouraging solar energy use is Japan. Japan first introduced a FiT scheme in 2009. Following the Fukushima disaster in 2011, an attractive FiT scheme for utility scale PV projects was announced, with some of the highest FiT rates in the world. The lucrative nature of the solar market in Japan has attracted major global investors, including Goldman Sachs who plans to invest almost half a billion US dollars in Japanese renewable projects over the next five years. In South East Asia, both Thailand and Malaysia have had solar FiT schemes in place for some time, and Indonesia and the Philippines have also both recently adopted them.

Price of panels

The price of solar panels has decreased substantially in recent years (Bloomberg has reported that global solar PV module costs declined by 83% during the 2000 to 2013 period) brought on to a large extent by the mass production of subsidized panels in China, together with advances in technology. The combination of cheap panels and attractive tariffs can paradoxically create difficulties. In the UK, this led to a flood in the market, which prompted the Government to retrospectively lower the FiT rate. This resulted in a court case which found that the Government had acted illegally and had caused significant commercial damage to the industry. In the EU, one of the responses to the lowering panel costs has been to increase import tariffs on Chinese solar panels, which has resulted in trade tensions between the EU and China.

Degression rates & quotas

Malaysia's approach to the issue of falling PV prices has been to apply a "degression rate" (a year-on-year gradual decrease) to the applicable FiT rates. The Malaysian FiT regime, which took effect in 2011 and applies to a variety of renewable sources (biomass, biogas, mini hydro and PV solar), requires the winning applicants to enter into power purchase agreements with the electricity distributors. The applicable degression rate is then determined at the time the project is connected to the grid and ready for commercial operation. The degression rates are reviewed at three year intervals. In Germany, where a similar scheme is in place (Malaysia's FiT regime is modelled on it), the latest degression rates have been described as "so severe" that some market experts have suggested it is likely they will impact on the viability of the market. While this seems less likely to have an impact in Malaysia (in 2013 the degression rate for solar increased from 8% to 20% for schemes above 24KW with little industry reaction), it is certainly a factor that needs to be considered when assessing the attractiveness of the market.

Malaysia also sets a quota, subject to review on an annual basis, to control the amount of renewable energy eligible for FiTs. In Malaysia's regulated energy market, the FiT scheme is funded by a Renewable Energy ("RE") Fund, which is sustained by the implementation of a 1.6% levy on all electricity consumers that use over 300 kWh of electricity per month (this was increased from 1% in January 2014). The quota in Malaysia can also be adjusted in order to increase interest in different types of renewable energy. There is presently discussion that the quota may be revised to favour biomass and biogas, which have not received as much attention from the market as solar power. Potential investors should therefore keep a close eye on the annual quota levels.

While renewable energy has been a part of the Philippines energy mix since the 1950s when the first hydropower plant was constructed, solar power has been slow to take off and a FiT scheme for renewables (including hydro, biomass, solar and wind) only came into effect in 2012, under the auspices of the Renewable Energy Act 2008. However, there has already been quite a lot of interest and a PV solar park of 22MW is under construction, with the first phase completed in May 2014. In addition to a reasonably attractive FiT rate, the solar park will benefit from an exemption from customs duties and taxes on imports, and a seven-year tax exemption on profits. Like Malaysia, there is a quota in place which limits the amount of renewable energy projects eligible for FiTs. This is currently set at only 50MW but may soon increase to 500MW, which would see the Philippines becoming a much bigger player in the solar market.

Capacity, uptake & duration

Most countries have restricted large scale solar projects from being eligible for FiTs. For example, projects in Malaysia cannot exceed 30MW without special Ministerial approval, and the FiT rate reduces the larger the project. In Indonesia the capacity quota is currently 140MW for 80 locations, with most listed projects between 1-6MW. In contrast, Thailand's original subsidy scheme encouraged medium-scale solar (up to 90MW), and solar projects above 1MW currently make up almost 99% of the solar market. Thailand is also currently one of the only countries in South East Asia which has seen much uptake in the larger CSP systems, with capacity at the end of 2013 at 5MW and more projects in the pipeline (the leading markets for CSPs remain the US and Spain, which at the end of 2013 had a combined capacity of over 3GW, or 0.9GW and 2.3GW respectively).



