

Year in review

2017

Legal developments
in the global construction
and infrastructure sector

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of a new regional
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arbitration hub

INTRODUCTION

We are pleased to present our "Year in review" for 2017, a Clyde & Co guide which sets out legal developments in the construction and infrastructure sector globally over the past 12 months, as well as insights into what you need to be aware of in 2018.

We hope that our guide will be a valuable reference in helping you respond to and understand legal and industry developments and how they will affect your business in 2018.

Please don't hesitate to contact article authors or infrastructure@clydeco.com if you have any questions or require further information.

JANUARY

UK

The Court of Appeal holds that applying extensions of time contiguously remains the correct approach, despite acknowledging the potentially unfair results in certain circumstances.

Canada

The Ontario Superior Court of Justice holds that construction liens do not attach to land with diplomatic immunity.

Canada

The Manitoba Court of Queen's Bench finds that the Canadian Revenue Agency has priority over sub-contractors and bonding companies with respect to holdback funds held by the owner in trust for the contractor.

Australia

The High Court of Australia considers the New South Wales security of payment legislation for the first time, finding that the existence of a reference date is an essential precondition to making a payment claim and that payment claims do not generally accrue following termination.

Australia

The Supreme Court of Western Australia provides clear procedures for parties to make applications in relation to arbitration agreements or proceedings by introducing the Supreme Court (Arbitration) Rules 2016 (WA) (Arbitration Rules).

Tanzania

Electricity project in the pipeline.

FEBRUARY

Hong Kong

The Hong Kong Court upholds enforcement of an ICC award, reinforcing its pro-arbitration stance.

Australia

The Commonwealth of Australia Parliament makes changes to national building legislation relating to the requirements which must be met by parties bidding for Commonwealth funded building work.

Tanzania

Signs MoU on railway project.

MARCH

UK

The Technology and Construction Court (TCC) provides insight into the NEC obligation to act in a spirit of mutual trust and cooperation.

UK

Theresa May formally invokes Article 50 and starts the Brexit process.

Canada

The Canadian Government published its budget for 2017 revealing that the Government and Infrastructure Bank will work to produce a big data bank of information relating to the infrastructure industry.

US

U.S. infrastructure receives a near-failing grade of D-plus from a leading engineering association, adding further significance to President Trump's vow of USD 1 trillion investment in the sector.

APRIL

UK

The TCC finds a broad exclusion clause does not breach the Unfair Contract Terms Act 1977, placing weight on the fact that the risk was something that the excluding party would expect the other to insure against.

UK

JCT completes the release of its 2016 suite of contracts.

Middle East

Saudi Arabia gives 12 months' notice for replacement of combustible cladding.

MAY

UK

The Northern Irish High Court provides further guidance as to how the NEC mutual trust and cooperation obligation should be interpreted by parties administering the contract.

Canada

The Government enacts new legislation to facilitate disclosure of wrongful conduct within the public sector and protect whistle-blowers.

Canada

The Ontario Legislature gives first reading to a bill to bring about a new Ontario Construction Act.

Australia

The High Court of Australia grants special leave to appeal two decisions considering security of payment legislation, the outcome of which will be significant for the industry, and for the efficacy and application of security of payment legislation nationally.

JUNE

UK

NEC releases an updated suite of contracts in the form of NEC4, along with some new additions to the suite: a Design, Build and Operation Contract and consultation Alliance Contract.

Hong Kong

Hong Kong's Legislative Council passes the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016, allowing third party funding of arbitration proceedings seated in Hong Kong.

Hong Kong

The Court of First Instance (CFI) dismisses the contention that a State-Owned Enterprise (SOE) is able to assert Crown immunity. Unless there are exceptional circumstances, Chinese SOEs are unlikely to be entitled to Crown immunity before Hong Kong courts.

US

There is a push to establish a national infrastructure bank to give state and local governments another tool for financing infrastructure projects.

US

President Trump announces the creation of a new council to help project managers navigate the permitting process, changing the focus from "lack of money" to "speedier permit approval".

South Africa

South Africa releases its contentious Mining Charter prescribing an increase in the Black Economic Empowerment Shareholding for all mines.

JULY

UK

The TCC holds that multiple design obligations in a contract may be considered separate and additional obligations on the contractor, provided that they do not operate inconsistently with each other.

Canada

The Ministry of Municipal Affairs announces the replacement of the Ontario Building Code, effective from 1 January 2019.

Australia

The Rail Safety National Law (South Australia) (Miscellaneous No 3) Amendment Act 2017 comes into force, introducing a number of key amendments to the South Australian state legal framework regarding safety in new rail projects.

AUGUST

UK

The TCC confirms that unpaid parties in an adjudication cannot recover their 'reasonable costs' of adjudication via section 5A of the Late Payment of Commercial Debts (Interest) Act 1998.

US

President Trump signs a Presidential Executive Order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure.

Saudi Arabia

Saudi Arabia to allow full foreign ownership of engineering companies

Australia

The Queensland Government proposes significant reforms to Queensland's building and construction legislation. The reforms aim to simplify existing legislation and improve security of payment for downstream contractors on construction projects.

Tanzania

Tanzania starts the process of reclaiming sleeping industries.

SEPTEMBER

US

President Trump appears to row back on his own infrastructure plan, which focused on PPPs. However, state activity in the PPP initiatives showed little signs of slowing down.

Australia

The Australian Senate Economics References Committee issues its Interim Report: Aluminium Composite Cladding – Non-conforming building products.

OCTOBER

UK

The TCC holds that parties are free to allocate concurrency risk in their construction contracts.

UK

The TCC finds that a firm of architects owed a duty of care to advise their client in relation to the project budget and their ability to work within this constraint.

Hong Kong

President Xi announces the importance of transitioning the Chinese economy from a phase of rapid growth to one of high-quality development.

Australia

The Supreme Court of Western Australia broadly applies the principle of strict compliance to enforce the entitlement of parties under performance and maintenance bonds.

NOVEMBER

US

US voters across the country approve state-developed infrastructure investment ballot measures.

UAE

The draft UAE Executive Regulations provide two immediate action points – register for VAT as soon as possible and review your contractual position.

DECEMBER

UK

FIDIC releases its 2017 versions of the Yellow, Red and Silver Books.

Australia

The Australian national review into Security of Payments legislation in the building and construction industries was due to be provided to the Minister for Employment by 31 December 2017.

UK

In *Carillion Construction Limited v Emcor Engineering Limited and Others* [2017] EWCA Civ 65 Carillion contended that the wording of a particular clause and commercial common sense warranted a move away from the traditional approach of awarding contiguous EOTs, allowing it instead to grant non-contiguous EOTs to its sub-contractor.

The case involved a 182 day delay for which Carillion blamed Emcor (in part). However, events had also occurred post-completion that would otherwise entitle Emcor to an EOT. Carillion argued that any EOT should be added non-contiguously. That is, not run continuously from the end of the current period for completion but be fixed at a later date to accurately reflect the period for which Emcor had been delayed but also take into account the period for which it was in culpable delay. Per this approach Emcor would bear the responsibility for the delay that it caused and be liable to Carillion for damages for the period between the original date for completion and the beginning of the new delaying event for which Emcor was entitled to an EOT. In contrast, under the established approach, Emcor would be exempted from liability during a period when it was in culpable delay and then be made liable during a period when it was not in culpable delay. The loss and damage suffered by Carillion during those two periods would not be the same – one of the parties would gain a windfall benefit.

The Court of Appeal rejected Carillion's arguments but acknowledged that the finding created an anomalous and potentially unfair situation.

The natural meaning of the clause in question meant that the EOT should be granted contiguously, as the effect

of an EOT was to revise the current period for completion and not grant separate periods with their own start and end dates.

Whilst the court recognised the logic in Carillion's argument, it was noted that only in exceptional circumstances could it depart from the natural meaning of wording for reasons of commercial common sense. Essentially, it was an example of a party negotiating a bad bargain.

Canada

In *Construction Excedra Inc. v Kingdom of Saudi Arabia*, 2017 ONSC 105, the Ontario Superior Court of Justice held that construction liens do not attach to land with diplomatic immunity. Any notes or certificates issued by Canada's Department of Foreign Affairs are conclusive proof of the diplomatic status of land and apply retroactively.

Canada

The Manitoba Court of Queen's Bench in *Manitoba Housing and Renewal Corp. v Able Eavestrouging Ltd.*, 2017 MBQB 27, found that the Canadian Revenue Agency has priority over sub-contractors and bonding companies with respect to holdback funds held by the owner in trust for the contractor. The Court held that the rights of the Crown, as stipulated by the Income Tax Act, cannot be displaced by private arrangements. Even though the unpaid sub-contractors and bonding company were potentially entitled to the holdback funds, employers' withholding tax or source deductions are at the heart of Canadian income tax collection procedures, and private arrangements cannot interfere with that right.

Australia

In *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd* [2016] HCA 52 the High Court of Australia:

- held that the existence of a reference date under a construction contract is a precondition to the making of a valid payment claim under s. 13(1) of the New South Wales security of payment legislation;
- affirmed the position that only one payment claim may be made in relation to a reference date;
- held that reference dates do not accrue after termination of the contract, unless the parties clearly agree otherwise; and
- held that it is possible for the accrual of reference dates to be suspended by the operation of the contract (for example, by taking work out of the contractor's hands).

Principals and contractors operating in Australia should take careful note of this decision. Contractors should seek to include provisions in contracts that ensure the continued creation of reference dates after the termination of the contract (especially in circumstances where the termination flows from the principal's breach) and limit the circumstances in which the accrual of reference dates can be suspended.

Australia

The Supreme Court of Western Australia demonstrated its commitment to supporting arbitration as a method of dispute resolution, by providing clear procedures for parties to make applications in relation to arbitration agreements or proceedings, in the form of the Supreme Court

(Arbitration) Rules 2016 (WA) and relevant forms (Arbitration Rules). The Arbitration Rules came into force on 3 January 2017 and apply to both international and domestic arbitrations.

The Arbitration Rules cover the following procedures:

- Staying proceedings or referring them to arbitration
- Setting aside or enforcing an arbitral award or procedural order
- Issuing subpoenas for documents or witnesses
- Disclosure of confidential information
- Seeking interim measures

Arbitration is increasing in popularity as a dispute resolution mechanism, particularly in the projects and construction industry where large, multinational players often seek to take advantage of the benefits of the arbitral process (e.g. confidentiality, flexibility of process, and choice of governing law). It is therefore important for domestic courts to have clear procedures for the commencement of actions that relate to both domestic and international arbitrations.

Tanzania-Malawi

The Tanzanian government announced that a 180 MW electricity project will be developed with Malawi. With an estimated development cost of USD 500 million, the project is said to be one of the biggest ventures entered into by the two countries.

Hong Kong

In *U v A* (Unrep., HCCT 34/2016), Hong Kong's Court of First Instance (CFI) dismissed an application to resist enforcement of an arbitral award. The Claimant ("U") had obtained an Order from the Hong Kong court to enforce its ICC arbitral award. The Respondent ("A") applied to set aside the Order on the ground that it had been unable to present its case, because the arbitrator refused to admit the relevant PRC judgment as evidence in the arbitration. In dismissing A's application, the court held that A fell short of the standard that "the conduct complained of must be sufficiently serious, even egregious, before a court could find that a party was unable to present its case".

So long as the parties were able to make representations in respect of any decisions that might affect the arbitration, they will have been afforded due process and given a fair hearing. Accordingly, the CFI concluded that A was able to present its case by being given the opportunity to submit expert evidence and by being able to address the issues relating to the decisions by the arbitrator. This decision reinforces the Hong Kong court's reluctance to set aside arbitral awards without compelling grounds. Parties should also be aware that indemnity costs will follow in the event of their unmeritorious attempts to resist enforcement in Hong Kong.

Australia

As foreshadowed in our 2016 edition, The Building and Construction Industry (Improving Productivity) Amendment Act 2017 came into effect in Australia on 17 February 2017.

The new Act amended the Building and Construction Industry (Improving Productivity) Act 2016 in relation to the Building Code and other areas. The key change relates to building industry participants and their eligibility to submit expressions of interest, tender for, or be awarded national Commonwealth funded building work. The new Act amended the timeframe applicable to the provision that transitionally exempted building industry participants from the requirement to comply with any enterprise agreement content rules as a condition of eligibility.

The amendments to section 34(2E) reduced the transition period from two years (originally expiring November 2018) to nine months (now expiring 31 August 2017) in which companies could submit expressions of interest and tender for national Commonwealth-funded building work, even though these companies have enterprise agreements which do not comply with the 2016 Code. This amendment, which has now come into force, allows only companies with compliant 2016 Code agreements to be awarded national Commonwealth funded work.

Tanzania

A memorandum of understanding was signed between the Tanzanian, Portuguese and Turkish governments in relation to a TZS 2.2 trillion (USD 1 billion) standard gauge railway project between Dar es Salaam and Mwanza (the second biggest commercial city in Tanzania). Reports suggest that the railway line will carry 17 million tonnes of cargo each year and will be developed within 3 years.



