2016...a year in review
Legal developments in the global construction and infrastructure sector
Contents

Introduction 1
2016…the headlines 2
2017…the year ahead 4
2016…a detailed year in review 6
In the spotlight… 22
– South Africa: New Financial Provision Regulations under NEMA 24
– Australia: Unfair terms in Australian small business contracts 29
– Brazil: Introduction of the Programme of Investment Partnerships to Combat Corruption 32
– Singapore: The Asian Infrastructure Investment Bank Opens
  – Early indications for the construction industry 33
– UK: Remind Us – What was the Northern Powerhouse? 35
– UK: What do construction firms need to know about the Insurance Act? 39
– Saudi Arabia: New Saudi arbitration centre signals the rise of a new regional and global arbitration hub 42
– India: In the spotlight 44
– Indonesia: PPP Regulatory Framework 46
– Key trends for 2017 51
– “Firm Foundations programme” 52
– “Global projects and construction group Clyde & Co” 53
Introduction

We are pleased to present “Firm Foundations: a year in review”, 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 2017.

The guide forms a key part of our Firm Foundations training programme, supporting our projects and construction clients through knowledge sharing, training and industry updates.

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 2017.

Please don’t hesitate to contact article authors or infrastructure@clydeco.com if you have any questions or require further information.
2016

…the headlines

For a more detailed overview on these key developments look no further than the next chapter...

January

Hong Kong: the Court of First Instance confirms Hong Kong’s pro-arbitration stance, fully embracing the principles of party autonomy and minimal judicial interference.

Canada: the Superior Court of Québec considers the issue of defects and the presumption of fault, establishing that the plaintiff has the burden of demonstrating that there is a defect that has an impact on the solidity of a building or that renders it unfit for its intended use.

February

UAE: the Government announces a major shake-up to prepare the UAE for the future. Ministries will be consolidated and government services outsourced to the private sector, providing a long term platform for continued growth and development in the private sector.

UK: the Sentencing Council publishes its definitive sentencing guidelines covering corporate manslaughter, health and safety, and food safety and hygiene offences. The guidelines span numerous offences, not only causing death but also harm and the risk of harm.

March

South Africa: the National Treasury launches a walk-in payment call centre in order to facilitate payments of suppliers by the Government that are overdue by more than 30 days.

Australia: the Supreme Court of NSW highlights the “inherent frailty of the process” of apportionment and the importance of ensuring risks are properly allocated, so as to avoid one party bearing all or part of the liability for risks not ordinarily contemplated by it.

UK: the Government mandates building information modelling (BIM) Level 2 for all centrally procured government projects.

July

KSA: the Saudi Centre for Commercial Arbitration (SCCA) is established.

Tanzania: the Government establishes the Electricity (Development of Small Power Projects) Rules 2016 in a bid to diversify the supply of electricity and encourage private investment in the energy sector.

August

United States: the construction industry is positioned to benefit from new Federal Aviation Administration rules that generally permit companies to use drones in commercial operations without obtaining prior approval.

UK: the Technology and Construction Court refuses to grant an injunction to prevent a party enforcing an expert’s determination on the alleged basis that the expert did not have jurisdiction to decide the dispute.

September

South Africa: the National Treasury proposes new State procurement regulations.

Hong Kong: in the first such conviction in recent years, a subcontractor is sentenced to jail for his involvement in bid-rigging relating to a local private housing estate.
April

**South Africa:** A draft International Arbitration Bill is gazetted, providing for the introduction of legislation to govern international arbitrations in South Africa.

May

**KSA:** The old companies law is repealed and a new law introduced, affecting all companies incorporated in the Kingdom of Saudi Arabia.

**UK:** The Court of Appeal decides that clauses designed to prevent oral variations cannot be an absolute bar to future variations of a contract orally or by conduct.

October

**UK:** A number of important adjudication cases clarify a paying party’s ability to claw-back amounts overpaid on a final account by way of subsequent adjudication and confirm the reluctance of the court to interfere in interim payment arrangements.

**South Africa:** Amends its Financial Provisioning Regulations, which it had introduced in November 2015, after the mining industry expressed concerns with the provisions.

**France:** Contract law undergoes its most significant reform in centuries, with the impact felt across all sectors, including construction.

November

**Australia:** The Unfair Contracts Act is introduced, extending consumer protection laws to ‘small business contracts’.

**Canada:** An Infrastructure Bank is established to help fund major construction projects across the country.

December

**Global:** FIDIC releases a consultation version of its Yellow Book contract, in preparation for a full release following industry comment in Spring of 2017.

**Australia:** Western Australia introduces much anticipated amendments to its statutory adjudication regime.
2017 ...

...the year ahead

These are just some of the anticipated developments for 2017 that may impact your business:

**Australia**
- The construction market in Australia is likely to continue to operate at two speeds in 2017. In the mining States of Western Australia and Queensland, construction activity is expected to continue to decline. On the East Coast, large infrastructure projects will continue to drive the market, although disputes have been steadily increasing in recent months as some projects come to an end.
- In 2016, a number of large take-overs meant that international contractors entered the Australian market or consolidated their positions in the market. The increased competition has led to tighter margins and the proliferation of principal-friendly risk profiles on many large-scale contracts. With that in mind, we expect 2017 to be a turbulent year, with a rising number of disputes on the East Coast and some international contractors leaving the Australian market for greener pastures. Australian contractors, however, will benefit from the globalisation of the construction market, particularly through the development of the G20-backed Global Infrastructure Hub and the significant infrastructure spending being deployed by its neighbours, particularly its closest neighbour Indonesia.
- Recent amendments to security of payment legislation in a number of States, as well as foreshadowed amendments in others, will mean that payment disputes will continue with fervour. In addition, the re-introduction of the Australian Building and Construction Commission, and a new-found political enthusiasm for special bidding requirements for Government projects, means that there will be no shortage of legislative developments to keep lawyers, commercial managers and those on the tools busy.

**United States**
- The California Legislature introduced over 5,100 bills in the 2015-2016 session, including an overhaul of the state’s construction laws. Changes relate to almost every aspect of construction, including finance, bonds, liens, payments, construction defect resolution procedures, licensing, wages, and the expansion of design-build procurement.
- The viability and success of the Public-Private Partnership (“P3”) model is becoming more recognized and trusted. As a result, the U.S. Department of Defense is now considering more P3 projects to provide a wider variety of facilities and services. Additionally, state-managed P3 projects are becoming more common. Examples include a train station for Pennsylvania Department of Transportation, a high-speed line connecting Dallas and Houston, numerous light rail projects in Los Angeles County, and several Florida rapid-transit projects.