Thailand's attractive subsidy rates (known as "adders") were introduced in 2006 under the Very Small and Small Power Producers Scheme ("VSPP" for projects less than 10MW, and "SPP" for PV projects between 10MW and 90MW), and led to what was described as a "solar gold rush" in 2008. A major difficulty with the scheme was that the level of uptake in permits far exceeded the amount of completed projects: there were many speculative applications as there was no requirement for a project to be completed within a set amount of time. This led to the Thai Government introducing measures, such as retrospective bid bonds and termination provisions, which were viewed by the market as confusing and lacking transparency and resulted in less investor confidence. The Thai Government has since sought to address these concerns, but investors should still play close attention to the conditions attached to any successful bid.

Another important factor for developers and investors exploring solar opportunities in these markets is the length of the power purchase agreement (PPA). In this regard, all countries in South East Asia with FiT regimes have suitably attractive PPA durations, for example the duration is 21 years in Malaysia, 20 years in Indonesia and the Philippines, and 25 years in Thailand. However, there exists uncertainty in some aspects, for example, it is not clear under the Indonesian scheme whether or not the FiT rate will be indexed for inflation.

Auctions

Another means of controlling the level of renewable energy in the market is through auctions. Together with the adoption of a FiT regime, Indonesia has recently adopted a "capacity quota" style auction system, which came into effect in June 2013. The Government owned electricity company, PLN, is required to purchase electricity from the power producers that win the auctions, and the parties enter into a PPA for a period of 20 years. The winners (those with the most competitive tariffs) are required to deposit 20% of the project cost into an escrow account with an Indonesian bank upon signing the PPA. They are also required to secure finance within 3 months of the award and commence construction within 3 months of financial close. Foreign entities looking to invest in this market should ensure they consider the implications that these potentially onerous timelines may have on the viability of the project.

Foreign investment rules & local components

Both the Philippines and Indonesia have "Negative Lists" which limit the amount of investment by foreign entities in many sectors, including renewables. The Negative List in Indonesia has recently been revised, and imposes restrictions on foreign investment in power generation in Indonesia, including a ban on foreign investment in generation of less than 1MW and only a 49% interest in generation between 1MW and 10MW. In Malaysia, in order to benefit from the FiT scheme, a foreign company may only own up to 49% of a solar project. In both Malaysia and Indonesia, there are also incentives in place for the use of locally produced components. In Malaysia, locally produced modules attract a bonus payment under the FiT scheme, while in Indonesia the FiT rate is higher if local components make up at least 40% of the PV power plant.

Land acquisition

For ground mounted solar projects, access to and use of large areas of land is essential. However, acquisition of land in South East Asia by foreign entities can prove difficult. In Indonesia, foreigners are not entitled to directly own land. While it is possible to obtain the right to use land, the process can be complex and bureaucratic. In the Philippines foreign land ownership is also heavily restricted, and it has been reported that this has been one of the factors slowing down the adoption of large-scale solar projects. In Malaysia, land rights are somewhat more straightforward, but interested parties still need to consider issues such as the ease with which the land can be accessed, grid access and the state of infrastructure development in the relevant province.

Construction duration

An attractive feature of solar power projects is that they are less capital intensive than other forms of renewable power, such as wind and hydropower. The equipment is less complex and the installation process much more straightforward. As a result, the construction period is much shorter. For example, a 30MW solar PV project will usually take around nine months to construct whereas a hydropower project of similar capacity could take between three to five years. Compared to offshore wind projects, there is also less risk of time delays, as inclement weather and changing sea conditions do not have the potential to cause as much (if any) disruption.