MARCH

UK

In *Costain Ltd v Tarmac Holdings Ltd* [2017] EWHC 319 (TCC) the TCC provided users with further insight into its interpretation of the mutual trust and co-operation clause contained in the NEC suite of contracts. Costain sought to argue that Tarmac had breached this clause by not informing Costain of the nature and scope of an applicable time bar. The TCC rejected Costain's argument, noting that the obligation did not require a party to act against its own self-interest. Rather, the provision prevents "improper exploitation" of the other party. In concluding that Tarmac had not breached clause 10.1, the TCC held that Tarmac had no reason to believe that Costain was acting under a false understanding of the relevant clause and therefore had no positive obligation to correct it. While this case provides users with important insight into the Court's interpretation of clause 10.1, the waters are still not completely clear, as what will constitute an 'improper exploitation' will depend on the circumstances of each individual case.

Canada

The Canadian Government published its budget for 2017. It revealed that the Government of Canada and the Infrastructure Bank, which was created in 2016, will work in partnership with provinces, municipalities and Statistics Canada to undertake the development of a big data bank that will provide a national picture of the state and performance of public infrastructure, the impact of infrastructure investment, and actual infrastructure demand and usage across the country.

US

U.S. infrastructure was given a near-failing grade of D+ by a leading engineering association. The D+ grade from the American Society of Civil Engineers' (ASCE) is unchanged from its last report card in 2013, suggesting that minimal progress has been made in improving public works. The ASCE estimated in a statement that the United States needed to invest USD 4.59 trillion by 2025 to bring its infrastructure to an adequate B- grade, a figure about USD 2 trillion higher than current funding levels.

In its report card, the ASCE said substandard infrastructure was costing each American family as much as USD 3,400 in disposable income a year. It also noted that "after years of decline, traffic fatalities increased by 7% from 2014 to 2015, with 35,092 people dying on America's roads."

In addition, America's water systems are leaking trillions of gallons of drinking water, and more than 2,000 dams are at high risk of failure.

In the ASCE's A-to-F grading of 16 infrastructure categories, seven areas showed progress and three declined. The highest grade (B) went to rail, up from C+ in 2013. The report said that significant spending, including USD 27.1 billion in 2015, was a major factor in the improvement. The lowest grade was D- for transit, down from D four years ago. Chronically underfunded rail and bus systems face a USD 90 billion rebuilding backlog, the ASCE said.



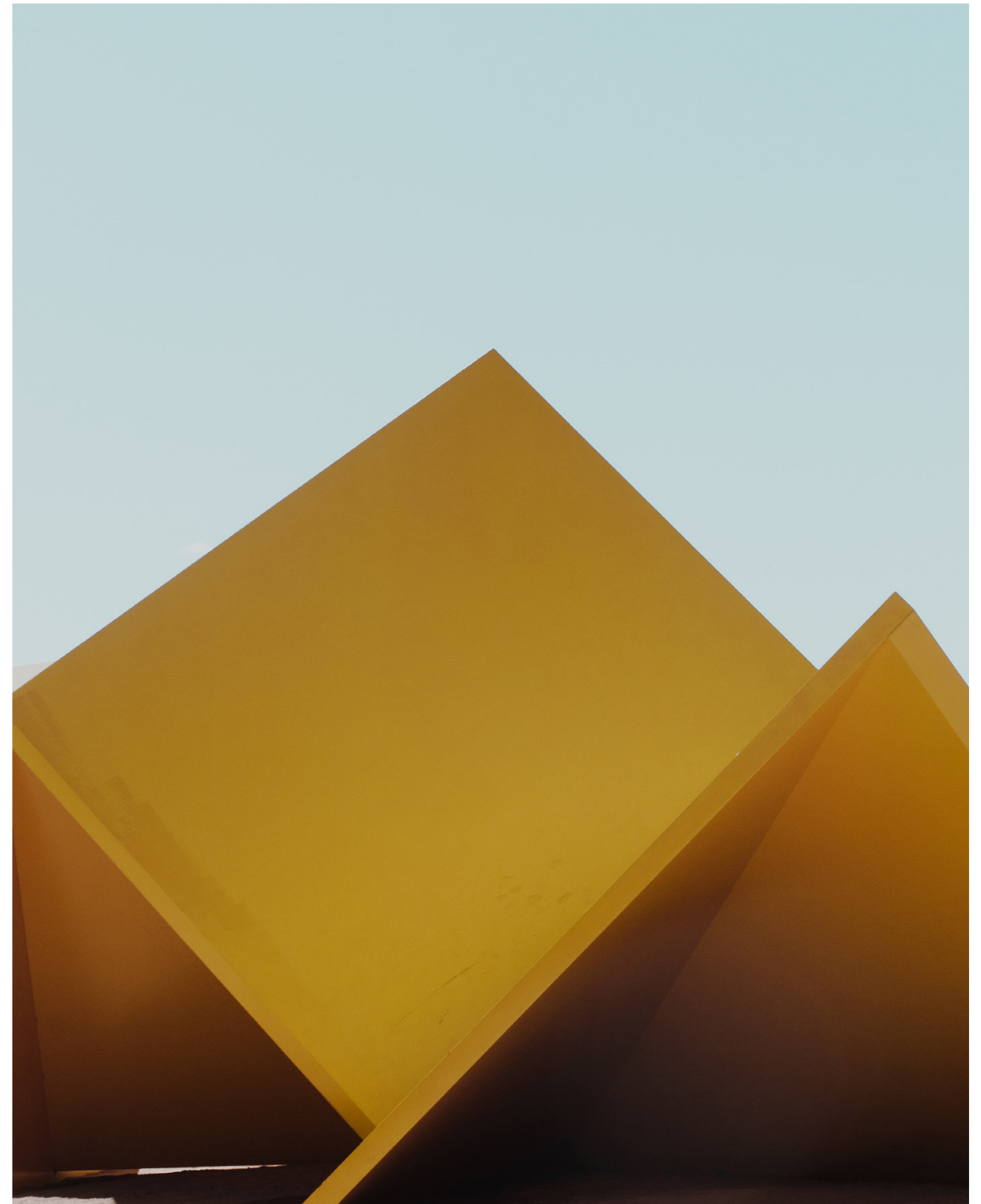
UK

In *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2017] EWHC 767 (TCC) Goodlife Foods (GF) employed Hall Fire Protection (HFP) to supply and install a fire suppression system at its factory. A fire occurred and GF brought a negligence claim against HFP. In defending this, HFP pointed to its standard conditions which excluded it from liability for any direct or indirect losses resulting from “negligence or delay or failure or malfunction of the systems or components provided by HFP for whatever reason” (including personal injury).

GF argued this clause was too broad and breached the Unfair Contract Terms Act 1977. The court disagreed, holding that, despite the breadth of the clause, it was not onerous, unusual or unreasonable as a whole. The court put weight on the fact that HFP’s terms and conditions were not uncommon (albeit at the extreme end of the spectrum) and that the exclusion was something that the other party would be expected to insure against anyway. As such the exclusion was not unreasonable for the purposes of the Unfair Contract Terms Act 1977 and the case was dismissed.

Middle East

Earlier in 2017, a new Fire Life and Safety Code was introduced by the Dubai Civil Defence to instill higher standards of fire safety at all stages of construction. This development in Dubai was being mirrored in the Kingdom of Saudi Arabia, who has given notice to all building owners in the Kingdom to replace combustible cladding within one year. A formal announcement is yet to be released but the Civil Defence and Minister of Municipal Affairs have shed some light on what this will entail for the construction industry including signing an the owners of existing and licensed buildings with combustible cladding will need to sign an undertaking to replace it upon renewal of their trade licence; owners of buildings under construction (but close to completion), will need to sign the same undertaking when applying for their trade licence; and owners of buildings under construction will have to stop using such cladding and their trade licence cannot be obtained until they have submitted a certificate which confirms that the materials used are fire retardant according to the regulations relating to construction material issued by the Saudi Standards, Metrology and Quality Organisation. In addition, the Minister of Municipal Affairs has issued another recent circular which prohibits the use of non-fire retardant materials.



UK

In Northern Ireland Housing Executive v Healthy Buildings (Ireland) Limited [2017] NIQB 43, further insight was provided into the interpretation of the NEC mutual trust and cooperation provision.

Northern Ireland Housing Executive (NI) engaged Healthy Buildings (HB) under an NEC3 Professional Services Contract (PSC). NI failed to notify a compensation event to amend the scope of the work and HB subsequently did so, but it took a further four months to do this. HB provided two quotations, both of which were rejected, but the work was still completed.

While the wording of the compensation provisions required a forecast assessment, the Court had to consider whether the assessment should be based on actual costs incurred, since the work had been completed. NI argued that, where evidence of the actual time and cost was available, the Court should take this into account. HB argued that its actual time and costs were irrelevant, pointing to the clause in question and its clear wording.

However, the Court recognised that the best evidence lay in the costs that HB had actually incurred. It made the point that the PSC should be read as a whole, meaning the mutual trust and cooperation clause had to be considered. It was held that HB's objection to the use of its actual evidence would offend the mutual trust and cooperation provision, as the best evidence should be used when calculating a compensation event.

Canada

Following the publication of the Charbonneau Commission report, the government enacted new legislation in May to facilitate disclosure of wrongful conduct within the public sector and establish measures to protect whistleblowers from reprisals.

Unfortunately, the law does not apply to municipalities and to private companies, and so may not provide an efficient way to prevent collusion and corruption in the construction sector.

Canada

The Ontario Legislature gave Bill 142 its first reading on May 31, 2017. Bill 142 will bring about the enacting of the new Ontario Construction Act. Changes to the previous regime include: a) adding "broader public sector organization" to the definition of "owner" under the Act; b) extending the timeline to preserve a lien claim from 45 to 60 days; c) adding a prompt payment regime in which general contractors and contractors will have 28 days and 7 days respectively to pay an issued "proper invoice", as defined by the Act; and d) the implementation of an interim adjudication system where a party may dispute and resolve an invoice or non-payment within a payment cycle of around 28 days.

Australia

The High Court of Australia granted special leave to appeal two decisions considering security of payment legislation. The High Court will determine whether adjudication determinations made pursuant to security of payment legislation can be set aside for a non-jurisdictional error of law (i.e. a misapplication of the terms of the construction contract). The outcome of the appeals will be significant for the industry, and for the efficacy and application of security of payment legislation nationally.



UK

On 22 June 2017, the NEC launched its NEC4 suite, which includes a new Design, Build and Operate Contract and a consultative version of an Alliance Contract. The changes in the latest suite were promoted as one of evolution rather than revolution.

One of the key aims of NEC was to reduce over reliance on Z-Clauses. As a result, a number of provisions that are usually incorporated by way of Z-Clauses have been built into the NEC contracts as core or secondary options. For example, provisions for collateral warranties, bribery and corruption, assignment and BIM, to name a few.

Other key changes included making provision for:

- consensual dispute resolution (prior to other formal processes) and dispute avoidance boards (which will be mandatory where the HGCR 1996 does not apply);
- a final assessment process, allowing for periodic reviews of the contractor's Defined Costs throughout the project to avoid major disputes at the end; and
- the Contractor to propose changes in Scope, to achieve cost savings, which could be shared between the Employer and Contractor.

[A more detailed analysis of the changes can be found at page 38.](#)

Hong Kong

On 14 June 2017, Hong Kong's Legislative Council passed the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 ("the Bill"). The Bill effectively amends the Arbitration Ordinance (Cap 609) ("AO") to allow third party funding of arbitration proceedings seated in Hong Kong. The reform will come into full force in the near future, once

the regulatory framework is in place. The types of proceedings affected include arbitration proceedings under the AO, related proceedings such as Court proceedings, and mediation and emergency arbitrations.

The bill also expressly deals with potential conflicts of interest, by only permitting funding if a third party funder does not have an interest recognised by law in the arbitration (other than under the funding agreement). Once a funding agreement is made, the funded party is required to give written notice to the arbitration body, and the parties to the arbitration, of the existence of such agreement and the name of the third party funder.

To complement the Bill, the Law Reform Commission has recommended that a code of practice should be developed to regulate third party funders, which the Hong Kong Government is currently developing.

Hong Kong

In *TNB Fuel Services SDN BHD v China National Coal Group Corp*, the CFI dismissed the contention that a State-Owned Enterprise (SOE) is able to assert Crown immunity. The judgment signals that, unless there are exceptional circumstances, Chinese SOEs are unlikely to be entitled to Crown immunity before Hong Kong courts.

TNB Fuel Services SDN BHD (TNB) sought to enforce an arbitral award against China National Coal Group Corp. (China Coal), a Chinese SOE. China Coal resisted TNB's application based on Crown immunity, and invited the Secretary for Justice (SJ) to intervene in the proceedings.

The SJ provided a letter from the Hong Kong and Macao Affairs Office of the State Council of the Central People's Government (CPG) stating that SOEs are independent legal entities and

shall not be deemed as part of the CPG save for in extremely exceptional circumstances.

The CFI concluded that the Crown did not have control over China Coal and that China Coal was able to exercise independent powers. Also, the CFI found that the letter submitted by the SJ clarified the position of the CPG, which defeated China Coal's assertion of Crown immunity.

US

Sens. Mark Warner (D-VA) and Roy Blunt (R-MO), along with seven other bipartisan co-sponsors, introduced S. 1168 – BRIDGE Act to establish a national infrastructure bank to give state and local governments another tool for financing infrastructure projects.