**South Africa**
- Despite the fact that the introduction of the Statutory Construction Prompt Payment and Adjudication Regulations (Regulations) stalled during 2016 and, for the short term, appeared to be a non-starter, it is hoped that the objections to the Regulations can be resolved, and that they will come into effect during 2017.
- The introduction of an International Arbitration Bill is expected in 2017. It is hoped that the introduction of the Bill will bring South Africa into line with other international arbitration hubs, such as New York, London and Singapore, and will make it an attractive seat for international arbitrations.
- A Public Procurement Act is scheduled to be tabled in parliament in early 2017 and will hopefully come into effect later in the year. It is likely to focus on various shortcomings in transformation initiatives by attempting to rebalance the ownership and control of the South African economy.
- Building Information Modelling (BIM) is steadily growing momentum in other jurisdictions, and governments are beginning to mandate the use of BIM on all public sector funded projects. It is anticipated that BIM will be implemented in South Africa in the near future.

**Canada**
- With the announcement of the Canada Infrastructure Bank in November 2016, the federal government’s spending on infrastructure is likely to be dramatically increased over 2017 and beyond.
- Quebec is still awaiting the implementation of the recommendations of the “Charbonneau Commission” report into the awarding and management of public contracts in the construction industry. This report was published in November 2015 and detailed corruption and collusion in relation to such contracts. It put...
forward over 60 recommendations, many of which will have an important impact, including the setting up of a procurement authority to provide better regulation of the award of public contracts.

India
- A Goods and Services Tax Law ("GST") is to be implemented on 1 July 2017 and is expected to have a significant impact on the construction and real estate sector.
- Presently, home buyers pay service tax and Value Added Tax on purchases of residential units when booked before completion. There are also various non-creditable tax costs, like excise duty, customs duty, entry tax, etc. paid by the developer, which are built into the pricing of units. All these tax costs add up to 22%-25% of the price. The proposed GST should replace these multiple taxes with a single tax and should ensure a smooth flow of credits through the supply chain. As a result, it is widely expected that GST will reduce construction costs to developers and aid in reducing (or at least maintaining) the current level of prices in the real estate sector.
- Further, GST should have a significant impact on commercial property developers, who are currently burdened with high costs, as no credit is available on construction services used for developing a commercial property that is then rented out. Under the GST regime, there should be a smooth flow of credit, and the current restriction on construction related credits not being available for offset is expected to be removed. This should help to reduce project costs in the hands of developers, which should have a positive effect on rentals.
- In short, GST intends to bring in a more comprehensive and uniform tax structure that will ensure greater transparency in the sector and enable a smooth and seamless distribution network, leading to more timely delivery of building material across India.

UAE
- The Ministry of Human Resources and Emiratisation recently announced three key changes to the resolutions regarding Emiratisation which will come into effect from 1 January 2017. The first requires construction and industrial sector employers, with a workforce of 500 or more, to employ an Emirati occupational health and safety officer. The second requires all companies employing 1000 or more employees to register the company on the Ministry’s electronic system, Tasheel, and to employ at least two Emirati employees to access that system. The final change provides that certain establishments’ Emiratisation categories can be upgraded from one classification level to another, if they meet certain reduced Emiratisation levels.
- The introduction of VAT across the GCC and a UAE federal corporate tax are anticipated in the near future.

Indonesia
- The Indonesian state-owned power monopoly (PT PLN) is currently undergoing a review of its internal processes, as the roll-out of the 35GW power generation program has been hindered by bureaucratic roadblocks, due to a lack of internal coordination between departments. We expect PT PLN to announce clearer guidelines for sponsors and contractors bidding for PPP power projects in the course of 2017.

Qatar
- In April 2016, it was announced that Qatar is in the process of drafting a new law to facilitate and nurture its fledging PPP sector, and to provide a strong legal framework for the efficient delivery of future PPP projects. A draft of the law was expected in August 2016 with implementation scheduled shortly after. At the time of going to print, however, the text of the new law has not yet been published, and it is to be hoped, therefore, that this will take place in 2017.

Global
- Back in September 1999, the International Federation of Consulting Engineers ("FIDIC") published its suite of four standard forms of contract. Over the years, the original four standard forms have developed into the Rainbow Suite, which is widely used in international construction and plant installation projects. In October 2016, it was announced that new editions of these the FIDIC standard forms would be released in 2017, along with new sector specific contracts. A consultation version of the amended Yellow Book was the first to be released in December 2016.
2016
...a detailed year in review

Below we take a look around the world and detail some of the key changes from 2016.

01 January

Asia: On 16 January 2016, the Asian Infrastructure Investment Bank (“AIIB”) was declared open for business at its inaugural meeting in Beijing. The China-led AIIB aims to support infrastructure construction in the Asian region by providing finance and professional advice to governments and the private sector. Refer to page 33 for an analysis of what the introduction of the AIIB may mean for the construction industry and the region. Given the strong influence of China on the AIIB, it is likely to prove to be the most effective vehicle to mobilise Chinese investment in the developing states of Asia. The AIIB’s development will continue to be of interest to all regional players in the construction industry.

Hong Kong: In Wing Bo Building Construction Company Limited v Discreet Limited (HCA 146/2015), Hong Kong’s Court of First Instance (CFI) dismissed the contention that the Arbitration Ordinance (Cap 609) was unconstitutional, and confirmed Hong Kong’s position as a pro-arbitration jurisdiction. The building contractor, Wing Bo, challenged the constitutionality of Section 20(8) of the Arbitration Ordinance, which provides that a Court’s decision to stay proceedings in favour of arbitration is not subject to appeal. In dismissing Wing Bo’s contention, the court held that the provisions of the Arbitration Ordinance (Cap. 609) are in line with Hong Kong’s legislative policy “to promote the use of arbitration, to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense, and to promote Hong Kong as an arbitration friendly jurisdiction”.

The CFI concluded that the restriction on appeal imposed by Section 20(8) is no more than necessary to accomplish the legitimate aims of the Arbitration Ordinance. This decision once again confirms Hong Kong’s pro-arbitration stance, and fully embraces the principles of party autonomy and minimal judicial interference.

02 February

Australia: In Australian Maritime Systems Ltd v McConnell Dowell Constructions (Aust) Pty Ltd [2016] WASC 52, the Supreme Court of Western Australia’s pro-arbitration attitude was reinforced. The Court ordered a stay of proceedings, rejecting an argument by AMS that the arbitration agreement no longer applied as the parties had executed a settlement agreement modifying their rights under the original agreement. The Court held that the arbitration agreement applied as the settlement agreement formed part of the original agreement. Another argument advanced by AMS was that McConnell Dowell had submitted its first statement of substance on the dispute and was out of time to make an application under section 8 of the Commercial Arbitration Act 2012 (WA). Mitchell J held that McConnell Dowell had not submitted its first statement on the substance of the dispute (a letter to the Court requesting consolidation of the disputes) as the letter did not contain any statement, express or implicit, as to the defendant’s position on how the dispute should be resolved, i.e. the proper construction of the settlement agreement. This case serves as a reminder that parties are required to stand by the dispute resolution methods in their agreements and the Court will not proceed in the face of a valid arbitration agreement.