However, the construction period is still a critical phase, especially in jurisdictions where the applicable FiT and degression rates are linked to the grid connection date, such as in Malaysia, or where there are penalties imposed for late completion, like in Indonesia, where if a project is not completed within 18 months of signing of the PPA there are staggered reductions in place (if up to three months late, 3%, between three and six months, 5%, and over six months 8%). Some factors affecting completion will be outside the control of developers, like for example grid connection and certification, which require the participation of regulators and local electricity companies, and may be subject to administrative hurdles. These factors need to be considered when negotiating the terms of the PPA and the construction contract, particularly in relation to the calculation and imposition of delay damages.

Climatic conditions

Changes in weather conditions can have an adverse impact on the financial attractiveness of solar projects. Even in South East Asia, where the equatorial position of most countries make them incredibly well-suited for solar, dramatic or unpredictable changes in weather patterns could have a detrimental effect on forecasted financial returns, which depend upon a set amount of sunlight. While it is not yet clear what impact global warming will have on weather conditions in South East Asia, this may feature more in future analysis. Solar heat is also affected by the “haze” brought about by the burning of palm oil plantations, a practice still common in some countries in the region.

Conclusion

The Asia Solar Energy Initiative, which was launched by the ADB in 2011, provides a good indication of the growing interest in the solar market in the region. The implementation of well-defined and relatively robust FiT regimes by many countries in South East Asia, including the recent adoptions by Indonesia and the Philippines, should provide a solid platform for foreign investment in this expanding market. While there is no doubt that investors need to bear in mind issues such as foreign land and project ownership restrictions, degression rates and onerous completion requirements when considering the viability of such schemes, the future renewable energy landscape in South East Asia looks set to be a bright one.



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Reinvent PPPs in coal sector

By Jay Cheema, Partner (Clasis Law LLP). First published in The Financial Express

Protracted electricity shortages in India are a grave threat to the country's growth. Despite having among the largest coal reserves in the world, India's reliance on imported coal is increasing and there is a clear need for innovation, technology and infrastructure in the domestic coal sector. Public private partnerships (PPPs) could be a major part of the solution.

Coal commands a 54% share of India's energy basket. However, coal production has consistently been below planned targets and the current model of private participation is clearly not delivering the results needed. There is a need to reinvent the way PPPs are utilised in the coal sector—as has been done in the airports, highways and ports sectors.

The ministry of coal has overall responsibility for policies and strategies regarding exploration and development of coal through Coal India Ltd, the single largest coal producing company in the world.

About 60% of India's total installed power capacity is generated using coal and 85% of new capacity coming on-stream by 2016-17 will also be coal-based. Although India accounts for nearly 10% of global coal deposits, the demand for coal has been outstripping indigenous production. Demand is expected to rise to 980 MT by 2016-17 and to 1,373 MT by 2021-22. Supply, however, is expected to be just 795 MT by 2016-17 and 1,102 MT by 2021-22.

The shortages caused by inadequate or delayed receipt of coal from Coal India and insufficient imports are hitting the electricity generation sector hard. The power minister recently said that several large coal-based projects have, at best, four days of coal reserves on-hand.

The situation was exacerbated when Indonesia, a key source of imported coal, substituted the long-term bilateral coal supply contracts regime that hedged the price and quantity since 1967, with a new coal pricing regulation that resulted in an increase in the landed price of imported coal from USD 36 per tonne to USD 102. The hike threatened to make several competitive tariff based power purchase agreements unviable.

Harnessing India's coal potential is constricted by political and socio-environmental factors. Monopolistic Coal India can't mine coal fast enough, and the country has failed to develop adequate transportation infrastructure to swiftly

move coal freight. In addition, substantial coal deposits lie under India's already shrinking forest cover, which houses endangered species and a large tribal population.

While the government needs to fast-track other sources of energy like renewables, LNG and shale, India's dependence on coal means it must find ways to ramp up coal production. PPPs in the coal sector should be one of the more viable solutions.