The bank will help state and local governments better leverage private funds to build, maintain, and repair the nation's infrastructure. Despite the legislation's name, transit, rail, airport, marine port, energy, water, and water resources projects of regional or national significance would all be eligible to apply for financing from the bank.

The creation of an infrastructure bank was first proposed in Washington over two decades ago and has been floated in a variety of forms since then, including by President Obama and by a then Trump transition team member. The bill would establish an independent, nonpartisan financing authority to provide loans and loan guarantees to help state and local governments fund the most economically viable infrastructure projects.

The bank would receive a one-time seed funding of USD 10 billion, which could incentivise private investment. The bill's authors predict that the legislation could make possible USD 300 billion or

more in total project investment. The bank is designed to be self-sustaining and not require additional federal appropriations. The idea, which has been executed at the state level, is that as one project's funds are paid back, the released funding can then be used to finance another project.

US

The National Environmental Policy Act of 1969 (NEPA) requires federal agencies to consider the environmental effects of an action and to involve the public in their decision-making process. The law is a frequent target of criticism from some sectors because it can add years to a project.

In response, Congress tried to fix the pain points in several pieces of legislation. The FAST Act included new procedural requirements aimed at ensuring early collaboration and efficient environmental reviews for complex infrastructure projects.

MAP-21 and the Water Resources Development Act also included permitting reforms, but these have not been fully implemented yet, and a Department of Transportation report from March 2017 found that the streamlining provisions in the FAST Act have possibly delayed the improvements expected from the streamlining measures in MAP-21.

On June 9, 2017, President Trump announced the creation of a new council to help project managers navigate the permitting process, including the creation of a new online dashboard. The council will focus on simplifying the government review process and making it more flexible to meet the different natures of rural and urban states. He also announced the creation of a new office within the White House Council of Environmental Quality "to root out inefficiency,

clarify lines of authority, and streamline federal, state and local procedures so that communities can modernize their aging infrastructure without fear of outdated federal rules getting in the way".

South Africa

South Africa's contentious Mining Charter was released in June but is yet to be implemented into law. It prescribes an increase in Black Economic Empowerment Shareholding for all mines, from a previous 26% to 30%. It also imposes other stringent measures on mines, including payment of 1% of turnover to empowerment partners. This, it is argued, would leave very little for other shareholders.

The Charter has been the subject of substantial criticism. It is claimed that its anticipated implementation has already caused substantial losses in the value of mining of stocks, as well as job losses, and that it has damaged investor confidence.

In September 2017, the South African Chamber of Mines withdrew an urgent application for a court order interdicting the Mineral Resources Minister from implementing the Mining Charter, after the Minister undertook not to implement the Charter, pending a judicial review of its legality and constitutionality. The review proceedings are to be heard in February 2019.

There have been calls from within the business sector urging the parties (the Minister and the Chamber of Mines) to come together in order to negotiate the terms of the Charter, in the broader interests of the industry.

UK

In 125 OBS (Nominees) & Anor v Lend Lease Construction (Europe) Ltd & Anor [2017] EWHC 25 (TCC) the TCC considered a dispute over which design obligations contained within a construction contract should take precedence. There were a number of documents which made up the Contract Documents, with no express order of precedence. A number of different design and quality standards were also prescribed within the Contract Documents.

The TCC held that, as there was no intrinsic inconsistency between them, they were separate and additional obligations – all of which the contractor was required to comply with. This case provides useful guidance as to how the imposition of multiple quality obligations on a party will be interpreted by the courts. The decision suggests that usually these will operate separately and additionally to one another, unless the terms are genuinely inconsistent.

UK

Clyde & Co's SSHE team released its report assessing the results of the health and safety enforcement guidelines, which were brought in on 1 February 2016. The report notes that the construction industry has seen a 26% increase in the Health and Safety Executive's inspection charges over the past year. Importantly, the size and number of fines has also risen considerably, with a total of GBP12,967,395.98 being collected in the first year alone. This represents an 82% rise from the previous year. In terms of percentage of turnover, small and medium sized construction businesses have been affected most by the changes.

Canada

The Ministry of Municipal Affairs announced the replacement of the Ontario Building Code, effective from January 1, 2019. Changes include:

- the requirement of “solar-ready” roofs and conduits;
- the reduction of trade-offs between building envelope and heating systems for energy efficiency compliance;
- the requirement of heat or energy recovery units in all buildings; and
- encouraging greywater re-use systems.

Australia

On 1 July 2017, the Rail Safety National Law (South Australia) (Miscellaneous No 3) Amendment Act 2017 came into operation. The new Act introduces a number of key amendments to the South Australian rail safety legal framework regarding new rail projects. The Act provides powers for the Regulator to charge additional fees for major rail projects, so as to ensure that regulatory oversight of operations can be appropriately maintained, as the number of rail projects increases. Additionally, the Act introduces a review mechanism that will allow a rail transport operator to seek a review of the Regulator's decision that a project is a major project. Finally, the Act specifies that the Rail Industry Safety Board Limited is a prescribed authority for the purposes of sharing information, in order to achieve national law objectives.



UK

In *Enviroflow Management Ltd v Redhill Works (Nottingham) Ltd* [2017] EWHC 2159 (TCC) the TCC finally put to bed the issue of whether an unpaid party in an adjudication dispute can be awarded its 'reasonable costs' of adjudication via section 5A of the Late Payment of Commercial Debts (Interest) Act 1998 (the 'Act').

While the position had always been unclear, there had been an increase in such claims in recent years, with the Act being used by parties where a construction contract contains no adequate right to claim interest on a late payment. In such circumstances, section 5A of the Act implies a term into the contract entitling a successful party to its 'reasonable costs' of recovering a debt.

In this case, *Enviroflow* made a claim for its 'reasonable costs' of recovering unpaid monies and the adjudicator awarded the costs. However, the TCC held that the adjudicator had no jurisdiction to make such an award. It found that, although there was a term implied by section 5A of the Act, it was caught by section 108A of the Housing Grants, Construction and Regeneration Act 1996, which states that any contractual provision that the parties may have agreed as to the allocation of adjudication costs is ineffective, unless it is made in writing after the giving of notice of intention to refer the dispute to adjudication. In light of the decision, unpaid parties wishing to secure the award of their legal costs in an adjudication will need to ensure compliance with section 108A(b) of the Construction Act.

This decision is unlikely to impact a party's ability to recover its reasonable costs of pursuing a debt outside the adjudication context.

US

On 15 August 2017, President Trump signed a Presidential Executive Order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure. The EO aims to reduce permitting time, which in the past took an average of seven years. This will now be condensed to an average of two years, according to the President's remarks.

The EO also repealed President Obama's Executive Order 13690, the Federal Flood Risk Management Standard (FFRMS), which required that any new federally funded infrastructure projects in a flood plain must first and foremost consider and mitigate flood disaster risk. It was designed to end the costly and unsustainable cycle of relying on disaster relief funds to rebuild after flooding events.

Australia

On 22 August 2017, the Queensland Government introduced the Building Industry Fairness (Security of Payment) Bill 2017 (Qld). The Bill aims to:

- improve security of payment for subcontractors in the building and construction industry by providing for effective, efficient, and fair processes for securing payment, including a framework to establish 'project bank accounts';
- modernise and simplify the provisions for creating a subcontractor's charge; and
- increase ease of access to security of payment legislation.

The Bill intends to repeal and replace the Building and Construction Industry Payments Act 2004 (Qld), and to introduce several important changes, including:

- removing the requirement to endorse a payment claim as one which is made under the Act;
- introducing a penalty for failing to provide a payment schedule;
- allowing claimants a longer time period in which to make an adjudication application; and
- removing 'second chance notices' (for the service of a payment schedule), so an adjudication application can be made without any further notice.

The Bill also provides for:

- the consolidation of the Building and Construction Industry Payments Act 2004 (Qld) and the Subcontractors' Charges Act 1974 (Qld) into one Act,
- the re-introduction of mandatory financial reporting for building companies; and
- measures to allow the government to stop corporate phoenixing.

Tanzania

The Tanzania Social Security Association pledged to team up with the National Health Insurance Fund, the Parastatal Pensions Fund, the National Social Security Fund, the Workers Compensation Fund and the Zanzibar Social Security Fund to invest in industries that have been left dormant for over 20 years.

On 10 August, Tanzanian authorities announced the repossession of 10 privatised industries after they had been dormant for several decades. Feasibility studies for 15 industries have been completed, while studies on another 10 industries will be completed within a short time.

Saudi Arabia

On 7 August 2017, during a Council of Ministers' meeting, the Crown Prince of the Kingdom of Saudi Arabia, his Royal Highness Prince Mohammed bin Salman bin Abdulaziz Al Saud, approved the decision of allowing Foreign Engineering Consultancy Companies to invest in the KSA with 100% foreign ownership. This announcement followed last year's similar decision to admit full foreign ownership in Retail and Wholesale Businesses to operate in the KSA.

SEPTEMBER

US

On 26 September 2017, Trump seemingly flip-flopped on his own infrastructure plan. Having said previously that PPPs would be a major component of his planned USD 1 trillion nationwide infrastructure spending programme, Trump backpedalled, reportedly saying in a closed-door meeting that PPPs are “more trouble than they’re worth”. According to another description of the conversation, he “dismissed it categorically”. Instead, Trump now favours public funding of infrastructure.

But regardless of Trump’s plans, infrastructure spending is largely a state affair in the US – and the market has been quite busy. In September alone, the following early-stage developments took place:

- Arizona freeway lighting
P3 – RFQ released
- Washington, DC, street lighting
P3 – SOQs submitted
- Daly Building police headquarters
P3, DC – advisers appointed
- Howard County Circuit Courthouse
P3, Maryland – EOIs returned
- Mobile River Bridge P3,
Alabama – RFQ released
- I-75 Modernization Project,
Michigan – RFQ due
- Maryland’s USD 7.6 billion Traffic
Relief Plan P3 – RFI released

These developments have piled on top of an existing pipeline of ongoing and recently-closed deals in California, Texas, Maryland, New York and elsewhere. While this may seem like a drop in the pond considering the scale of the US, sponsors are said to have been staffing up over the last 12 months.

Australia

On 6 September 2017, the Australian National Senate Economics References Committee issued an Interim Report: Aluminium Composite Cladding – Non-conforming building products. This recommended that Australia should ban the importation, use and sale of flammable aluminium cladding ‘as a matter of urgency’.

The Interim Report was driven by London’s Grenfell tower tragedy in June 2017 and Melbourne’s Lacrosse building fire in November 2014, where combustible cladding allowed fire to travel up thirteen storeys in less than 10 minutes. Currently, the building code permits polyethylene-core panels to be used in buildings, if they have mitigating factors (such as sprinklers to reduce fire risk). In addition, there are no mechanisms in place to ensure the quality of imported products, and local practitioners face no or little sanction for failing to comply with the National Construction Code that governs how buildings should be built.

In response to this, the Interim Report recommends that builders be licensed under a national scheme, and be barred from federal government work for failing to comply with the National Construction Code, and that company directors should be given identifying numbers to prevent illegal phoenixing activity that allows builders to evade responsibility.



UK

Traditionally, parties have remained silent in their construction contracts as to the issue of concurrent delay, relying on the common law to resolve any issues of concurrency that may arise. One of the reasons for this was uncertainty around the enforceability of provisions that sought to allocate concurrency risk.

The case of *North Midland Building Limited v Cyden Homes Limited* [2017] EWHC 2414 (TCC) evidences a shift in this approach. At common law, where the effects of a contractor risk event are felt concurrently with the effects of an employer risk event, the contractor is entitled to time but not money. However, in this case, the parties agreed a term which disentitled the contractor to both time and money in the event of concurrent delay.

A dispute arose and the employer sought to rely on this provision to limit the contractor's entitlement to an extension of time. The contractor tried to argue that, by virtue of the prevention principle, the employer's construction of the term was 'not allowed' and that the effect of the clause was to make time at large. However, the TCC gave this argument short shrift, viewing the wording as crystal clear, stating that there was no rule of law that prevented the parties agreeing what they did, and that the prevention principle simply did not arise.

This decision is going to have a significant practical impact on parties negotiating construction contracts. We now have a very clear case acknowledging the enforceability of provisions allocating concurrency risk, and court-accepted wording. It is likely that we will see more and more of these provisions as parties try to allocate such risks and achieve more certainty in their contracts.

UK

The case of (1) *Riva Properties Limited* (2) *Riva Bowl LLP* (3) *Riva Bowl Ltd* (4) *Wellstone Management Ltd v Foster + Partners Ltd* [2017] EWHC 2574 (TCC) concerned a claim in professional negligence by a client against its architects (Fosters). One of the key issues was the duty of care owed by Fosters to its client in relation to the project budget. It was accepted that Fosters' owed its client a duty to exercise reasonable skill and care in the performance of its services under the relevant appointment. However, the schedule of services also include an obligation for Fosters to identify its client's requirements and possible constraints on the development. The primary issue was whether the client's budget was a 'constraint' which Fosters was required to advise upon. The client argued that it had advised Fosters of a specific budget, though Fosters disputed that any budget was ever indicated. The scheme produced by Fosters was almost three times higher than the client's alleged budget. The client subsequently increased its budget to get closer to the value of the scheme produced on the basis that Fosters advised it could 'value engineer' down to the new budget. This turned out to be impossible. The TCC held that it was necessary for an architect in Fosters' position to establish whether or not there was a budget at an early

stage, as that is the only way that all of the key requirements and constraints could have been identified. There was a budget and it was a breach of Fosters' duty to exercise reasonable skill and care to (i) not determine this itself; and (ii) subsequently ignore it. Finally, Fosters' value engineering advice was negligent or, alternatively, Fosters had a duty to advise its client that the value engineering was impossible and breached its duty by not doing so. Fosters could not rely on the fact that its client was an experienced businessman to avoid its obligations. Architects should take care to consider, and potentially revise, the terms of their schedule of services. An obligation to identify the client's requirements and constraints will impose an obligation on architects to determine the client's budget, how flexible it is, and to take this into account in preparing the design.