United States: The Florida legislature adopted revisions to its statutes in an effort to strike a balance between the public’s right to access public records and the need to protect private entities (e.g., contractors) that do business with the government, including the closing of loopholes that exposed contractors to attorneys’ fees and to costs incurred to enforce access to records.
Under Florida law, certain records of contractors are “public records” that must be maintained and produced to the public upon request. A failure to provide prompt and reasonable access can result in civil and criminal penalties. And, if a civil action is filed to obtain the records and the court determines that the records were unlawfully withheld, the court is required to award the prevailing party reasonable attorneys’ fees and costs. Unfortunately, certain litigants have exploited these laws to run a money-making scheme.

As a result, the Florida Legislature has amended the public records law to substantially reduce the risk that a contractor will fall victim to this scheme. First, the statutes now require that a public records request be made directly to a public agency (and not to the private entity). Only if the public agency does not possess the requested documents, and then requests them from the contractor is the contractor obligated to take any action. Second, in the event a lawsuit is filed, written notice must now be sent to the contractor by common carrier delivery service or registered mail. Most importantly, a contractor that complies with the request within eight business days after the notice is sent (not received) is not liable for attorneys’ fees and costs of enforcement.

UAE: The UAE announced a major government shake-up to prepare the UAE for the future. A number of ministries will be consolidated and most government services will, in the future, be outsourced to the private sector. The rationale for the change is that ministries should focus predominantly on setting policies, drafting laws and regulating private sector activities, rather than undertaking commercial activities themselves. It is striking that this “federal” announcement came so soon after the publication on 20 September 2015 of Dubai’s new PPP law (Law No.22 of 2015), and, when taken together, it is clear that a considerable opportunity is now emerging for the UAE private sector, both in Dubai and the UAE as a whole. With many private sector businesses currently facing challenging market conditions, the new “outsourcing” policy adopted at a federal level and the new PPP law in Dubai should provide a good long term platform for the private sector to continue to develop and grow in the UAE.

UK: The Sentencing Council published its definitive sentencing guidelines covering corporate manslaughter, health and safety, and food safety and hygiene offences. The guidelines span a range of offences and, unlike previous guidelines, do not just cover those causing death, but include causing harm and the risk of harm. Companies convicted of the most serious offences (i.e where they have flagrantly breached the law and created a very high risk of serious harm, or where serious harm has actually been caused) can expect to receive a fine proportionate to (i) the seriousness of the offence; and (ii) their financial means. In the most serious of circumstances, large organisations (turnover of > GBP 50 million) could face fines of up to GBP 10 million (or potentially more, in the case of very large organisations), whilst individual offenders could be handed custodial sentences of up to 2 years.

UK: In Deluxe Art & Theme Ltd v Beck Interiors Ltd [2016] EWHC 238 (TCC) Coulson J enforced one adjudication decision, but refused to enforce a second, on the grounds that the same adjudicator could not adjudicate on more than one set of proceedings at the same time without the parties’ consent. The respondent Beck had engaged Deluxe as joinery sub-contractor. Issues arose and Deluxe referred three separate disputes to adjudication. The same adjudicator was appointed on each occasion.

Adjudication 3 was commenced prior to the adjudicator reaching a decision in adjudication 2. Beck objected to the adjudicator dealing with two disputes at the same time but the adjudicator continued in his determinations. After Beck failed to comply with the decisions in adjudications 2 and 3, Deluxe sought enforcement in the TCC.
Beck argued that the adjudicator had breached the rules of natural justice in adjudication 2, but the judge disagreed and enforced the decision. However, he declined to enforce the decision in adjudication 3 because it constituted a separate dispute, and Beck had not consented to the adjudicator dealing with more than one dispute at a time as required under paragraph 8(1) of the Scheme. He also clarified that paragraph 8(1) is not limited in its application to circumstances where more than one dispute is set out in a single notice of adjudication and also applies to separate adjudications.

Accordingly, in the absence of both parties’ consent to separate adjudications being heard by the same adjudicator at the same time, the referring party was required to wait until the adjudication 2 had concluded before referring another to the same adjudicator.

March

South Africa: The National Treasury launched a walk-in payment call centre in order to help facilitate payments of suppliers by Government that are overdue by more than 30 days. This move has been seen as a compromise to the proposed amendments to the Construction Industry Development Regulations (Regulations) which were expected to be introduced into law in 2016. The amendments, proposed back in May 2015, intended to introduce prompt payment requirements into all construction works contracts (excluding home building contracts), as well as bringing into effect mandatory statutory adjudication for the construction industry in relation to payment disputes. However, the process came to a halt following substantial objections to the initial draft of the Regulations and an indication by several large state-owned entities (including Eskom (state power utility) and the South African National Roads Agency Limited) that they wished to be exempted from the Regulations.

The new call centre regime is an enforcement of section 38(1)(f) of the Public Finance Management Act (PFMA), which already requires that all creditors must be paid within 30 days of receipt of an invoice (unless determined otherwise in a contract). Although non-compliance with section 38 of the PFMA by an accounting officer is a criminal offence, Government would seem to regard the 30 day period as a guideline only and there has been no record of disciplinary action taken against Government Departments for failure to pay suppliers on time. While the Government has reported that it has seen an improvement in the payment of suppliers, it has not given any figures/statistics since June 2016, and Statistics South Africa have reported that company liquidations are up for the year ended August 2016, compared to the same prior period. There remains a need, therefore, for the introduction of such Regulations into the construction industry.

Australia: In Thiess Pty Ltd and John Holland Pty Ltd v Parsons Brinckerhoff Australia Pty Ltd [2016] NSWSC 173, the Supreme Court of NSW highlighted the “inherent frailty of the process” of apportionment. The case involved the apportionment of blame where multiple parties in a PPP structure were responsible for a tunnel collapse. Claims were brought by the D&C contractor against its designer, geotechnical engineer and independent verifier. The Court ultimately held that the designer was responsible, but that the geotechnical engineer had also failed to comply with its contractual obligations (which had a significant contribution). The designer was found to be two thirds liable and the geotechnical engineer was found to be one third liable (the claims against the independent verifier had been settled out of court). The case serves as a reminder that parties should be aware of their respective contractual obligations particularly where there is a complex project structure with many parties involved. Care should be taken to ensure that risk is appropriately allocated, and the scope of work is adequately documented, to avoid one party being held fully or partly responsible for risks not ordinarily contemplated by it.
Hong Kong: The Government of Hong Kong issued an internal memo, requiring Works Departments to continue to adopt the NEC form in all public works contracts (including design and build contracts) for tenders to be gazetted or called after 2016, so far as possible. In order to facilitate effective preparation, administration and management of NEC projects, a set of NEC Practice Notes will be circulated by the Government, addressing commonly encountered issues such as option evaluation, pain/gain share mechanisms, treatment on cost saving proposals, improvement on contractor’s cash flow etc. Works Departments have been requested to identify suitable public works contracts valued over HK$1 billion to adopt NEC Option C or D.

UK: The Government mandated Building Information Modelling (BIM) level 2 for all centrally procured Government projects from 4 April 2016. This includes an obligation on all government departments to produce a complete set of Employer’s Information Requirements (EIRs) for every contract. The Government mandate coincided with the launch of an official BIM level 2 website, hosted by the British Standards Institution (BSI). The website sets out official standards and guidance documents, together with the Construction Industry Council (CIC) BIM Protocol, Uniclass (the unified classification for the construction industry), and the National Building Specification (NBS) toolkit.