A number of options currently exist for private participation in India's coal mining sector but they are not without their issues. Through Miner Developer Operator (MDO) participation, the MDO undertakes all mining related activities and has responsibility for seeking approvals and land acquisition. Since the MDO is selected through competitive bidding, the mine owner derives the advantage of the lowest price and the agreement is based on fixed output and fixed revenue.

In the case of joint allotment of a coal block, the JV model is used wherein each consortium member is required to hold equity in the JV company in proportion to their assessed requirement for coal. Their allocation of coal must be used exclusively for their respective end use projects.

Self-mining for captive use is also permitted for companies in iron, cement and power production and they can mine allocated coal blocks, but only for the designated end-use purpose.

While these avenues exist for PPP participation, the system is peppered with regulatory hindrances. Changes required urgently include implementation of a fair and transparent bidding system. In 2012, a massive coal allocation scam was reported by the CAG. The aftermath of the scam resulted in cancellation of a number of coal blocks. The scam left a trail of unanswered questions about the non-transparent method of allocation of coal blocks and increased the clamour for overhaul of the bidding methodology.



The current MDO model is just contract-mining, based only on a fixed fee per tonne formula. As a result, there is no in-built incentive for the contractor to scale-up production or to maximise revenue and profit. A PPP route that grants ownership rights to the private partner would result in faster production as the contractor would have invested an upfront equity in the coal block and would have a natural interest in faster turn-around of the mine asset.

In the interest of faster production, the mine owners under MDO arrangements must sort out land acquisition issues and seek regulatory approvals beforehand. It is currently common practice for mine owners to pass on obligations relating to land acquisition and regulatory approvals to MDO contractors, causing long delays in the production of coal.

India must also urgently do away with the end-use clause. No other major country allocates minerals based on an end-use. While tying a mine to an end-use project guarantees security of supply for the project, it also restricts full exploitation of the quality and quantity of the mine. Equally, restrictions on the sale of surplus coal in the open market by captive consumers must be lifted. The right to sell surplus coal in the market has the potential to make the PPP model in coal mining more attractive for investors. The government in this respect is moving in the right direction by formulating a draft policy on usage of surplus coal.

The government could also consider giving “infrastructure status” to the coal mining industry to attract more players. Fiscal concessions available to the infrastructure sector would economise coal production. Coal companies engaged in power generation would also be able to import equipment and machinery at concessional duties.

Arbitrary barriers to private participation need to be broken down to attract foreign investment. Current conditions prohibit the formation by government coal entities of a JV with any foreign private company for developing areas containing coal. This condition is particularly damaging in the context of promoting PPPs in coal mining where private sector companies have the skills, technology and experience required to accelerate development of assets.

Other initiatives such as opening coal exploration to the private sector, boosting investment in development of underground coal mining and incentivising development of coal transport infrastructure with rail, road, pipeline and shipping enhancements would work to rebalance the supply and demand.

If these barriers were removed and appropriate incentives for PPPs put in place, the benefits for India's coal sector, and its economy, would flow. Introduction of new PPPs in India's coal sector is a long-awaited move—and one that requires urgent attention.



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The role of dispute adjudication boards under FIDIC: a view from the courts

By Anthony Albertini and Rachel Chaplin

The fact that the FIDIC suite of contracts, at clause 20, provides for disputes to be resolved by dispute adjudication board (DAB) prior to commencing arbitration proceedings means that disputes arising out of FIDIC contracts rarely come before the courts. However, two recent decisions provide helpful clarification on the operation of the provisions of clause 20.

Amended FIDIC Silver Book provided for DAB and litigation

In *Peterborough City Council v Enterprise Managed Services Ltd*, the contract in question was a FIDIC Silver book for a project which involved the design, supply, installation, and testing of a 1.5MW solar energy plant by Enterprise Managed Services (EMS) on the roof of a building owned by Peterborough City Council (the Council). The works were completed late and failed to achieve the stipulated power output. As a result, the Council claimed it was entitled to a price reduction, a fact disputed by EMS.