Hong Kong

The Chinese Communist Party convened the 19th National Congress. On a national level, President Xi proposed a 2-stage development plan, which is centred on the building of a prosperous society for socialist modernization and on developing China into a prosperous and strong country. President Xi also highlighted the transition of the Chinese economy from a phase of rapid growth to a stage of high-quality development whilst, at the same time, turning Chinese enterprises into world-class firms. On China-Hong Kong affairs, President Xi upheld the practice of "One Country, Two Systems" and progress towards national reunification.

This all suggests more solid economic development both in Hong Kong and in China, and the increasing demand for Hong Kong legal services to support this.

Australia

In *Swanhill Enterprises Pty Ltd v QBE Insurance (Australia) Ltd* [2017] WASC 279, the Supreme Court of Western Australia assessed the entitlement of the plaintiffs in two actions to enforce 'maintenance performance bonds'. The defendant argued that there was a failure of strict compliance, in that the demand had been issued to QBE Insurance (International) Ltd and not QBE Insurance (Australia) Ltd as required. Further, it was argued that the defendant's address was incorrectly described and that there was an error in the serial number listed on the demand.

In granting summary judgement to the plaintiffs, Master Sanderson held that the deficiencies alleged by the defendant were minor and that the plaintiffs had met the main requirements of the bond. Firstly, the plaintiff had certified in its demand that the contractor had breached its performance obligations and, secondly, the plaintiff had specified the amount of loss it had suffered as required under the main requirements of the demand.

This case serves as a reminder that, despite minor deficiencies in a demand for payment, the Court is unlikely to intervene, in cases where parties have complied with the main requirements of the demand.



NOVEMBER

US

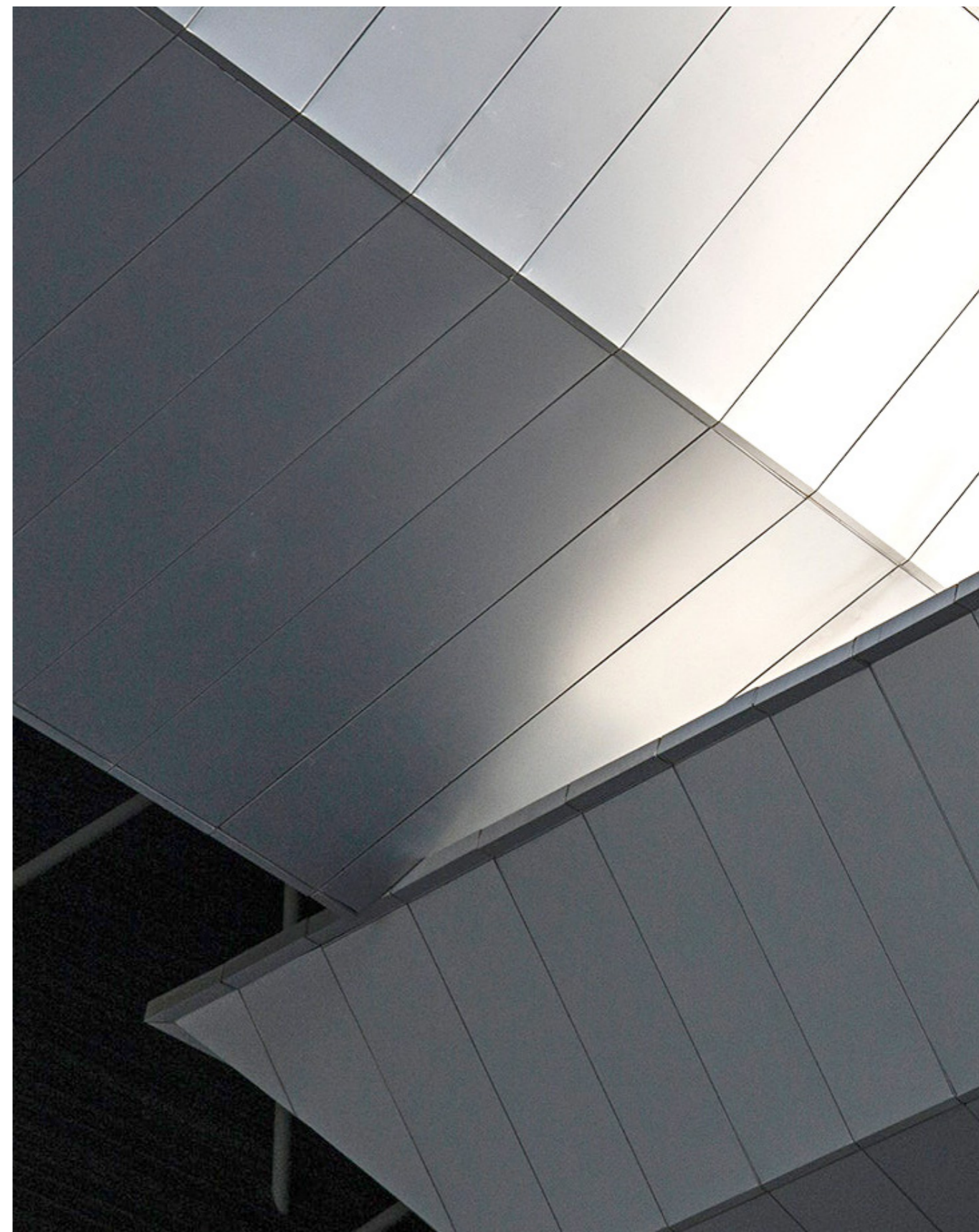
On 7 November 2017, U.S. voters across the country approved state-developed infrastructure investment ballot measures. In Maine, a resounding 72% of residents across the state voted in favour of the issuance of USD 105 million in bonds for transportation projects around the state. The bonds also qualify as matching funds when the state seeks federal support.

Local ballot measures fared well too. In Colorado, 73% of Denver voters approved USD 431 million in bonds for the city's road-repair backlog. In Georgia, 70% of DeKalb voters chose to increase taxes to improve their area's transportation infrastructure. Also notable was the outcome of a Kansas City, Missouri, ballot measure, in which voters opted to spend USD 1 billion to redesign the Kansas City International Airport.

2017's successful ballot measures reflect a larger trend – voters favour increased investment in infrastructure, and support candidates that do the same. For example, according to analysis by the American Road & Transportation Builders Association (ARTBA), 69% of the 280 transportation funding ballot measures up for vote were approved in 2016, totalling USD 201 billion for state and local transportation projects. Preliminary statistics show that this trend continued in 2017 and will likely continue in 2018.

UAE

On 8 November 2017, the Director General of the UAE Federal Tax Authority (the FTA) stated that the draft Federal Decree Law No. 8 of 2017 on Value Added Tax has been signed by the UAE Cabinet. Under Article 17 of the Draft Regulations, a person required to register for VAT with effect from 1 January 2018 (the Implementation Date) must apply for that registration in accordance with the deadlines announced by the FTA. This will affect any business which anticipates that the total value of all its VATable supplies will exceed the mandatory registration threshold of AED 375,000. Ultimately any business which is registered late for VAT due to a failure to comply with the FTA announced deadlines may be subjected to administrative penalties under Article 25 of the Tax Procedures Law (Federal Law No. 7 of 2017). Cabinet Resolution No. 40 of 2017 on administrative penalties for breach of the UAE tax laws provides that the fine for this breach will be AED 20,000.



Global

At its International Contracts Users' Conference on 5 and 6 December, FIDIC released the much anticipated second editions of the Red, Yellow and Silver Books.

[A summary of the key changes to the Yellow Book can be found at page 41.](#)

Australia

Mr John Murray AM's final report from the national Australian review into Security of Payments legislation in the building and construction industries was due to be provided to the Minister for Employment by 31 December 2017. As at the date of publication, no announcements had been made in relation to the report.

Largely in response to a lack of consistency across jurisdictions in Australia, the review's terms of reference were to: identify existing best practice, consider the findings of other reviews and enquiries, consult with interested parties (including business groups, regulators and unions), and consider how to prevent restrictive contract clauses.

It is hoped that the Report will identify ways of harmonising legislation, in particular the divide between the 'East Coast Model' and the 'West Coast Model,' and possibly ease pressures on respondents by increasing response timeframes or linking response times to claim amounts.



In the
spotlight

Updates to International Standard Forms: NEC4 and FIDIC 2017

Rebecca Evans
Professional Support Lawyer
+ 44 20 7876 4914
rebecca.evans@clydeco.com

In 2016, JCT introduced its latest suite of contracts to the industry. In 2017, NEC and FIDIC followed suit, with NEC publishing its NEC4 suite of contracts and FIDIC publishing its 2017 editions of the Yellow, Red and Silver Books. In this feature, we take a look at the key changes that users of these international forms need to be aware of.

NEC4 - KEY CHANGES

On the 22 June 2017, the UK Institute of Civil Engineers released its NEC4 suite of contracts – the most substantial update since NEC3 was published in 2013. The new suite of contracts was released to “build on the success of NEC3”, with the objective of “evolution not revolution”. The NEC4 suite involved an update to all of the existing NEC3 contracts, as well as the release of the following additional contracts:

- a Design, Build and Operate Contract;
- an Alliance Contract (in consultation form only); and
- new forms of subcontract.

The rationale behind the changes introduced by NEC4 included NEC’s desire to minimise differences between the forms, to reduce users’ over-reliance on z-clauses, to increase clarity within the forms, to bring the forms more in line with public sector principles and to take on board industry feedback. Many of the changes in the NEC4 suite are minor, but some are significant, presenting new risks and opportunities for users. Below, we outline some of the key changes to the Engineering and Construction Contract (ECC) that users need to be alive to.

Scope:

- The term Works Information is no longer used, now replaced with the term Scope throughout the suite.
- A new core clause allows the Contractor to propose Scope changes to the Project Manager for acceptance, with a value engineering percentage used (under Options A & B) to split the benefit between the parties.

- A new secondary option also makes provision for the Contractor to propose Scope changes to reduce the whole of life cost of the asset, though the form is silent on liability issues if the proposed results are not achieved.

Time:

- The term Risk Register is no longer used, now replaced with the term Early Warning Register, to distinguish it from the project risk register used for wider project management purposes.
- Amendments have been made to the early warning regime requiring the Project Manager to prepare the first Early Warning Register within 1 week of commencement and set a date for the first Early Warning meeting within 2 weeks. The forms were previously silent on how this process was kick-started.
- Employers should be aware that there are new deeming provisions in relation to any Contractor’s programme submitted for acceptance. The programme will be deemed to be accepted by the Project Manager if he / she does not notify acceptance or non-acceptance within two weeks of it being submitted and such failure continues for a further week upon the Contractor giving notice. The rationale is to resolve the stalemate that otherwise arose under NEC3 and therefore reduce the scope for uncertainty as to the status of the Contractor’s programme.

Payment:

- Significant changes have been made to the payment provisions. Contractors should be aware that there is a new obligation to submit a payment application to the Project Manager before each

assessment date. If the Contractor fails to do so, the amount due is deemed to be the lesser of the Project Manager’s assessment or his previous assessment. Accordingly, in the absence of an application, Contractors can only receive a nil or negative assessment for that payment cycle.

- A new deadline has been introduced for the Project Manager to make a final assessment of the amount due: four weeks after the Defects Certificate or 13 weeks after the termination certificate. The Project Manager’s final assessment is conclusive unless the specified time limits for dispute resolution procedures are complied with, meaning any challenge by the Contractor outside these time limits will be time barred. However, if the Project Manager fails to issue the final assessment of the amount due by the deadline in the Contract, then the Contractor may issue its final assessment of the amount due. This will then become conclusive unless the specified time limits for the dispute resolution procedures are complied with. Under Options C, D and E, the Contractor can request that parts of the Defined Cost are assessed as the Works progress. This is done by the Contractor notifying the Project Manager when part of the Defined Cost is finalised. The Project Manager then has 13 weeks to review the part and if no assessment is issued by the Project Manager, the Contractor’s assessment is deemed accepted.

Compensation:

- There is a new compensation event if the Project Manager rejects a quotation for a proposed

instruction, enabling the Contractor to seek payment for the costs of preparing the quotation. Additional compensation events may also be stated in the Contract Data. The rationale is to reduce the parties’ need to incorporate them by way of z-clauses.

- The concept of a ‘dividing date’ has been introduced to resolve the debate about the point at which the Contractor’s compensation changes from actual Defined Cost to forecast Defined Cost (plus the Fee in both cases). Where the compensation event relates to a communication, the Dividing Date is the date of the relevant communication, in relation to all other compensation events, the Dividing Date is the date of notification of the relevant event.