Mandating BIM level 2 reflects a long-standing commitment that the Government first made in its May 2011 Government Construction Strategy. Further Government activity in this field is likely to focus on delivering its Digital Built Britain initiative, which aims at achieving BIM level 3.

April

South Africa: A draft International Arbitration Bill (“Bill”) was gazetted in April 2016. The Bill provides for the introduction of an Act to govern international arbitrations in South Africa. This new development is long overdue and is seen as a positive step by South Africa to not only modernise its international arbitration regime, which is currently governed by the domestic Arbitration Act of 1965, but to make South Africa an attractive seat for international arbitrations, given its developed legal system, independent judiciary, and supporting infrastructure (such as hotels and airports). The Act, when it comes into force, will incorporate and adopt (hopefully unaltered) the UNCITRAL Model Law on International Commercial Arbitration as well as update the existing provisions in respect of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”). These developments should be of interest to all involved in cross-border disputes, from the point of view of familiarity with the dispute resolution framework, ease of enforcement of arbitral awards, and curtailment of judicial intervention and review of arbitral awards.

Australia: In *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation* [2016] WASC 119, the Supreme Court of Western Australia held that a determination under the Construction Contracts Act 2004 (WA) against a paying party does not prevent that party from exercising its contractual rights (i.e. by having recourse to security) despite the obligation to pay the amount determined to the party who has provided the security. The Court held that the payee’s right to be paid the amount of the determination and the paying party’s right to cash security exist in parallel. The Court further established that a determination only creates a positive obligation to pay the money owed under the determination itself. An adjudicator’s reasons for the determination are not binding or capable of creating further obligations.
Hong Kong: In L v B (HCCT 41/2015), the Hong Kong Court granted a stay of proceedings pending the outcome of a challenge to set aside an arbitration award in the Bahamian Court (the “Award”). The stay was conditioned upon the Respondent making payment of substantial security of HK$41 million and security for costs of HK$600,000. The Court took into account two factors when considering the stay application: (a) the strength of the argument that the award was invalid; and (b) the ease or difficulty of enforcement of the award. In relation to (a), the Court did not consider the award to be “manifestly invalid” and considered the arbitral tribunal acted within its authority. Further, the Court rejected the Respondent’s argument that the Award had not yet become binding on the parties. An appeal to set aside an award is to be distinguished from an appeal on the merits. An arbitral award is not binding only if it is open to appeal on the merits before a judge or an appeal arbitral tribunal. As for (b), the Court did not find any difficulties in enforcing the award and confirmed its “unfettered discretion” derived from Article VI of the New York Convention, in deciding whether to adjourn award enforcement and to order the provision of security. Ultimately, the Court granted only a four month stay and awarded substantial security to the Applicant. Costs of the application for security were granted to the Applicant on an indemnity basis. This judgment confirms the pro-arbitration stance in Hong Kong and the Court’s wide power and discretion to order security generally, taking into account the merits of the proposed challenge, the delay likely to be occasioned, the conduct of the parties and balancing the prejudice to the party entitled to enforcement of a binding award against any possible prejudice to the party resisting enforcement.

UK: Building Regulations have been updated in order to implement Article 8 of the EU Broadband Cost Reduction Directive (2014/61/EU). The Building (Amendment) Regulations 2016 (SI 2016/490) came into force on 9 May 2016 but there were transitional provisions in place for works notified to a local authority before 1 January 2017. The updated regulations have removed the requirement for energy performance certificates for new and converted buildings to be part of the Building Regulations regime. Other amendments require new construction and major renovation works to provide in-building physical infrastructure, to enable broadband services to be easily connected to the building.

UK: In Stellite Construction Ltd v Vascoft Contractors Ltd [2016] EWHC 792 (TCC), the court severed from an adjudicator’s determination an issue he decided that went beyond his jurisdiction. Stellite (employer) had referred its claim for LDs against Vascroft (contractor) to adjudication after Vascroft failed to pay the LDs levied. Vascroft argued that it was not liable to pay LDs on the basis that the extension of time mechanism had ceased to apply and time was at large. The adjudicator agreed, finding that time was at large and no LDs were due. However, he went further, and also decided what a reasonable date for completion would be. This prompted Stellite to issue part 8 proceedings for a declaration that the decision was unenforceable because the adjudicator had breached the rules of natural justice. Stellite contended that the adjudicator had not fairly canvassed the issue as to whether clause 2.29 permitted an EOT for the events that had caused delay (Issue 1). Stellite also contended that the only dispute referred to the adjudicator was whether Vascroft was entitled to an EOT, and thus an additional finding by the adjudicator concerning what was a reasonable date for completion was a breach of natural justice (Issue 2).

Carr J found that Issue 1 was within the adjudicator’s jurisdiction, and was canvassed fully by the parties. However, she found that the adjudicator had exceeded his jurisdiction in determining Issue 2. While it was a ‘logical next step’ once he had found time was at large to determine a reasonable completion date (and he had the material before him to decide the issue), he did not have the jurisdiction. The parties agreed that, if the judge were to find the adjudicator had exceeded his jurisdiction in deciding Issue 2, then that could be severed from the balance of the decision. Accordingly the judge dismissed the claim for declaratory relief in relation to Issue 1, but granted it in relation to Issue 2.
May

**KSA:** In May 2016 the old Saudi companies law was repealed and a new companies law was introduced, affecting all companies incorporated in the Kingdom of Saudi Arabia. Of key note for international contractors is that the new companies law allows for foreign companies to establish branches, agencies or offices in the KSA after being licensed by the Saudi Arabian General Investment Authority (“SAGIA”). Those with existing companies in Saudi Arabia have until May 2017 to ensure that the company’s Constitutional Documents are in line with the new law.

**Abu Dhabi:** The Courts of the Abu Dhabi Global Market (“ADGMC”), located in Abu Dhabi’s international financial centre, released a raft of new procedural rules and directions, which came into force on 30 May 2016. Included are the Court Procedure Rules (the ADGMC Rules), Practice Directions, a schedule of Court Fees and mandatory conduct rules applicable to legal practitioners appearing before the ADGMC. In addition, the ADGMC has also published a Memorandum of Understanding (MoU) between the UAE Ministry of Justice and the ADGMC entered into on 15 May 2016. The MoU deals with the manner in which the ADGMC and the UAE Ministry of Justice will cooperate in legal and judicial matters. The announcement and the release of the ADGMC Rules followed over a year of consultation by the ADGMC, first begun on 7 January 2015.

**UK:** In Globe Motors Inc v TRW Lucas Variety Electric Steering Ltd [2016] EWCA Civ 396, the Court of Appeal decided that the inclusion of a clause intended to prevent oral variations of the contract could not prevent future variations of a contract orally or by conduct. The case concerned a long term contract for supply of certain products to the automotive industry. It included a clause that provided it could “only be amended by a written document which (i) specifically refers to the provision of this Agreement to be amended and (ii) is signed by both Parties”.