In *Peterborough*, Clause 20 of FIDIC Silver Book provided that disputes were to be referred to a DAB, whose decision was to be final and binding unless a notice of dissatisfaction is given, following which (in an amendment to the standard wording) the dispute was to be settled by the courts of England and Wales. Following an unsuccessful attempt to resolve the dispute by mediation, EMS gave notice under the contract that it intended to refer the dispute to adjudication, whereas shortly afterwards the Council issued and served its court claim. EMS issued an application for the court proceedings to be stayed so that the dispute could be referred to the DAB.

Clause 20.2.1 provided as follows:

"Disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision]. The Parties shall jointly appoint a DAB by the date 28 days after a Party gives notice to the other Party of its intention to refer a dispute to a DAB in accordance with Sub-Clause 20.4."

It is clear that the DAB was to be the 'ad hoc' variety, convened to deal with a dispute as and when it arose, not the 'standing' variety, which is in place from the outset of the project. EMS contended that the requirement for disputes

to be resolved by a DAB under clause 20.2.1 was mandatory, and accordingly the Council's issue of proceedings was premature and amounted to a breach of contract. Any alternative reading would, EMS submitted, render the subsequent sub-clauses (20.2 to 20.7) redundant.

Clause 20.8.1 defined circumstances when use of the DAB was disappplied:

"If a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise:

- (a) *Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply, and*
- (b) *the dispute may be referred directly to the courts of England and Wales under Sub-Clause 20.6 [Final Settlement]."*

Was clause 20.8 a general 'opt-out' provision?

The Council argued that the provisions of clause 20.8 effectively allowed an 'opt-out' for a party that did not wish to use the DAB procedure and wanted to go straight to court. In scrutinising the operation of the procedure under clause 20, consideration was given to a perceived flaw in the FIDIC dispute resolution procedure. This occurs where a DAB decision has been given, and one party has given a notice of dissatisfaction, rendering the decision binding but not final. In those circumstances, if the unsuccessful party fails to comply with the decision, arguably the only remedy available to the other party is to refer the dispute arising from the non-compliance to a further DAB. This could lead to a course of consistent non-compliance from one party, thus depriving the other party of an effective remedy.



Court conflicted over forcing parties to submit to DAB

Mr Justice Edwards-Stuart acknowledged that this point was arguable where the standard wording was left intact and an arbitration clause was included, because of the limitations on arbitrators to order specific performance. However, in the present case where the forum for final resolution of the dispute was litigation before the English courts, it was possible for the court to intervene. The judge considered that clause 20.8 was intended to apply to those situations where a 'standing' DAB had been convened, but had, by the time of the dispute, ceased to be in place for some reason. It did not confer a unilateral right on a party to opt out of the adjudication provisions. Accordingly, the judge went on to find that a stay of the proceedings should be granted in order to allow the contractual machinery to be operated, although he had sympathy for the Council's arguments and reservations about forcing the parties to submit to a DAB procedure which was unlikely to be determinative. It is therefore fairly clear, that under English common law, the obligation to refer a dispute to a DAB is a mandatory one.

Open to abuse?

An interesting point raised in the case was the potential ability of the parties to abuse the dispute resolution procedure to avoid compliance. It should however, be remembered that FIDIC is an international contract used in numerous jurisdictions, many of which have civil codes which enshrine the concept of 'good faith' which does not exist under English common law. A recent Swiss case has looked at the relationship between 'good faith' and operation of the FIDIC dispute resolution procedure, and in doing so considered the same provisions as the English court.

The case in question, Decision 4A_124/2014, heard by the Swiss Supreme Court, considered the jurisdiction of an arbitral tribunal to hear a dispute under a FIDIC contract which had not previously been referred to a DAB. It involved two contracts between a French construction company (the Contractor) and a state-owned entity (the Owner) for construction of part of a national highway. The contracts incorporated the 1999 FIDIC conditions of contract, with the law of the contracts being Romanian law.