Secondary Options:

- Option X10 introduces a BIM clause. The option is designed to be ‘protocol independent’, allowing the Employer to specify its requirements in the Scope. However, in terms of ownership of the model and liability issues, these are dealt with in the option itself. Importantly, NEC4 takes a different approach in this regard than other industry protocols. The Employer takes ownership of the model as well as the Contractor’s rights over the Project Information it provided for the model. The Contractor is only liable for a fault or error in its Project Information where it failed to provide the Project Information using the skill and care normally used by professionals providing information similar to the Project Information (i.e. if it is negligent).
- Option X15 has been amended to provide for additional requirements

Updates to International Standard Forms: NEC4 and FIDIC 2017

in relation to design and build contracting. Importantly, the Contractor's design liability has been aligned with the standard expected from professionals (i.e. it must carry out its design using the skill and care normally used by professionals designing works similar to the Works). Previously, the Contractor's liability was just linked to a requirement to exercise reasonable skill and care. The onus is now also on the Employer to prove that the Contractor did not exercise this standard, as opposed to the Contractor proving that it did, which was the position under NEC3. The option now also includes additional provisions relating to licensing, retention of design documents and the requirement to take out professional indemnity insurance.

General changes to dispute resolution options (Now termed "Resolving and Avoiding Disputes")

As a general note it is important to remember that Options W1 and Option W3 are for contracts where the Housing Grants, Construction and Regeneration Act 1996 does not apply. Option W2 must be used for contracts where the 1996 Act does apply. There have been important changes to all of these dispute resolution options:

Option W1:

- A new mandatory 'Step 1' has been introduced, requiring parties to refer a dispute to Senior Representatives prior to commencing adjudication.
- This process has very short deadlines for compliance, failure to comply with which will result in the referring party being time barred. The deadlines differ depending on the particular dispute in question.

- Once the dispute is referred to the Senior Representatives, the parties have one week to submit written statements of case and the Senior Representatives then have three weeks to negotiate and produce a written list of issues agreed and not agreed. The issues not agreed must be referred to adjudication within two weeks and if this deadline is missed the parties are time barred from disputing the issues further.

Option W2:

- The Senior Representatives procedure from Option W1 has also been introduced to Option W2. However, it is purely consensual and does not fetter the parties' right to adjudicate at any time.

Option W3:

- If this option is used, a standing Dispute Avoidance Board is put in place to resolve potential disputes. Reference to the Dispute Avoidance Board is a pre-condition to reference to the tribunal.

It is clear that a number of significant amendments have been made to the NEC4 suite. While NEC are keen to promote the new suite as one of "evolution not revolution", the amendments have resulted in a much longer form and appear to adopt regimes users may be used to seeing in other standard forms, such as JCT. In this way, the question arises as to whether NEC is moving away from the original ethos of the form and therefore whether its NEC4 suite does actually represent revolution over evolution?

FIDIC 2017 – KEY CHANGES

Almost 20 years after FIDIC released the 1999 editions of the Yellow Book (Plant and Design-Build), Red Book (Building and Engineering Works designed by the Employer) and Silver Book (EPC Turnkey), the industry has finally got its hands on the much anticipated second editions, which were released at the FIDIC International Contracts Users' Conference on 5 December 2017.

There was much hype about what might be expected, particularly following the widely criticised changes that were introduced by the consultation version of the Yellow Book (released at last year's Users' Conference). Those following developments closely will recall some not so friendly feedback from a number of international contractor bodies. Issue was taken with the higher degree of risk transfer from Employer to Contractor and more burdensome obligations in relation to contract administration.

FIDIC appears to have taken some of this feedback on board, softening the risk allocation that was previously viewed by some as not reflecting good industry practice. However, the new Books are still much more administratively burdensome than their 1999 counterparts, with various deeming provisions and time bars that may catch parties out if they are not careful. FIDIC has stated that the new Books are aimed at increasing clarity and certainty within the forms. However, the introduction of such numerous highly prescriptive procedures may not be what some users want to see.

Below, we summarise some of the key changes to the Yellow Book that users need to be alive to.

Risk Allocation

In terms of risk allocation, perhaps one of the most contentious amendments proposed by the consultation version was that relating to the Contractor's design risk. Under the consultation version of the Yellow Book, the Contractor was required to indemnify the Employer against all errors in its design which resulted in the Works not being fit for purpose or resulted in any loss / damage for the Employer. Furthermore, this indemnity sat outside the indirect and consequential loss exclusion and the aggregate cap on liability. In the 2017 Yellow Book, this indemnity has been retained but has been limited to errors in design resulting in the Works not being fit for purpose. In addition, Contractors will be happy to hear it is no longer carved out from the exclusion for indirect and consequential loss or the aggregate cap on liability. So while the indemnity itself may still be a point of contention, it is limited to an extent.

In addition, users will be pleased to know that the confusing amendments that had been proposed in relation to Employer's Risks and Contractor's Risks have been replaced with much simpler provisions. Effectively, the categories of what used to be referred to as 'Employer's Risks' have been expanded and now also include any act or default of the Employer's Personnel or other contractors. In addition, the Employer's indemnities in favour of the Contractor have been expanded to capture damage to property as a result of these liabilities. Importantly, both parties' liability under the indemnity provisions will be reduced proportionately to the extent that an event for which the other party is responsible has contributed to the loss.

Updates to International Standard Forms: NEC4 and FIDIC 2017

Contract Administration

In terms of contract administration, one of FIDIC's main aims was for the second editions to stimulate better project management. This is reflected through:

- more stringent requirements relating to notices;
- changes to the programming provisions, including:
 - additional programming requirements; and
 - new deeming provisions for the acceptance of revised programmes;
- the introduction of advance warning provisions:
 - similar to the NEC approach requiring each party to notify the other of any known or probable future events that may adversely affect the performance of the Works, increase the Contract Price or delay the execution of the Works;
- changes in the role of the Engineer, including:
 - a requirement that the Engineer has suitable qualifications, experience and competence to act as the Engineer under the Contract and must act like a skilled professional;
 - new deeming provisions in relation to the issue of an Engineer's determination, which must be issued within 42 days of the parties failing to agree a matter, otherwise (i) in the case of a Claim, the Engineer is deemed to have rejected it; or (ii) in the case of any other matter, the matter is deemed to be a Dispute which either Party can refer to the Dispute Avoidance / Adjudication Board (DAAB) without the need for a Notice of Dissatisfaction (NOD);
- a requirement that in making his / her determination the Engineer must act 'neutrally';
- if a Party objects to a determination of the Engineer, a requirement that they issue a NOD within 28 days, otherwise the determination is final and binding; and
- if either Party fails to comply with an agreement of the Parties or a final and binding determination, a right for the other Party to refer the failure directly to arbitration for enforcement by expedited procedure;
- changes to claims provisions to encourage faster dispute resolution, including:
 - making the claims procedure and its time bars apply to the Employer as well as the Contractor;
 - extending the 42 day period for provision of the Fully Detailed Claim to 84 days and creating a time bar where the claiming Party fails to give a statement of the legal basis of its claim within this time;
- new grace provisions allowing the claiming party to dispute that its NOD is time barred (whether by failure to comply with the initial 28 day timeframe or subsequent 84 day timeframe) by reference to the Engineer though the Engineer may only allow late submission if it is justified in the circumstances;
- amendments to the final assessment provisions, including:
 - a requirement that the Contractor include all claims in its final statements (whether referred to the DAAB or not, and despite any NOD being issued in relation to them), otherwise the Employer will avoid all liability for them; and
 - the introduction of a 56 day time bar for the Contractor to dispute the Final Payment Certificate, otherwise it will be deemed accepted and the Employer will have no further liability; and
- amendments to the DAAB process, including:
 - the appointment of the DAAB as a standing board;
 - the option for parties to request that the DAAB provide informal assistance under a new 'Avoidance of Disputes' regime; and
 - a new 42 day time bar to refer Disputes to the DAAB.

While one can see the logic behind some of the changes, the reality is that it will be contractors, more than employers, who are adversely affected by the amendments. The administrative burden of the changes will fall predominantly on contractors, with potentially significant consequences if notices or deadlines are missed. Moreover, while the changes are intended to encourage better contract management and avoid prolonged disputes, they will likely also result in formal dispute resolution being commenced at an earlier stage, in order to avoid time bars.

UK: The Supreme Court upholds fitness for purpose on a slender thread

Robert Meakin
Partner, London
+ 44 20 7876 4249
robert.meakin@clydeco.com

The much awaited Supreme Court case *MT Højgaard A/S v E.ON Climate & Renewables UK Robin Rigg East Limited* and another [2017] UKSC 59 provided a number of interesting comments in relation to fitness for purpose obligations in construction contracts, as well as providing a number of important practical lessons.

Background to the case

MT Højgaard ('MTH') was employed by E.On to design, fabricate and install the foundation structures for 60 offshore wind turbines. Shortly after completion, the foundation structures failed and the parties agreed that E.On would develop a scheme of remedial measures. They could not agree, however, as to who should bear the cost of such measures. This litigation was then launched.

The contract documents included a number of provisions as to quality, including various reasonable skill and care provisions, "minimum" compliance with an internationally recognised standard (J101) and, within the technical specifications, a requirement for a design life of 20 years.

Compliance with the J101 standard was expected to ensure a service life of 20 years. What was not known at the time was that the standard had a fundamental error, which meant that compliance with the standard would never have resulted in a 20 year service life.

However, within the technical requirements section of the Employer's Requirements, there was the following more onerous fitness for purpose obligation: "the design of the foundations shall ensure a lifetime of 20 years in every aspect without planned replacement". It was this specific obligation that E.On claimed had been breached.

The TCC agreed that MTH had breached the contract and was liable for the failures, because its design was not fit for purpose, putting emphasis on the 20 year service life obligation.

MTH appealed against this decision arguing that the more onerous 20 year requirement was inconsistent with the other design obligations. The Court of Appeal agreed, stating that one mention of the 20 year service life was "too slender a thread upon which to hang a finding that MTH gave a warranty of 20 years life for the foundations" and that the provision was inconsistent with the other, less onerous, design obligations in the contract.

The Supreme Court

The first issue that the Supreme Court had to consider was whether the Employer's Requirements were properly incorporated into the contract documents. MTH alleged that they were not, but E.On argued that they were, for the following three reasons: "(i) clause 8.1(x) of the Contract required the Works to be fit for purpose, (ii) Part C of the Contract equated fitness for purpose with compliance with the Employer's Requirements, (iii) Part C also defined Employer's Requirements as including the contents of the TR [technical requirements]".

The Supreme Court agreed with E.On, and held that the requirements were properly incorporated into the contract. As such, Lord Neuberger (who gave the unanimous judgement) noted that there were two arguments open to MTH, the first being that the 20 year obligation was inconsistent with the other design obligations, in particular that of compliance with J101 and, second, that it was too slender a thread to hold such an important and onerous requirement.

In relation to the argument of inconsistency with the other terms, the Court rejected this. Emphasis was given to the point that J101 was the "minimum" required standard and as a result MTH could reasonably have been expected to decide where requirements additional to those in J101 were needed to meet the 20 year service life obligation. The Court held that there was no inconsistency because of this, as one provision was simply a less onerous obligation on the contractor.

The argument in relation to the requirement being too slender a thread saw MTH suggest a number of reasons as to why that was the case. It was noted that the Employer's Requirements were unsatisfactory, in that they were ambiguous and inconsistently drafted, due to the fact that they were multi-authored. The Court agreed that this was the case, but held that this did not alter the rules of contractual interpretation, and that the Court's role was to interpret the provisions based on normal principles and give effect to the natural meaning of the words, unless it created an improbable or unbusinesslike situation. It was held the requirement for a service life of 20 years was not improbable or unbusinesslike by nature, and as such the words should be given their natural meaning.

E.On's appeal was allowed, therefore, and the decision of the TCC restored.

Takeaways

This judgement provides a number of important takeaways for employers and contractors alike:

- The case makes clear how important fitness for purpose obligations in construction contracts are deemed to be by the courts. If they are properly incorporated they will be upheld, even if they are very difficult or impossible to achieve, as the principle is that the contractor takes the risk of compliance, and should adapt to situations where it becomes a great deal more difficult to meet the obligations included in the contract.
- One of the practical lessons is the need to ensure that it is clear and unambiguous which documents are intended to be contract documents and which are not. This can be done, for example, through clauses establishing an order of priority for the contract documents and their obligations.
- It is also vital to make absolutely clear what the required standard is and to seek (as far as possible) to remove any obligations which are in conflict with that standard. The required standard should be set out in the main contractual clauses and it should be made clear that they override any lesser standards mentioned in any other documents.
- Finally, this case reinforces the trend of courts refusing to go behind the express words of contract documents. In this case, it was noted that, despite the documents containing "ambiguities and inconsistencies", the Court should not try to interpret the provisions in a different manner to the normal established rules.

UK: Better, quicker procurement?

David Hansom
Partner, London
+ 44 20 7876 4127
david.hansom@clydeco.com

The European Commission has recently published its latest procurement initiative: "Making Public Procurement work in and for Europe". This reflects a recent review of the way public procurement operates across the EU and is of interest to contractors and buyers alike.