On appeal, when considering a separate issue, Beatson LJ made obiter comments designed to clarify the position with respect to anti-oral variation clauses, following existing conflicting decisions on the point. He stated that “The parties have freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct. The consequence in this context is that in principle the fact that the parties’ contract contains a clause such as Article 6.3 does not prevent them from later making a new contract varying the contract by an oral agreement or by conduct”. Beatson LJ acknowledged that difficulties of proof might arise whenever it was claimed that a contract had been made orally or by the conduct of the parties and the facts had to be determined by the trial judge from the evidence given by the parties and their witnesses. In such a case a variation should only be found where the evidence on the balance of probabilities establishes that such variation was indeed concluded. These comments reaffirm the principle of freedom to contract, but also highlight that attempts to limit the manner in which parties may alter the contract may be insufficient to override the principle of party autonomy. Accordingly, if the parties intend to vary the contract, this should be properly documented to avoid the potential for disputes.
June

**Australia:** In *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2016] NSWSC 770, the Supreme Court of NSW quashed an adjudication determination on the basis that the adjudicator's contractual interpretation leading to its determination amounted to an error of law. This significantly broadened the previously existing narrow scope for challenging an adjudication determination. The determination was quashed and the matter was remitted to the Adjudicator for further consideration and determination according to law.

**UK:** In *Reveille Independent LLC v Anotech International (UK) Ltd* [2016] EWCA Civ 443, the Court of Appeal considered whether a provision requiring both parties to sign a document for it to be legally binding could be waived by conduct. Reveille had proffered a 'Deal Memo' which had to be signed by both parties to be binding. Anotech altered, signed and returned the document, thus making a counter-offer.

Anotech later sought to argue that no agreement was in place, because Reveille had not signed the amended document. At first instance, the judge concluded that Reveille had not properly signed the Deal Memo, but had accepted by conduct the counter-offer in the amended document, a decision appealed by Anotech.

On Appeal, Mr Justice Cranston found that the Deal Memo amended by Anotech constituted a counter-offer which required acceptance. By not signing it, Reveille as offeree was waiving the prescribed method of acceptance. As Anotech was receiving the benefit of Reveille’s performance of the Deal Memo’s terms, it was not in any way prejudiced by the waiver. There was also clear evidence of Reveille’s acceptance of the offer by conduct, of which Anotech was aware. The court therefore decided that Reveille did waive the provision that there would be no binding contract in the absence of its signature on the Deal Memo. There was no prejudice from this to Anotech. There was acceptance by conduct on Reveille’s part of the terms of the Deal Memo, leading to a binding contract. Accordingly the appeal was dismissed.

July

**Tanzania:** The Government established the Electricity (Development of Small Power Projects) Rules 2016 in a bid to diversify the supply of electricity and to encourage private investment in the energy sector by introducing cost-reflective tariffs for private investors. One of the failings of the previous Small Power Projects Framework was that the low tariffs were unattractive for larger wind and solar technologies up to 10 MW. The new framework consists of two approaches: Renewable Energy Feed-in Tariff for the development of solar and wind projects up to 1 MW and small hydro and biomass projects, and a competitive/bidding process for wind and solar projects between 1 MW and 10 MW.
Australia: In Laing O’Rourke Australia Construction Pty Ltd v Samsung C&T Corporation [2016] WASCA 130, the Court of Appeal of the Supreme Court of Western Australia clarified the law as to when an adjudicator’s determination may be quashed for jurisdictional error. The Court of Appeal has confined the basis upon which determinations may be reviewed. The Court of Appeal established that an application for leave to enforce a determination is not an opportunity to undertake a de facto review of the determination. In doing so the Court of Appeal refocussed attention on the characterisation of the adjudication process as being a trade-off between a precise legal decision and the speed and efficiency that modern day construction projects require. Martin CJ stated that the relevant provisions of the Construction Contracts Act read in context with its purpose and objectives “lead inexorably to the conclusion that an adjudicator will not exceed the jurisdiction to make a determination…merely because he or she misconstrues the contract or makes an error in the application of its terms to the facts found”.

United States: In Tribal Casino Gaming Enter. v. W.G. Yates & Sons Constr. Co., 1:16-CV-00030-MR-DLH, 2016 WL 3583813, at (W.D.N.C. July 1, 2016), a federal district court holds that impracticability of an arbitration clause, which required a decision within 30 days of the selection of a three-arbitrator panel, did not render it invalid. This was because the arbitration clause incorporated AAA rules that would provide the arbitration panel with additional time.

A casino entered into a contract with two general contractors to expand gambling facilities, including the construction of two parking decks. The contractors then hired a subcontractor to build the parking decks. After a partial collapse of a parking deck, the casino sued the contractors and subcontractor who then moved to compel arbitration. At the heart of the dispute was the enforceability of an arbitration clause that stated: “[a]ny controversy … shall … be settled by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association” and that the “arbitration panel shall … render a decision within thirty (30) days after being notified of their selection.”

After the court determined that it possessed the power to determine arbitrability, it addressed the issue of enforceability and held that “the 30-day decision period set forth in the arbitration clause” was not unconscionable. In so holding, the court recognized that the 30-day decision period was “tight;” however, the court noted that the arbitration provisions incorporated the Commercial Arbitration Rules of the American Arbitration Association, which contained procedural mechanisms that would provide the arbitration panel additional time to decide a complex, post-construction dispute. As such, the court denied the motions requesting the court to hold the arbitration clause unenforceable or enjoin the arbitration proceeding already commenced.

KSA: The Kingdom of Saudi Arabia established the Saudi Centre for Commercial Arbitration (“SCCA”). This development is considered in detail at page 42, with a summary of the rules and what this means for KSA and arbitration globally.
2016
...a detailed year in review

August

United States: On August 29, 2016, the Federal Aviation Administration’s (“FAA”) rules regarding the commercial operation of small unmanned aircraft (a.k.a. drones) became effective. The FAA’s new rules are a major step for the eventual integration of unmanned aircraft into business operations nationwide. Before Part 107, companies had to obtain preapproval through a lengthy exemption process before conducting commercial unmanned aircraft operations. The exemption process imposed significant restrictions on unmanned aircraft operations and required operators of unmanned aircraft to have a pilot’s certificate. The new rules, however, generally permit companies to use unmanned aircraft in commercial operations without obtaining preapproval from the FAA and with fewer restrictions than were previously required. The construction industry will stand to benefit from Part 107, as unmanned aircraft can be employed in a variety of operations helpful to construction companies, including: topographical surveys, access to hard-to-reach locations, job progress tracking, videography/marketing, building and structure inspections, site security, safety, and general construction site troubleshooting.

UK: In ZVI Construction Co LLC v. The University of Notre Dame (USA) in England [2016] EWHC 1924 (TCC) the court refused to grant the claimant an injunction, which it sought to prevent the enforcement of an expert’s determination on the basis that the expert did not have jurisdiction.