Unacceptable delay in constituting DAB led to arbitration

The Contractor claimed to be entitled to approximately EUR 21 million, and notified the Owner of its intention to refer the matter to a DAB in March 2011. Each party nominated an adjudicator but appointment of the DAB chairperson was prolonged for a variety of reasons. By June 2012 they had finally agreed on the chairperson, but had yet to conclude the dispute adjudication agreement (DAA). The following month, the Contractor made a request for arbitration to the ICC and a tribunal was appointed. A couple of months later, in September 2012, the DAB chair circulated a draft DAA. The Owner commented on this in October 2012, suggesting some amendments and inviting the Contractor to comment or confirm its agreement. The Contractor responded that an 18 month period had elapsed since it had first tried to refer its claim to the DAB, and it had thus been forced to pursue the matter via arbitration without first using the DAB. The Owner challenged the arbitral tribunal's jurisdiction because the DAB procedure had not been followed.

Was the DAB procedure mandatory or optional?

The parties agreed that the arbitral tribunal should deliver a preliminary award on the issue of its jurisdiction to hear the dispute. This it did, and in January of this year, (almost 3 years after the Contractor had first notified its claim) the tribunal confirmed its jurisdiction. The tribunal found that the procedure at clause 20 was optional rather than mandatory because:

- Although the use of 'shall' in clause 20.2 was 'general' the use of 'may' in clause 20.4 indicated the DAB procedure was only optional
- Clause 20.8 allowed the parties to go to arbitration if there had been an attempt to resolve a dispute using the DAB but no DAB was in place
- The lack of a timescale for convening the DAB gave credence to the idea that the DAB tier was optional (although this was obiter)

In February 2014 an application was made to the Swiss Supreme Court to set aside the tribunal's interim award based on a lack of jurisdiction, relying on provisions contained in the Swiss Private International Law Act.



The Swiss Supreme Court rejected the Owner's challenge, although it disagreed with the tribunal's reasoning. In considering the nature of the provisions at clause 20 it applied a two-stage test, established in previous decisions, as follows:

- Firstly, an assessment of whether the pre-arbitral tier was mandatory
- Secondly, if so, whether the party challenging the tribunal's jurisdiction was acting in good faith

The court went on to disagree with the tribunal's finding that the DAB was optional, instead confirming that it was a mandatory pre-arbitration stage. In support of this conclusion it relied on:

- Use of the word 'shall' in clause 20.2
- A systematic interpretation of clause 20.2
- The fact that interpreting clause 20.8 as an opt-out allowing a party to resort to arbitration whenever no DAB was in place would undermine FIDIC's dispute resolution system

How do obligations of 'good faith' affect the position?

In spite of this, it found that the failure to determine the dispute using a DAB before going to arbitration was not fatal to the tribunal's jurisdiction, and in doing so relied on the principle of good faith enshrined in Swiss law. In particular, the Owner's insistence on the mandatory nature of the DAB process was against good faith when it had been primarily responsible for the delays in constituting the DAB, whereas the Contractor had acted in good faith. The court questioned the purpose of forcing the parties to proceed with a DAB at this stage, when the project was over, given that the FIDIC system seemed to favour a standing DAB for resolution of disputes during the project.

Understanding how to manage the DAB procedure

It is clear from these two decisions that the requirement to submit to the DAB procedure in FIDIC contracts is a mandatory one, which cannot be opted out of by relying on the provisions of clause 20.8. It will only be in exceptional cases that the parties will be able to circumvent the DAB procedure in order to go straight to arbitration. Interesting questions are raised by these decisions, in particular, how an English court would deal with the question of inordinate delay and/or bad faith on the part of one party, given the absence of a good faith concept. In addition, how does one address the difficulties of dealing with a party intent on not complying with a binding, but not final, decision, where the ultimate dispute resolution procedure is an arbitral tribunal with limited powers. There are solutions available by amending the original contract wording, for example to provide that the DAB procedure is only to be operated during the course of the project, and once completion has been achieved the parties may choose to refer a dispute straight to arbitration. The problem of non-compliance with a DAB decision may be addressed by opting for litigation, rather than arbitration, so that appropriate orders may be sought. Some parties may prefer not to have a mandatory interim DAB procedure, and remove it altogether. It is useful to at last have consistent judicial guidance on the operation of these provisions from common and civil law courts.