Fundamental to the initiative are the overarching themes of strategy and partnership. The partnership is a broad one, between national authorities, local bodies, businesses, stakeholders and the Commission, who are together encouraged to adopt a more "strategic approach" to procurement. The Commission recognises the need to create a more receptive, "needs based" procurement process in which data can be collated and where instances of non-compatibility and delays are reduced.

In summary, the proposal comprises four elements:

- a "strategic approach" focused on six areas identified for improvement;
- a voluntary scheme for buying authorities to obtain advice about their procurements and to share best practice (known as the Ex-Ante Assessment Mechanism and knowledge sharing platform);
- the further professionalisation of public buyers; and
- a planned consultation with stakeholders.

Amongst the areas identified for improvement within the strategic approach is the need to digitise and simplify procurement processes (for instance by rolling out the planned E-certis e-form system), to increase accessibility for SMEs (by promoting the use of first instance review bodies), and to address the lag in the growth of innovation procurement (through the wider use of the pre-existing innovation partnerships procedure).

Of interest from a Brexit standpoint is a renewed focus on reciprocity in free trade agreements and a desire to conclude "ambitious procurement chapters" within those agreements. The Commission also calls for an end to the current impasse in the European Council around an International Procurement Instrument, with its potential post-Brexit ramifications.

The concrete expression of the "needs based" approach is the Ex-Ante Assessment Mechanism. This is aimed at large infrastructure projects (worth EUR 250 million or more) where an EU helpdesk will answer questions relating to the initial stage of the procurement process. For larger projects (worth 500 million or more), authorities will be able to request a confidential and non-binding "notification" as to the compatibility of a procurement plan with EU procurement legislation.

For initial stage queries, answers must be provided within a month, though an authority may need to wait up to three months before it receives a full "notification." Despite being labelled an 'ex-ante' mechanism, the Commission envisages that feedback will be available "throughout project implementation".

The assessment mechanism will operate alongside an information exchange database for use by national authorities and contracting entities. This database will include tender files, contracts, guidelines on procedures and court rulings, and will be supplemented by a separate information exchange platform that will allow those involved in large infrastructure projects to share their knowledge. Both the database and platform will be operational by early 2018 and will complement

existing initiatives, such as the JASPERS' Knowledge and Learning Centre.

There is a planned consultation with stakeholders (operative from 3 October to 31 December 2017) to focus on the means of stimulating innovation through the procurement of goods and services.

At the core of the Commission's proposal appears to be an emphasis on providing practically focused advice and guidance.

For contracting authorities in the UK, these proposals will be legislated on in due course and, depending on timescales, it remains to be seen what will be adopted by the UK post-Brexit.

The more strategic approach to procurement, especially on major projects, is to be welcomed. It remains to be seen how widely used a non-binding mechanism will be, particularly given the possible three month wait for a notification, but this could be a useful mechanism to reassure public bodies undertaking 'bet the ranch' projects.

In light of the recent National Audit Office report into the failed Nuclear Decommissioning Authority procurement, increased scrutiny is likely on larger projects in the UK.

Indonesia: Key considerations for foreign investors in the Indonesian power sector

Justin Tan
Partner, Singapore
+ +65 6544 6577
justin.tan@clydeco.com

Indonesia is currently undergoing massive growth and transformation in its power sector following a string of reforms to facilitate the five-year 35 GW program promulgated by President Joko Widodo in 2014. The projected USD 93 billion expansion has attracted both local and foreign investors to invest in both traditional as well as renewable energy production. In this article, we explore four areas that foreign investors should consider, before deciding whether to make a move into the Indonesian power industry.

Criteria for developer

On 28 June 2016, the Ministry of Energy and Mineral Resources (MEMR) issued Regulation No. 19 of 2016, which revokes the former Regulation No. 17 of 2013. Foreign investors should take note of this new regulation as MEMR will now determine whether a foreign investor qualifies as a developer on a first-come-first-serve basis in accordance with the following procedures:

- A foreign investor registers itself as a developer candidate through an online system to be launched by MEMR;
- MEMR will verify documentation submitted by such candidate;
- MEMR will then inform such candidate on the eligibility to apply for quota capacity;
- Such candidate then submits an application to have quota capacity to MEMR;
- MEMR will verify the documentation submitted by such candidate; and
- MEMR will then declare such candidate a developer of specific quota capacity.

To be registered as a developer candidate, a foreign investor needs to establish a foreign investment limited liability company under Indonesian law (PMA Company). The establishment of the PMA Company is subject to certain investment regulations and restrictions including, among others, Presidential Regulation No. 44 of 2016 (Negative List). Pursuant to the Negative List, maximum foreign ownership in a PMA Company which operates on a small scale (1 – 10 MW) is 49% and large scale (capacity >10MW) is 95%. This local partner requirement should be considered by foreign investors when planning their project.

Land

Land acquisition is the biggest challenge for foreign investors looking to invest in the power sector. The process may take years, and could cause substantial delay and uncertainty.

To counter the land acquisition issue, the Indonesian Government has promulgated Law No. 2/2012 on Land Procurement for Public Interest Development (Land Acquisition Law), together with accompanying regulations. These regulations are intended to speed up the current lengthy land acquisition process. The maximum time period is in theory 583 working days from the date of submission of the land acquisition plan to issue of the certificate of registration.

However, foreign investors should not be overly buoyed by the reforms introduced by the Land Acquisition Law, as there have been many cases where local residents, supported by

environmental activists, refuse to release their land due to what they perceive as an unfair compensation process. For example, the USD 4 billion Batang plant, a 2 GW coal-fired power plant in Central Java, originally scheduled ground-breaking for 2012, but was delayed until August 2015, due to problems caused by land acquisition.

When selecting a site for the power plant, it will be better for foreign investors if the chosen site is on state land. The acquisition process will likely be smoother, if the livelihoods of the local people are not affected. In addition, the taking over of state land, if previously not a greenfield site, requires merely undertaking a coordination process between institutions, avoiding the need to go through a convoluted restitution process with local residents and businesses.

Financing

Another key concern for foreign investors is financing. Indonesian power projects have largely been financed by international lenders and export credit agencies, such as the Japan Bank for International Cooperation and the Korea Export Import Bank.

An important issue for the choice of lenders is the availability of a government guarantee. Presidential Regulation No 4/2016 on Acceleration of Power Infrastructure Development, issued on 8 January 2016, introduces a new government guarantee for development of power projects, which covers both projects developed by the state-owned electricity company, PT Perusahaan Listrik Negara (PLN), and those projects developed by PLN in

cooperation with independent power producers (IPP) or their subsidiaries.

However, the euphoria brought about by the new PR No 4/2016 appears to be premature, as MEMR subsequently issued Regulation No. 10/2017 on Principles of Power Purchase Agreements on 19 January 2017 which, for the first time in any material way, seeks to impose certain requirements as to what provisions must be built into Power Purchase Agreements (PPA) in the power sector.

Some of the changes raise major bankability concerns. For example, where PLN is unable to evacuate the power from the power plant due to force majeure, PLN is relieved of its payment obligations.

Regulation 10/2017 seems to have removed the discretion of PLN to negotiate PPA terms with the developers, and is a move away from the fairly standardised forms of PPA that PLN has developed over time. In light of these changes, foreign investors are advised to seek specialist legal advice, prior to entering any negotiation with PLN or the banks.

Further, foreign investors should take note of the regulations issued by the Central Bank of Indonesia as they impose, amongst others, reporting obligations on companies with transactions made with overseas banks or companies domiciled outside Indonesia, and a mandatory requirement to use Indonesian Rupiah in power project transactions, including the payment of power purchase.

Indonesia: Key considerations for foreign investors in the Indonesian power sector

Captive power

In addition to traditional power project models, foreign investors could also consider venturing into the captive power sector, which has been given a boost by the Indonesian Government, which plans to set up 11 special economic zones and 15 industrial estates throughout the nation.

Unlike a power project under the PPP framework, a captive power project does not go through the tender process and, depending on the offtake options and procurement process, could be developed to financial close within just 2 years.

We outline briefly the main issues that foreign investors should take note of in relation to captive power project development.

Site selection

Key decisions for a developer when targeting sites would include whether to focus on greenfield or brownfield, electrified or remote regions, and tenant type and power requirements.

Investor and development

Having identified a site, a developer would need to decide if it plans to develop the site independently or in partnership. The requirements listed under the above section "Criteria for developer" would apply.

Licensing and consent

A developer would need to obtain the following from the government:

- a supporting letter from the head of the local government;
- national permits, including an electricity supply business permit, an operational license (izin operasi) and a designated operating area (wilayah usaha);
- consent from PLN – if excess power is wheeled via the transmission and distribution networks of PLN or if other arrangements have been made with PLN.

Financing

A key downside of a captive power project is that, as most industrial estate tenants use short-term contracts to purchase power, such contracts may be inadequate for banks to lend money on a non-recourse basis. Funding directly from the parent, or financing with recourse to the parent, is often the more feasible option. Hence, a sponsor with a strong balance sheet may need to guarantee the debt, in order for its subsidiary to raise financing, or else raise such debt directly itself.

Spotlight on: third party funding in Singapore and Hong Kong

Eugene Tan
Partner, Singapore
+ 65 6544 6583
eugene.tan@clydeco.com

Third party funding (TPF) in arbitral and related proceedings is becoming increasingly popular, with Singapore relaxing its policies against TPF and Hong Kong laying the ground work to introduce TPF in their respective jurisdictions. Set out below is a summary of the steps taken in both jurisdictions and what this will mean for parties to arbitration agreements seated in these regions.

SINGAPORE: THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION: SHARPENING SINGAPORE'S EDGE AS A LEADING ARBITRATION SEAT

Introduction

Third party funding refers to the funding of legal proceedings in return for financial reward, by a third party that does not otherwise have an interest in those proceedings. The third party funder typically obtains a percentage of the damages awarded or the settlement sum, as its reward. Third party funding has been on the rise over the last decade with numerous jurisdictions embracing and/or widening their policies on the same. It is also well received by major arbitration seats around the world including London, Paris and Geneva. This is especially so in international commercial arbitration, where the costs of such proceedings can be substantial and, on some occasions, prohibitive.

On 10 January 2017, the Singapore Parliament passed the Civil Law (Amendment) Bill (No. 38/2016) ("Bill") permitting, amongst other things, third party funding for international arbitration and related proceedings in Singapore¹. The Bill is a key piece of

legislation and undoubtedly sharpens Singapore's competitive edge as a leading arbitration seat. The Bill introduces the following three key changes to Singapore's legal landscape:

- Abolishing the common law tort of maintenance and champerty in Singapore, and legalising third party funding arrangements in international arbitration and related proceedings in Singapore;
- Regulating third party funders; and
- Clarifying a legal practitioner's professional duties when a third party funder is involved.

Legalisation of Third Party Funding Arrangements for International Arbitration and Related Proceedings

Third party funding is historically considered as wrongful under the tort of maintenance and champerty. Briefly, maintenance is the "support of claims by a stranger without just cause", and champerty is "an aggravated form of maintenance where the support is in return for a share of proceeds"². Champertous arrangements, which include third party funding arrangements, are therefore unenforceable under contract law as being contrary to public policy³.

The Bill addresses this by abolishing the common law tort of maintenance and champerty, and legalising the use of third party funding arrangements in relation to certain prescribed dispute resolution proceedings. The Bill read with the Civil Law (Third Party Funding) Regulations 2016 (Cap. 43, No. S 000) ("Regulations") presently prescribes

the following dispute resolution proceedings:

- International arbitration proceedings;
- Court proceedings arising from or out of the international arbitration proceedings;
- Mediation proceedings arising out of or in connection with international arbitration proceedings;
- Application for a stay of proceedings referred to in section 6 of Singapore's International Arbitration Act (Cap. 143A, 2002 Rev Ed); and
- Proceedings for or in connection with the enforcement of an award or a foreign award under Singapore's International Arbitration Act.

Whether or not the above categories of permitted dispute resolution proceedings will be expanded remains to be seen, and will depend on further assessment by the Singapore Government.

Regulation of Third Party Funders

The Bill, read with the Regulations, prescribe that third party funding can only be provided by "qualified Third Party Funders". Regulation 4 of the Regulations provides that the third party funder must satisfy and continue to satisfy at all times, the following requirements:

- The third party funder carries on the principal business, in Singapore or elsewhere, of the funding of the costs of dispute resolution proceedings to which the third party funder is not a party;

- The third party funder has access to funds immediately within its control, including within a parent corporation or the third party funder's subsidiary, sufficient to fund the dispute resolution proceedings in Singapore;
- The funds referred to in requirement (b) above must be invested, pursuant to a third-party funding contract, to enable a funded party to meet the costs (including pre-action costs) of prescribed dispute resolution proceedings.

Senior Minister of State for Law Ms Indranee Rajah stated during the second reading of the Bill on 10 January 2017 that the implementation of the above criteria will ensure, amongst other things, that "only professional funders whose principal business is funding claims will be allowed".