The applicable provisions of the relevant construction contract were clauses 17.1, which provided for disputes to be decided by an independent expert, and 17.2, which stated that disputes relating to the meaning or construction of the agreement were to be referred to arbitration. Further, clause 24 stated that the agreement could not be altered or any of its provisions waived unless confirmed by the other party, in writing and signed.

The defendant alleged defective works against the claimant (and another) and invoked clause 17.1. During the investigations, the expert asked if the parties wanted to extend his jurisdiction to include clause 17.2, even though no such dispute had yet arisen. While the defendant agreed, the claimant did not, but the claimant equally did not suggest there were, or might be, disputes that would arise under that clause.

In January 2015, the parties agreed to allow the expert to determine liability and in July 2015 the expert found the claimant (and another) liable for many of the defects. The claimant did not consider itself liable under the agreement and began Part 8 proceedings in the UK, seeking three declarations and an injunction against the defendant to prevent it enforcing any aspect of the expert’s decision.

It was held that parties to a contract could implicitly confer jurisdiction to an expert where otherwise there would be none, but it was a question of fact as to whether there had been such a submission. In this case, by partaking in the investigations by the expert, the claimant had implicitly submitted to his jurisdiction over the matter. Further, the defendant understood the claimant to have submitted to the jurisdiction and in doing so had relied on the expert settling the dispute. This had resulted in detriment as the defendant had undertaken proceedings to enforce the expert determination on the understanding the claimant had agreed to the expert’s jurisdiction. The claimant was estopped by convention from now questioning this jurisdiction. Further, clause 24 was held as unengaged because neither side had altered or waived any part of the agreement, but had merely proceeded with the understanding that the expert was to have jurisdiction under 17.2.
UK: In *Lulu Construction Limited v Mulalley and Co Limited* [2016] EWHC 1852 (TCC), deputy judge Mr Jonathan Acton-Davis QC considered whether an adjudicator had jurisdiction to consider costs incurred during adjudication proceedings.

The claim was made by Lulu in relation to £47,666.27 for debt recovery costs. The authority for claiming such costs is found in sections 1(1) and 5A (3) of the Late Payment of Commercial Debts (Interest) Act 1998.

Mulalley argued that the adjudicator had no jurisdiction to decide such costs because the claim was not made in the request for adjudication. Strangely, it was Mulalley (the payer) who served the notice of adjudication and the TCC made clear it was hardly surprising that the notice did not contain the debt recovery costs within them. However, it was shown by previous authority that a “dispute referred to adjudication will or may include claims for relief which are consequential upon and/or incidental to it and which enable the dispute, effectively, to be resolved.” Therefore, the TCC ruled that the dispute referred to adjudication did include the costs claimed and thus the adjudicator had jurisdiction to decide them. The £47,666.27 was thus included in judgement for Lulu.

South Africa: The Supreme Court of South Africa overturned the 2015 decision of the Pretoria High Court, which had found that Eksom Holdings Limited was strictly liable to a passer-by who was electrocuted after coming into contact with a low-hanging live powerline. Strict liability was imposed in terms of the Consumer Protection Act (“CPA”). The decision at first instance extended the traditional delictual liability imposed in terms of the common law and extended the ambit of the CPA beyond the scope of a consumer-supplier relationship. On appeal, the Supreme Court disagreed with the trial judge’s findings. It held that the CPA is limited in its application to harm caused by goods that are supplied “in terms of a transaction”. To interpret the application of the CPA beyond the ambit of a consumer-supplier relationship would be to substitute strict liability for common law negligence, and to extend the CPA’s application beyond what the Legislature intended.

While the decision is a welcome relief to public liability insurers and entities such as municipalities, the decision nonetheless serves as a reminder of the wide application of the Consumer Protection Act and as a cautionary tale to those involved in the construction industry. Thus: (i) consultants may be strictly liable for harm arising out of goods manufactured, constructed, installed, sold or supplied on behalf of the consultant, in the design-build/construction scenario where the consultant is the lead figure, or takes contractual responsibility for the design and build components; and (ii) similarly, health and safety representatives under the Occupational Health and Safety Act, and designers of structures under the Construction Regulations 2014, whose obligations encompass the services of ensuring the implementation of health and safety measures will also be strictly liable for harm caused by goods inasmuch as these professionals “provide access to” goods as contemplated by section 61(2) of the Consumer Protection Act.

South Africa: The National Treasury proposed new state procurement regulations. These regulations are to be applicable to all organs of state (save for Telkom). The proposed regulations were scheduled to be promulgated on 1 November 2016 and came into effect on 1 April 2017. Of significance will be Section 13 of the proposed regulations, which will make it mandatory for a tenderer to sub-contract a minimum of 30% of the value of contracts above R30 million, to certain qualifying entities, including an exempted micro enterprise (EME’s) or qualifying small business enterprise (QSE’s) owned by black people, black females, black people between the ages of 14 and 25, or black people with disabilities.
Australia: In Maxcon Constructions P/L v Vadasz & Ors [2016] SASC 148 the Supreme Court of South Australia found that the risk that a subcontractor may not be able to refund moneys paid as progress payments under the Building and Construction Industry Security of Payment Act 2009 (SA) is a risk which the Parliament had assigned to the head contractor under the Act. The head contractor had applied for a stay in respect of the enforcement of an adjudication determination on the basis that the subcontractor risked becoming impecunious. The Court found that this mere risk was insufficient to justify a stay and refused to grant a stay. The decision is a departure from lines of authority in other States and Territories which provide for the staying of the enforcement of a determination in circumstances where a subcontractor is impecunious or insolvent.

Hong Kong: The Hong Kong Court sentenced a subcontractor to jail for his involvement in a bid-rigging project relating to a local private housing estate. This is the first conviction concerning building management misconduct in recent years. The judge noted that the lack of regulation in this respect was being exploited and a statutory body should be set up for regulation. The widely alleged bid-manipulation practices in the residential renovation and maintenance market in Hong Kong has raised deep public concerns for a number of years. Combating bid-rigging (serious anti-competitive conduct under the Hong Kong Competition Ordinance) has been an enforcement priority for the Competition Commission since the Competition Ordinance came into full force on 14 December 2015. In May 2016, the Competition Commission released a Report into aspects of the market for residential building renovation and maintenance. The result appears to be consistent with the general belief that there were bid-manipulation practices in Hong Kong in recent years. In particular, according to the Report, contractors were more likely to win a tender when they were associated with either the consultant organizing the tender or the other contractors participating in the tender. The results also suggested that bidding patterns of consultants often appear disproportionate with the underlying costs. In light of the recent conviction, the Hong Kong Competition Commission will work closely with other relevant law enforcement agencies, such as the Independent Commission against Corruption and the Police, to ensure a co-ordinated and effective approach to tackle this issue.

Canada: In Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co., 2016 SCC 37 the Supreme Court of Canada held that a “faulty workmanship” exclusion in a “Builder’s Risk” insurance policy precludes from coverage the cost of recleaning the windows of a building (held to be excluded faulty work) but not the cost of replacing the damaged windows (held to be covered as resulting damage).