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Clyde & Co Snapshot

Clyde & Co takes 18 'Law Firm of the Year' awards across Asia and MENA regions:

Clyde & Co has been awarded 18 'Law Firm of the Year' category wins and 16 Honourable Mentions in an annual survey of over 21,000 in-house counsel and senior company directors across the Asia Pacific and Middle East regions, including being named 'Most Responsive International Firm', in the UAE for the fifth year running

Read more [here](#).



Clyde & Co establishes fully integrated office in Saudi Arabia

Clyde & Co has been providing advice and assistance to its clients in relation to their operations in Saudi Arabia via its associated law firm in Riyadh, Abdulaziz Al-Bosaily Law Office, since 2009. The move to a fully integrated Clyde & Co office is a major step forward for Clyde & Co in KSA providing a solid platform for further expansion of its KSA business. The firm is one of only two global law firms operating in KSA to move away from the traditional associated office structure.

Clyde & Co announce the arrival of Jonathan Brown into the firm's professional and commercial disputes group



Jonathan is a highly regarded insurance litigator, having spent the last 12 years working at a number of London firms. Jonathan joins from DWF Fishburns where he was in the firm's construction professional indemnity team.

Train Times

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UK infrastructure in 2014 briefing

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Clyde & Co advises Econet on USD 300m debt facilities to expand African footprint

A team from Clyde & Co in London and Dar es Salaam recently advised the Econet Wireless Group on three separate secured facilities totalling approximately USD 300 million.

The facilities are being provided by an Afreximbank led syndicate (including DEG, FMO, Proparco and Stanbic Zimbabwe), China Development Bank and Ericsson Credit AB.

The funding will be used to finance the expansion of mobile banking services and solar energy projects across a number of countries in Africa and to expand existing network infrastructure in Zimbabwe, where Econet currently has over 9 million subscribers and more than 3 million mobile money users registered on its EcoCash system.

Robert Franklin, Legal Director said “We are delighted to have advised Econet Wireless on these transactions. They are a market leader in providing advanced mobile technology to subscribers and using infrastructure as a platform for innovative products such as mobile banking, which is playing a central role in the economic growth story in Sub-Saharan Africa and helping to achieve financial inclusion.”

The Clyde & Co team comprised Robert Franklin, Legal Director, London and Teresa Parkes, Legal Director, Dar es Salaam.

Clyde & Co bolsters international arbitration practice with the appointment of Patrick Zheng



Patrick specialises in international arbitration, China-related litigation (both onshore and offshore) and other China-related contentious matters. He will also assume the role of managing partner

for Clyde & Co's Beijing office and will be playing an active part in relation to the firm's China and Korea development desks.