Measures were also implemented by the Bill to safeguard each party's rights in a third party funding agreement. Should the third party funder's qualification lapse, or it fail to comply with the above requirements, the Bill prescribes that it will be disqualified and will not be able to enforce its rights under its funding agreements (whether by court proceedings or arbitration proceedings). This would include the third party funder's right to receive a share of damages, should the claim succeed.

Clarification of a Legal Practitioner's Professional Duties

Legal practitioners in Singapore are still prohibited from entering into a champertous arrangement with their client. However, the Bill amends Section

¹ Civil Law (Third-Party Funding) Regulations 2016 (Cap. 43, No. S 000), Regulation 3. It should be noted that the Bill is not yet in force, and will only come into operation on a date to be notified in the Government Gazette.

² The Singapore Ministry of Law, "Public Consultation on the Draft Civil Law (Amendment) Bill 2016 and Civil Law (Third Party Funding) Regulations 2016", <<https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/public-consultation-on-the-draft-civil-law--amendment--bill-2016.html>>

³ Otech Pakistan Pvt Ltd v Clough Engineering Ltd and another [2007] 1 SLR(R) 989 (SGCA), at [32].

Spotlight on: third party funding in Singapore and Hong Kong

107 of the Legal Profession Act (Cap. 161) to permit Singapore legal practitioners to:

- introduce, or refer, third party funders to their clients, so long as the legal practitioner does not receive any direct financial benefit from the introduction or referral; and
- advise on, negotiate, draft, and act in a dispute arising out of and/or in connection with their client's third party funding contract.

In addition, to minimise if not eliminate any potential conflicts of interests, Senior Minister of State for Law Ms Indranee Rajah indicated, during the second reading of the Bill on 10 January 2017, that amendments will be made to Singapore's legal professional conduct rules to require legal practitioners to disclose the existence of any third party funding which their client is receiving.

Such measures are already in place for international investment arbitrations administered under the auspices of the Singapore International Arbitration Centre ("SIAC"). On 1 January 2017, SIAC introduced the SIAC Investment Arbitration Rules 2017 ("SIAC IA Rules"). The SIAC IA Rules provide that the arbitral tribunal in an international investment arbitration may order the disclosure of the existence of a party's third party funding arrangement and/or the identity of the third party funder and, where appropriate, details of the third party funder's interest in the outcome of the proceedings, and/or whether or not the third party funder has committed to undertake adverse costs liability. It is likely that the general SIAC rules will be amended to include similar provisions with respect to international arbitration proceedings.

Why consider third party funding?

Third party funding, if available, provides certain advantages.

Arbitrations can be expensive affairs. Third party funding allows the sharing of the risks involved in pursuing a claim. In addition, the presence of a third party funder with deep pockets may, in some instances, encourage early settlement of a claim.

Claimants with the means to arbitrate may prefer to divert some of the risk associated with a costly arbitration, and forgo a portion of any damages recovered. Doing so may free up money for the company to invest elsewhere.

In addition, third party funders can bring a more objective and commercial perspective in assessing a dispute, and are likely to have no emotional or historical attachments to the claim when assessing its merits. It's a wholly commercial proposition for them and they will assess the risk and merits of the claim from that perspective. Third party funders usually conduct extensive and thorough due diligence and carry out their own risk assessment of the merits of the claim before agreeing to provide funding. They generally provide funding for claims with:

- good prospects of success;
- likelihood of an award for a quantum of damages commensurate with the risk of financing the litigation costs;
- a respondent who is able to meet the claim, costs and interest; and
- high chance of enforcement.

Very often, this objective assessment will assist the claimant in understanding its case better and even provide a different perspective to its case strategy. In some instances, as mentioned above, it may even encourage early settlement once the other party is made aware that the claim has the backing of a third party funder.

However, the main disadvantage to a claimant of third party funding is the cost of such funding. Third party funders generally share revenue on a "net" basis. Most third party funders will also require that they get repaid first, before the funded party receives any of the money recovered. Moreover, the costs involved in engaging a third party funder, and any associated negotiations, are generally costs thrown away and not recoverable from the losing party even in a successful arbitration.

That said, recent case law from the UK suggests that arbitral tribunals have the jurisdiction to award costs of a party's third party funding, although this would be subject to the overall requirement of reasonableness as an "important check and balance"⁴. It remains to be seen whether the Singapore Courts will adopt a similar approach.

On that note, the SIAC IA Rules already provide that the arbitral tribunal in an international investment arbitration may take into account any third party funding arrangements in (a) apportioning the costs of the arbitration, and (b) ordering in its Award that all or part of the legal or other

costs of a Party be paid by another Party. We have not to date received any indication as to whether the general SIAC rules will be amended to include similar provisions with respect to international arbitration proceedings.

What to look out for when entering into a third party funding arrangement

A well-crafted third party funding contract is paramount. Such a contract will generally provide for, amongst other things, an alignment of interests in the outcome of the arbitration, the management of the expectations of all parties involved, and ultimately an equitable and just distribution of the damages awarded or the settlement sum.

Issues regarding privilege and confidentiality also need to be managed properly early on when entering into third party funding arrangements. It would be sensible to enter into a non-disclosure agreement at the earliest opportunity. This is the case even when providing the potential third party funder with the first batch of documents/information. Of course, parties should also consider entering into a common interest agreement subsequently once the third party funding arrangement is finalised.

A third party funding contract that achieves the above goals will give the party seeking such funding a real opportunity in the arbitration to realise the benefit of any resulting success.

Spotlight on: third party funding in Singapore and Hong Kong

Ian Cocking
Partner, Hong Kong
+ 852 2287 2802
ian.cocking@clydeco.com

HONG KONG: THIRD PARTY FUNDING ("TPF") IS FINALLY COMING TO HONG KONG

Singapore introduced TPF earlier this year. Now it is time for Hong Kong, which is in the process of changing its law to allow TPF in the context of arbitration and mediation.

Setting the scene for TPF

In Hong Kong, the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance ("the new law") was enacted on 23 June 2017. The new law has laid out the foundation for TPF of arbitration and mediation in Hong Kong. The new law will come into full force in the near future, once the regulatory framework is in place.

In respect of arbitration, the new law is designed to add Part 10A to the Arbitration Ordinance. Part 10A consists of the following six divisions:

- Division 1 – Purposes
- Division 2 – Interpretation
- Division 3 – Third party funding of arbitration not prohibited by common law offences or torts
- Division 4 – Code of practice
- Division 5 – Other measures/safeguards
- Division 6 – Miscellaneous

Transitional arrangements

Some of the above divisions have been added to the Arbitration Ordinance, but divisions 3 and 5 are yet to be included and therefore will not be effective until further notice is published in the Gazette.

Division 3, once implemented, will operate to permit TPF in Hong Kong by dis-applying the common law offences of maintenance and champerty in the context of third party funded arbitration. In other words, without division 3 in effect, third party funded arbitration is still illegal in Hong Kong.

Similarly, division 5 will waive confidentiality restrictions and allow parties to communicate certain confidential information to third party funders in order to obtain funding. Without division 5 in operation, parties cannot disclose information about their cases to funders, making it practically impossible for TPF arrangement to take place.

Upcoming regulatory framework - Code of Conduct

The expectation is that divisions 3 and 5 will be brought into effect, after finalisation of the code of practice, which will set out the expected standards and practices of third party funders. The Department of Justice has prepared and issued a preliminary draft code of practice in the Legislative Council Brief in 2016. Areas covered in the draft are: promotional materials, funders' minimum capital requirements, annual return requirements, procedure for conflicts of interest and protection of funded parties.

No concrete timeline has been set for finalisation of a code of practice, but an authorised body will be appointed and finalise the code of practice, subject to a public consultation process.

Commercial perspective

From the commercial perspective, agreements between parties and funders will likely follow a format similar to those seen in other jurisdictions where TPF is available. In the UK, for example, it is common for funders to take between 20% and 35% of proceeds recovered or three times the funder's investment, whichever is greater. In addition, it is worth noting that funders commonly aim to invest up to one-tenth of the claim value.

The exact mechanism of TPF in Hong Kong and its impact on the volume of arbitral proceedings remain to be seen. Nonetheless, the development should be worthy of note to all involved in arbitration, including those not directly considering TPF of their proceedings. This is particularly so because they may be facing a third party funded opponent in arbitration.

Nigeria: The implementation of an “open access” electricity market in Nigeria?

A quick look at the new Eligible Customers regime

Julien Barba
Associate, Paris
+ 33 1 44 43 88 70
julien.barba@clydeco.com

On 19 May 2017, a critical step forward in the Nigerian Electricity market was realised, with the issuance by the Minister in charge of Energy of the directive on Eligible Customers (the “Directive”), specifying the classes of end-use customers that will be able to directly purchase electricity from licensees other than the sole incumbent distribution licensees (the “Discos”).

The publication of the Directive has legally empowered the Nigerian Electricity Regulatory Commission (NERC) to frame and issue a specific regulation setting out the modalities and conditions of this new Eligible Customer regime.

After several months of consultation with various stakeholders, NERC published on 1 November 2017 the expected regulations on Eligible Customers (the “Regulations”).

These Regulations trigger the transition to an “open access” electricity Market in Nigeria, which will provide new opportunities for IPPs, project development and manufacturing industry. The success of this transition remains however subject to several questions, as set out below.

Eligible Customer criteria

The first end-use customers to benefit from the Eligible Customers regime are, as expected, the heavy and electro-intensive industries present in Nigeria. Several conditions are required to register with NERC as an Eligible Customer (the “Applicant”):

First of all, the Applicant must meet a consumption level of 2 MWh/h over the course of one month, which remains a fairly reasonable threshold considering that heavy-industries start with a minimum of around 100-200 kW/h of monthly consumption, for a load profile of 500 kW, but can go up to several MWh/h monthly.

It is noteworthy that a group of end-use customers can apply by aggregating their consumption in order to meet the 2 MWh/h threshold, provided that

(i) they are all connected to the same distribution network through the same feeder, (ii) they have incorporated a single SPV (which will legally become an Eligible Customer) to execute the transaction documents on behalf of the concerned end-use customers during the lifetime of the PPA and (iii) each concerned end-use customer must have a minimum consumption of 500 kVA at each site located within the same geographical network.

Please note that in a case where the Applicant is directly connected to the transmission network, the Applicant is exempted from the 2 MWh/h threshold requirement and may automatically register as an Eligible Customer.

Secondly, the Applicant’s facility must be already connected to (i) the distribution network, (ii) the transmission network, (iii) the dedicated distribution network, or (iv) the generation facility through a dedicated distribution line which has been authorised by the relevant Disco in the area.

With regard to the above criteria, a fairly large number of industries present in Nigeria may qualify for the Eligible Customer regime – especially the chemical and pharmaceutical industry, food and beverage producers, and manufacturers of plastic and rubber products.

In practical terms, this means that the Eligible Customers will pay the generation licensees directly, rather than the Discos, for the electricity supplied to them, and that the Discos will potentially lose revenue. We can understand, therefore, that this Eligible

Customer regime may be seen as a real threat towards the incumbent Discos and the investment capacity in distribution networks in Nigeria.

However, in our view, this opinion may be partially revised, since recent surveys show that only 3 - 4% of the energy consumption of Nigerian manufacturing industry comes from grid-connected electricity⁵ and that a majority of companies are using captive generation⁶. Additionally, Discos may also see new source of revenue, due to the wheeling electricity going through their network from the generation licensee to the Eligible Customer and the collection of “wheeling charges”. Finally there is a high probability that the Discos may be selected as “supplier of last resort” in case of technical interruption of the initial supplier.

What are the conditions for registering as an Eligible Customer?

Any Applicant to the Eligible Customer regime must fulfil the following contractual requirements, as a precondition for registering by the Commission:

- Execution of a Power Purchase Agreement (guided by the Commission’s standard template) with the prospective supplier (although we expect the PPA templates not to be as heavy as the PPAs currently executed with Discos in Nigeria);
- In cases where the electricity supplied is wheeled through the distribution or transmission network, the execution of the Distribution Use of System (“DUoS”) or Transmission Use of System (“TUoS”) agreement;

- Where the electricity is directly wheeled through a dedicated distribution line, execution of a bilateral agreement with the Disco for the construction, installation and operation of a distribution system to be used for the supply to the customer
- Execution of market participation agreements with the Market Operator (Transmission Company of Nigeria has been the Market Operator until now);
- Execution of other agreements as prescribed by NERC.

Additionally, Applicants must post a Letter of Credit or Bank Guarantee in favour of the Market Operator in accordance with the Market Rules to cover market administration charges, TUoS and DUoS charges, and other charges as may be approved by NERC.

What are the conditions for selling to Eligible Customers?

Suppliers wishing to sell and supply electricity to Eligible Customers must be granted one of the following licenses:

- a generation license (which means that generation facilities under 1 MW of installed power capacity cannot qualify, since they have no generation license) or
- a trading license.

As a reminder, the generation license authorises the licensee to “construct, own, operate and maintain a generation station for purposes of generation and supply of electricity” and the trading licensee authorises the licensee to “engage in the purchasing, selling and trading of the electricity”.

⁵ Survey “Captive Power in Nigeria, a comprehensive guide to project development” – November 2016.

⁶ Captive Generation is defined in the ESPRA as “the generation of electricity for the purpose of consumption by the generator and which is consumed by the generator itself and not sold to a third party”.

Nigeria: The implementation of an “open access” electricity market in Nigeria?