The dispute arose from the insurers’ denial of coverage for damages caused by the improper cleaning of windows of an office building under construction. The subcontractor hired to clean the windows scratched them by using inappropriate tools and cleaning methods. The building’s owner and the general contractor sought the cost of replacing the windows under the project’s “Builder’s Risk” or “All Risk” insurance policy. It excluded from coverage the “cost of making good faulty workmanship”, with the exception of “resulting damages” (an undefined term). The insurers denied coverage on the basis that replacing the windows was “making good faulty workmanship”.

Applying general principles of contract interpretation, as the exclusion was ambiguous, Justice Wagner found that the exclusion served to exclude from coverage only the cost of redoing the faulty work. The resulting damages exception covered costs or damages apart from the cost of redoing the faulty work. Thus, only the cost of recleaning the windows was withdrawn from coverage. The Ledcor ruling sheds light on the boundary between “making good faulty workmanship” and “resulting damage”, especially when the alleged faulty work causes damage to the very object of the work or part of the work on which it is applied (the windows in that case).
France: In October, France saw the biggest reform in contract law since the promulgation of the famous Civil Code in 1804 by Napoleon. This reform is applicable to all contracts concluded after the 1 October 2016 and will have some serious impacts on construction contracts. Refer to page 40 for an overview of the relevant changes.

South Africa: Amendments were introduced to the regulations under the National Environment Management Act.

The existing regulations, introduced in November 2015, govern the requirement for financial provision for the carrying out of environmental rehabilitation in the mining industry. These regulations changed the manner in which the necessary financial provision is to be calculated, as well how financial vehicles are used to make this provision. The likely effect of these regulations is that the quantum of the necessary financial provision by mines, both existing and new, will increase and the use of financial guarantees will also increase, in light of the fact that trust funds can no longer be utilised in on-going or final rehabilitation.

The only change introduced by the 2016 amendments was to extend the grace period allowed to bring existing financial provision into line with the requirements in the regulations, until February 2019. The implementation of the regulations will be onerous for the mining industry and they also come at a very difficult time for mining houses. Refer to page 24 for a detailed review and analysis of the regulations.

Tanzania: The Mining (Mining Shareholding and Public Offering) Regulations were introduced requiring mining companies to list their shares on the Dar es Salaam Stock Exchange and obtain a minimum local shareholding of 30% of the total issued and paid up share capital. However, where the holder of the licence has failed to secure the minimum requirement due to an unsuccessful public offer, the Capital Markets and Security Authority may grant a waiver. Holders of Special Mining Licences (“SMLs”) have one year to comply with these regulations if their SML was granted after the regulations came into force. For SMLs that were granted before these regulations came into force, SML holders have two years to comply with the minimum shareholding requirement and the requirement to list.

Australia: In Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd [2016] VSCA 247 (14 October 2016) the Victorian Court of Appeal found that the Building and Construction Industry Security of Payment Act 2002 (Vic) is not available to claimants in liquidation. Façade Treatment Engineering commenced proceedings against Brookfield Multiplex to recover amounts claimed under Payment Claims which were not paid by Brookfield Multiplex and in respect of which no Payment Schedule was issued. The Court found that a person who is entitled to a progress payment as they have undertaken to carry out construction work (or to supply related goods and services) under the contract must be a person who is continuing or capable of continuing to undertake construction work or to supply related goods and services. Therefore a company in liquidation which is no longer able to trade is not a person entitled to a progress payment. Further, in circumstances where payments under the Act are interim, the Act could not work in a manner where a respondent is required to pay an amount but is prevented from commencing proceedings to recover that amount as a result of the claimant being in liquidation.
UK: In Kilker Projects Ltd v Purton (trading as Richwood Interiors) [2016] EWHC 2616 (TCC) the court considered whether the failure to serve a payment or pay less notice in accordance with the Construction Act prevented the paying party from challenging the payee's contractual entitlement to such payment so that the 'notified sum' in s.111 of the Act became final and conclusive as to the sum due under the contract.

It was held that the provisions of the Construction Act were concerned only with ensuring cash flow and they do not affect the ultimate value of the contract sum. Subject always to the express terms of the contract, where the 'notified sum' was in respect of an interim payment, usually there was no contractual basis on which the contractor's entitlement to that payment could be re-opened. Any errors can be corrected in subsequent interim or final valuations. However, where the 'notified sum' determined in adjudication was in respect of a (“final payment”), unless the contract provided that such payment was conclusive as to the sum due, either party was entitled to have the ultimate value of the contract sum determined in a subsequent adjudication.

UK: In Balfour Beatty Regional Construction Ltd v. Grove Developments Ltd [2016] EWCA Civ 990 the Court of Appeal enforced an interim payment schedule agreed between the parties despite it being a 'bad bargain' for one of them. The relevant contract included an interim payment schedule listing 23 monthly instalments, ending in July 2015 (the planned month for completion) “Tumber schedule”. There was no provision in the contract as to what would happen if the project overran beyond the 23rd instalment.

The project overran and was not completed until July 2016. In August 2015, Balfour Beatty ("BB") issued an interim payment notice extrapolating from the payment schedule. Grove subsequently issued a payment notice and Pay Less notice (deducting £2 million) and paid the remaining amount. However, BB took issue with Grove's calculation of dates and argued the Pay Less notice was ineffective.

Grove took the position that BB had no continuing entitlement to receive payments and took the matter to the TCC, who agreed, on the basis that: (i) the Tumber schedule was a specific amendment to the contract; (ii) it did not make any express provision for further interim payments; (iii) there was no implied term for interim payments after the 23rd instalment; (iv) the Tumber schedule satisfied the requirements of s. 109 and 110 of the Construction Act 1996 so the Scheme did not apply; and (v) no new agreement was ever reached between the parties as to the essential terms for further interim payments.

BB appealed arguing such a construction of the contract that no further interim payments would be payable until the final payment date under the contract was “commercial nonsense”. Lord Justice Jackson disagreed with this stating it was clear the parties only agreed payments up to July 2015, meaning that was what they intended. Further, in his view, it was impossible to deduce what the payment amounts, dates or notices should be beyond expiry of the payment schedule. Finally, he stated that it was a classic case of one party making a bad bargain and the court cannot “use the canons of construction to rescue one party from the consequences of what that party has clearly agreed...” Regarding compliance with s. 109 and 110 of the Construction Act, Justice Jackson LJ was of the view that s. 109(1) gave parties considerable latitude as to the system of interim payments which they may agree and that the regime of 23 interim payments up to the date specified for completion, though unusual, was sufficient. The appeal was therefore dismissed.
Indonesia: There has been renewed focus on PPP projects in Indonesia over the course of 2016, particularly in the power generation sector, with the Jokowi administration’s acknowledgement of the country’s infrastructure shortfall which is holding back growth. Refer to page 46 for a detailed overview of Indonesia’s PPP Regulatory Framework.