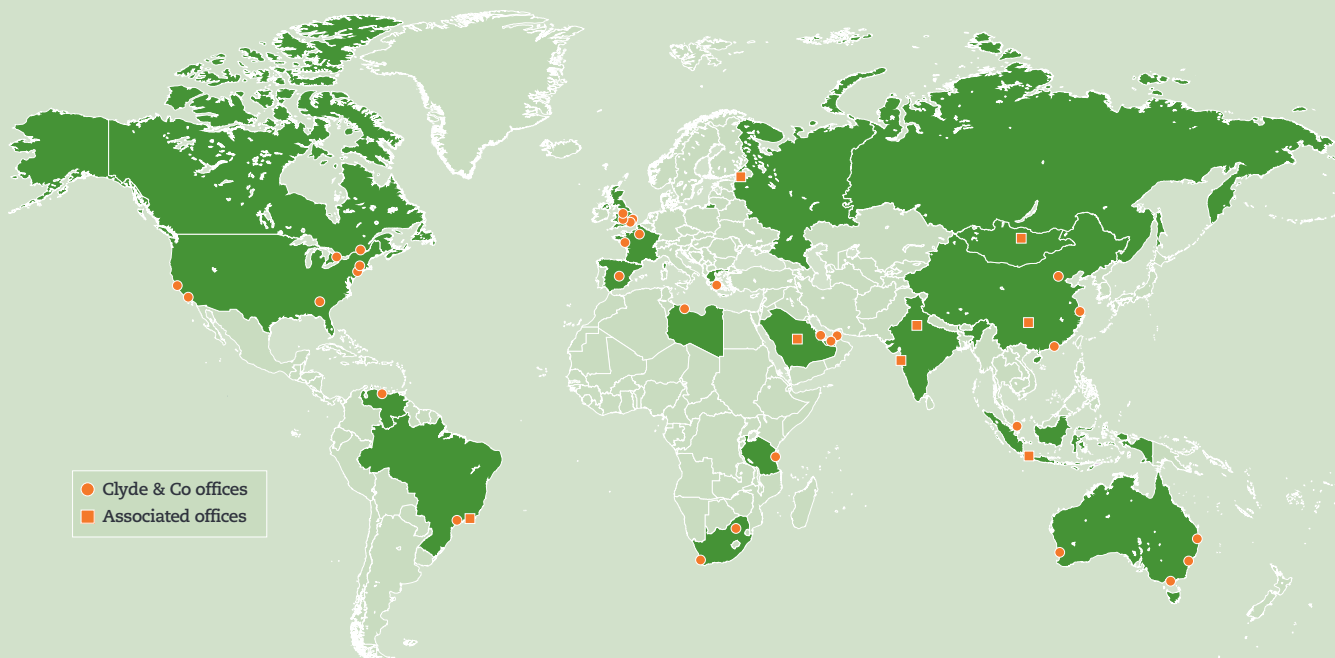
Clyde & Co Paris continues to expand its offering across infrastructure, energy and telecoms

The Clyde & Co infrastructure and energy team continue to grow with the recent joining of 3 new associates to the office in August joining partners Carole Arribes and Eric Diamantis (who joined the firm at the beginning of May 2014), their addition will enhance the firm's French corporate and commercial practice and cross-border capability, and the global projects & construction group in particular. This valuable addition of 3 lawyers further strengthens our capability in Paris, Francophone Africa and the infrastructure sector through their diverse set of technical, language and sector experience.

Our Paris-based projects & construction group comprises of:

- **Carole Arribes, Partner:** Carole has significant experience in the energy sector in contractual and transactional matters, namely on regulatory issues and project development. Carole has also been very active in the technology and communications sectors, advising on matters across Europe, Asia, North and West Africa.
- **Eric Diamantis, Partner:** Eric has advised on significant infrastructure projects and acquisitions in the oil and gas, mining, renewable energy, telecoms, transportation and hospitality sectors. He is also involved in dispute resolution, with special expertise in international arbitration, including ICJ, ICC, ICSID, SIAC and AAA jurisdictions. Eric's geographic expertise spans Eastern and Western Europe, the Middle East, North and West Africa.
- **Jemal Taleb, Associate:** Jemal has significant experience in energy and transportation projects and in international arbitration, with a particular focus on Africa.
- **Pierre Ferroud, Associate:** Pierre has significant experience in the field of M&A, projects and private equity.
- **Julien Barba, Associate:** Julien has significant experience in the renewable energy sector and in relation with construction and maintenance contracts and with public law contracts and regulatory aspects.

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40

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6 continents

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over 1,500 legal staff
and 2,500 staff

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www.clydeco.com/offices/global

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