A quick look at the new Eligible Customers regime

Additionally, in cases where the supplier intends to wheel the electricity through an existing distribution or transmission network operated by a distribution or transmission licensee, it must enter into a DUoS or TUoS agreement with the relevant operator in order to organise electricity delivery through the network.

In cases where the supplier intends to wheel the electricity through a dedicated distribution line, it must enter into a bilateral agreement for its construction, installation and operation with the relevant regional Disco, which has a regional monopoly for constructing and operating the network, on the basis of its distribution license).

Although this has not been expressly mentioned in the Regulations, but only in the Directive, the generation licensee will be required to reserve at least 20% of his generation capacity to the distribution or transmission licensee, under a bilateral agreement, at a price that does not exceed the wholesale price or any other such clearing tariff set by NERC for the purpose.

How are the switching rules organised?

The switch of supplier by the Eligible Customer is subject to the following rules:

- NERC must approve all power purchase agreements with prospective suppliers before the commencement of service.
- An Eligible Customer that intends to exit from a Disco’s supply agreement shall provide a minimum of 3-months’ notice to the supplier. A waiver may be allowed for Force Majeure events but subject to verifications by NERC.
- An Eligible Customer wishing to reconnect to a Disco’s supply network shall provide a minimum of 3-months’ notice of intent to allow for adequate planning, unless waived by the other party.
- An Eligible Customer that intends to switch suppliers shall inform the current supplier in writing of the intention to switch at an agreed date, subject to the termination clause under the PPA and NERC’s approval of the new contract for supply.

How will the recent regime provide opportunities in Nigeria?

Until now, the selling and purchase of electricity in Nigeria was rather restricted.

Any IPP operating a power plant in Nigeria was required, as per section 26 (1) d of ESPRA, to sell electricity only to i. the relevant Discos⁷ or ii. the Eligible Customers.

However, since the Eligible Customers regime was not yet implemented, generation licensees could sell their production only to the Discos⁸.

This meant that the generation licensees were required to sell electricity at a regulated tariff, under a regulated PPA, and sometimes under the rules of a tender process settled by NERC⁹. In practical terms, and although this risk was mitigated by the “Availability Event” mechanism under the PPA entered into with NBET, generation licensees were facing power cuts and unreliability of services provided by the Discos and were unable to inject their production into the grid and make it beneficial to end-use consumers.

On the other hand, end-use customers were required to purchase electricity for their needs only from their exclusive regional Disco. Due to irregular power supply, however, and the need for manufacturing industries to sustain production, Nigerian industries resorted to the use of diesel and gas for their energy needs¹⁰.

Although innovative legal and technical solutions were sought by IPPs and heavy-industries to escape from the poor quality of supply from Discos, such as the equal fragmentation under 1 MW of the generation plants on an industrial site in order to escape from the generation license requirement, or the establishment of ring-fenced “industrial parks” for example¹¹, the vast majority of high-scale IPP projects were selling and delivering the electricity produced directly to the exclusive regional Discos¹².

– For the future, this new regime should enable new configurations.

This new regime should liberalize the sale and purchase of electricity in Nigeria, and bring (i) a better quality of supply to the customer and (ii) a higher bankability for IPP projects, since the regime responds to an imperative economic need.

⁷ Until February 2015, NBET was the transitional entity designed for the execution of PPAs with the generation licensees during the time the electricity market was still immature. Since then, the PPA are now in force between distribution licensees and the generation licensees.

⁸ Around 98% of the generation licensees in Nigeria are supplying their production in the distribution or transmission network.

⁹ Please refer to the NERC regulation for the Procurement of Electricity Capacity, 2014.

¹⁰ Estimates suggest that between 8 and 14 GW of captive diesel generator capacity is currently installed in the country.

¹¹ Also defined as “Independent Electricity Distribution Network” (I.E.D.N) with dedicated generation capacities, settled between several heavy industries in a same area.

¹² See above note “Around 98% of the generation licensees in Nigeria are supplying their production in the distribution or transmission network.”

Nigeria: The implementation of an “open access” electricity market in Nigeria?

A quick look at the new Eligible Customers regime

From a commercial point of view, the Eligible Customer regime enables the generation licensees to benefit from lower risks in payment, based on the creditworthiness of the Eligible Customer rather than the Discos.

For IPPs, a distinction should be made between existing and new generation facilities:

- For existing generation licensees: if they already supply electricity to distribution or transmission licensees through an ongoing PPA, they will not be authorised to contract directly with any Eligible Customer regime¹³. A solution would be the selling of any surplus, or the installing of new generation capacities which would be legally eligible for sale to Eligible Customers.
- For new generation licensees: they may engage in the direct selling of electricity to Eligible Customers by wheeling the electricity produced through either
 - the existing distribution network: in this case, the Eligible Customer remains dependent on the management and service delivery of the Disco and the payment of TUoS and DUoS charges. On the other hand, it does not have to finance, build and operate the network; or
 - a dedicated distribution line: in this case, the Eligible Customer will be required to enter a bilateral agreement for the construction,

installation and operation with the relevant regional Disco which has the monopoly for distribution networks. Since this option may be burdensome for Eligible Customers, the generation licensee may be authorised to contract on behalf of the Eligible Customer and thus provide turn-key solutions. This seems to be most efficient solution, since generation licensees would in practice benefit from stable operation and efficiency due to the flatter load profiles of Eligible Customers (heavy-industries generally need power over a longer period and remain fairly uniform throughout the day) and lower technical losses.

For Nigerian manufacturers, the Eligible Customer regime will be likely to lead to fewer power cuts and less unreliability due to the poor management of the incumbent Discos, and will probably foster the development of renewable energy projects on a large scale.

What are the pending Issues to be tackled before the full implementation of the Eligible Customer regime?

One of the first issues to consider would be third-party access to the distribution or transmission system for wheeling the electricity from the generation licensee to the Eligible Customer¹⁴.

Indeed, it is noteworthy that the Disco will remain a key player in the structure of the Eligible Customer regime and a direct link between the generation licensee and the Eligible Customer, even in the case where there is only a dedicated transmission line:

- Wheeling tariffs should be regulated, published and available to all parties (and not only via reference to the MYTO Tariff as currently provided¹⁵), in order to foster transparency, avoid market distortions and ensure a fair and equitable charge for using the network.
- The right of way for the deployment (by the operation licensee) of the dedicated transmission lines and the amounts payable to the Discos should be limited or prohibited by NERC. Since the local Discos have a geographical monopoly for the construction and operation of distribution lines, NERC has noted that Discos tend to charge without limitation the generation licensees for the deployment and operation of dedicated transmission lines.
- A dispute resolution mechanism should be settled to aid speedy resolution of disputes that may arise with the Discos for third party access to the grid, and should include a timeline within which all disputes would be resolved. The Regulations provide in Chapter VIII, section 27, that the party denied access may file a petition to the commission against the denial. Where a network licensee unduly refuses to allow third party access to an Applicant,

the Commission may issue an order granting access and sanction the licensee for the denial.

A second issue to consider would be the loss of customers and revenue for the Discos, due to the direct supply of the Eligible Customer by the generation licensees. There is a risk for the Discos that their investments will be now focussed on rural and residential feeders with high fault, low payment and unpredictable consumption profiles. One solution would be to compensate through (i) an increase of the wheeling charges, which are the TUoS or the DUoS charges, or (ii) a rebalancing of the electricity tariff for end-use customers, in order to mitigate the loss of revenues from the exit of industrial customers.

A third issue would be the appropriate process for migration, exit, notification and switching by the Eligible Customers. Although the Regulations provide a specific framework for switching, the basic rules for the termination of the current supply contracts with the Disco will be first found in the existing supply agreement itself! This will have to be carefully checked before engaging in the migration process.

¹³ This requirement is however subject to interrogation since the Regulations have not imposed this criterion in the final draft.

¹⁴ In the scenario where there is no dedicated transmission line.

¹⁵ The Multi-Year Tariff Order (MYTO) is a tariff model for incentive-based regulation that seeks to reward performance above certain benchmarks, reduces technical and non-technical/commercial losses and leads to cost recovery and improved performance standards from all industry operators in the Nigerian Electricity Supply Industry.

New Saudi arbitration centre signals the rise of a new regional and global arbitration hub

Ben Cowling

Partner, Riyadh

+ 966 11 253 2111

ben.cowling@clydeco.com

It is common knowledge that the Kingdom of Saudi Arabia is the largest economy in the Arabian Gulf and has the second largest proven oil reserves in the world. It is less well-known that, in recent years, the Kingdom has developed an advanced arbitration system – starting with the 2012 Arbitration Law based on the UNCITRAL Model Law and now the publication of world-standard arbitration rules by the Saudi Centre for Commercial Arbitration (SCCA). Such developments put the Kingdom on a direct path to becoming a regional and global arbitration hub – including the seat of choice for the many Saudi disputes that, historically, have been determined by other local and international dispute resolution fora.

The context

Historically, disputes concerning commercial dealings in Saudi Arabia have been referred to international arbitration centres (such as the International Chamber of Commerce (ICC), Dubai International Arbitration Centre (DIAC), the DIFC-LCIA Arbitration Centre and the Singapore International Arbitration Centre (SIAC)) or to the local courts (particularly in relation to government contracts). As such, significant barriers to the efficient resolution of Saudi commercial disputes exist – including, in the case of offshore arbitration, additional cost, inconvenience and obstacles to the enforcement of awards.

In 2012, a new Saudi Arbitration Law was enacted by Royal Decree M/34. The Arbitration Law is based on the UNCITRAL Model Law and intended to be consistent with the principles enshrined in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which the Kingdom acceded to in 1994. Saudi Arabia was the first of the Gulf States to adopt a form of the UNCITRAL Model Law into its domestic law, thereby leading the region in bringing its arbitration law into line with international standards.

The SCCA

Established by a Cabinet decision in 2014, the SCCA is an independent body governed by a Board of Directors from the private sector (who are prohibited from also holding government positions). It is the SCCA's aim to be the preferred alternative dispute resolution choice in the Gulf region by 2030.

The SCCA Rules

In 2016, the SCCA released its Arbitration Rules (effective 31 July 2016) (SCCA Rules)¹⁶. The SCCA Rules are the first rules of arbitration for general application to commercial dealings to be released in the Kingdom.

The SCCA has stated that its starting point for the development of the SCCA Rules was the UNCITRAL Arbitration Rules, although the SCCA has not been afraid to make significant amendments to the template, as exemplified below:

Administration

While the SCCA Rules are based on UNCITRAL, they provide for institutional, and not ad hoc, arbitration with the SCCA acting as the “appointing authority”.

Emergency procedures and interim measures

Consistent with the trend across all sets of major institutional rules, the SCCA Rules contain a provision for the appointment of an emergency arbitrator with power to grant relief prior to the appointment of the arbitral tribunal.

Joinder

The SCCA Rules provide for the joinder of third parties beyond the claimant and respondent stated in the original notice of arbitration. Again, this is reflective of multi-party changes introduced to many sets of arbitral rules, most recently the SIAC Arbitration Rules.

Seat and language of arbitration

Under the SCCA Rules, parties are free to specify the seat of the arbitration, as well as the language of the arbitration, as they see fit.

Governing law

Consistent with UNCITRAL, the SCCA Rules state that the arbitral tribunal is bound to decide in accordance with the terms of the contract, taking account of any usage of trade applicable to the transaction. That said, these provisions of the SCCA Rules are expressly stated to be subject to the rules of Sharia and any international conventions to which the Kingdom is a party.

Appointment of arbitral tribunal

In a significant departure from UNCITRAL, arbitral tribunals consisting of three members (unless the parties have agreed otherwise) are not constituted by each party nominating one member and those two members selecting a chairperson. Instead, the SCCA provides a common list of candidates from which the parties are to try to agree the members of the arbitral tribunal, failing which the SCCA will select the members based on those “approved” by both parties from the list and ranked in order of preference.

Pleadings and procedure

Unlike UNCITRAL, the SCCA Rules do not require pleadings and the arbitral tribunal has a wide discretion to determine its own procedure – including deciding preliminary issues and bifurcating proceedings.

Privilege

The SCCA Rules state that the arbitral tribunal shall take into account the applicable principles of privilege, including those involving the confidentiality of communications between lawyer and client. In particular (and uniquely in the region), the SCCA Rules state that when the parties, their counsel or the documents would

be subject under applicable law to different rules, the arbitral tribunal should, to the extent possible, apply the same rules to all parties, giving preference to the rule that provides the highest level of protection.

Awards

In addition to the usual procedures for the making of awards under UNCITRAL, the SCCA Rules state that the final award is to be made no later than 60 days from the date of the closing of the hearing unless otherwise agreed by the parties, specified by law or determined by the Administrator.

Fees

Finally, consistent with an ICC approach, the SCCA Rules fix administrative and arbitrators' fees as a percentage of the value of the amount in dispute.

A bright future

The establishment of the SCCA and the release of its impressive Arbitration Rules is an extremely positive development and should promote further foreign investment and business confidence in the Kingdom's economy. We have already seen parties adopting the SCCA Rules and believe that they recognise a further shift towards a recognition by Saudi parties that arbitration is a commercial, robust and reliable method for dispute resolution that should be considered and embraced.

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