Singapore: In PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation [2015] 4 SLR 364 (SGCA) (“Perusahaan”), the Singapore Court of Appeal confirmed that interim awards made under Singapore’s International Arbitration Act (“IAA”) are final and enforceable - notably, that an interim award based on a binding but non-final dispute adjudication or avoidance board (“DAB”) decision made under the 1999 FIDIC Red Book Conditions of Contract for Construction (the “Red Book”), is final and enforceable.

The decision in Perusahaan is significant, reinforcing the “pay now, argue later” principle central to the DAB procedure. In this regard, the Singapore Court of Appeal clarified that any failure to comply with a binding but non-final DAB decision may be referred directly to arbitration, without having to first attempt amicable settlement and/or allowing the period for amicable settlement to lapse.

If the arbitral tribunal subsequently overturns the DAB decision, an account of money would be made, such that any overpayment or underpayment in the interim award based on the DAB decision, would be dealt with in the final award.

November

South Africa: As part of the government’s medium to long term plans for electricity provision leading up to the year 2050, the Integrated Energy Plan (“IEP”) was published for comment on 25 November 2016. The purpose of the IEP is to provide a roadmap of the future energy landscape for South Africa which guides future energy infrastructure investments and policy development.

Eight objectives have been identified, which include minimizing negative environmental impacts from the energy sector and increasing access to modern energy. With regard to the energy mix, it is reported that gas and renewables will form the biggest part of installed capacity by 2050 with a significant reduction in installed capacity from coal. It is estimated that 37,400 MW from wind, 17,600 MW from solar plants, 25,292 MW from gas, and 15,000 MW from coal will be generated by 2050.

In terms of renewable energy, the Department of Energy has procured over 4,000 MW of renewable energy under the Renewable Energy Independent Power Producer (“REIPP”) Program. In the IEP it is recommended that the REIPP Program should be extended to ensure the ongoing deployment of renewable energy technologies, and the emphasis should be placed on solar energy. The industry is now waiting to see what emphasis Government will place on renewables in the light of a drive by Government to also procure a fleet of nuclear reactors.

Australia: The Unfair Contracts Act was introduced, extending Australia’s consumer protection laws to ‘small business contracts’. Refer to page 29 for a detailed look at the legislation and its potential impact on construction contracts in Australia.
2016
...a detailed year in review

Australia: The Strata Schemes Management Act 2015 (NSW) and the Strata Schemes Management Regulation 2016 (NSW) commenced on 30 November 2016 and impose new stringent requirements on residential property developers. Of most relevance is the requirement for developers of strata schemes to issue a bond (equivalent to 2% of the value of the building work performed) to the Department of Finance before an Occupation Certificate is issued for the development. The developer must also appoint an independent building inspector within 12 months of the completion of building work and that inspector must inspect the strata scheme and issue reports on any defects, with recommendations on rectification and an assessment of the likely costs within 15 - 18 months (Interim Report) and then again within 18 to 24 months (Final Report) from the completion of the building work. The bond provided by the developer may be used by the Owners’ Corporation for the costs of rectifying defective building work identified in the inspector’s Report.

Australia: Legislation to revive the Australian Building and Construction Commission (“ABCC Bill”) passed through the Senate. The Government’s intention is that the re-establishment of the ABCC will improve productivity while creating a robust overseer and maintaining the rule of law. Many of the offences under the ABCC Bill already exist under the Fair Work Act 2009, however, the ABCC Bill increases the powers of the ABCC such as the power to compulsorily examine persons who may have been involved in a contravention or who could otherwise assist the ABCC. This has been the cause of much controversy regarding the proposed re-establishment of the ABCC.

Other changes include an amended Building Code, with which builders and construction companies will need to comply should they wish to bid for Commonwealth-funded work. The ABCC is likely to continue to be a hot topic in 2017.

Canada: Plan for the Canada Infrastructure Bank (“Bank”) were announced with it likely to come into effect in 2017. The purpose of the Bank is to help fund major construction projects across the country. With an initial capitalisation of $CAN 35 billion, it is designed to attract foreign investments in infrastructure. The idea for the Bank is to allow other levels of government that are doing infrastructure programs to borrow at the federal government rate to reduce the cost of borrowing so larger infrastructure projects can proceed.

Qatar: The Qatari government has passed a law requiring a minimum level of protection for personal data within the State of Qatar. It is the first GCC member state to issue a generally applicable data protection law.

UK: A new Pre-Action Protocol for the TCC came into effect on 14 November 2016, aimed at reducing parties’ costs at the pre-action stage. Some of the major changes include:

- Parties can contract out of the Protocol provided all parties agree.
- Parties can now agree to use a Protocol Referee Procedure to resolve disputes about the implementation of the Protocol.
- The Court can only impose cost sanctions in exceptional circumstances, such as a flagrant disregard for the Protocol.
- The application of the Protocol is intended to be quicker, shorter, and less expensive, with a greater emphasis on proportionately.

While these changes may help to stop the front loading of costs, it is feared that they may not serve to reduce costs overall. The loosening of required details in the letter of claim and the tightening of timescales may result in fewer pre-action settlements and more litigation.
December

Australia: In recent years some Australian states have amended their Security of Payment legislation to even the playing field between claimants and respondents. The Western Australian Government appears to have accentuated the perceived claimant-friendly adjudication process with amendments to the Construction Contracts Act 2004 which came into force on 15 December 2016.

These include extending the date by which an adjudication application must be made from 28 days from the payment dispute arising to 90 business days, with no commensurate extension to the time by which a respondent must serve its response (14 days). The prohibition against making recycled claims (claims which have already been included in a payment claim and rejected) has also been removed.

An amendment has also been made that essentially permits an adjudicator to take a substance-over-form approach by allowing determinations to be made where an application does not strictly comply with the formal requirements under the Act.

It is likely that if the parties are in protracted disputes, several payment claims may be adjudicated at the same time. This will make it harder for a respondent to prepare substantive responses in each case. The recycling of claims will also increase the quantum and complexity of adjudication applications and this will affect both respondents and adjudicators.

UAE: Under the UAE Penal Code, Article 257, Arbitrators may now face temporary imprisonment for acting contrary to the duty of fairness and impartiality.

UK: The court in Octoesse LLP v Trak Special Projects Ltd [2016] EWHC 3180 (TCC) clarified the position in regard to the recovery of consultant’s costs in enforcement proceedings. Trak claimed the recovery of claims consultant’s costs in relation to the role they played in enforcement proceedings. It was held that consultant’s costs in relation to adjudication and enforcement, would usually be recoverable as they fell under an exception to the general rule as they were considered to provide “specialist assistance”. Jefford J went on to say that although the enforcement proceedings in this case went to the substance of the dispute, in his view the recoverability of consultant’s costs would not change if the issue was decided in summary.

Global: A consultation version of the amended FIDIC Yellow Book was released at the London FIDIC conference in December. This is the first in a series of amendments likely to result in changes across the entire Rainbow suite, which will inevitably lead to challenges for the industry. This is not a small update, with a number of clauses completely redrafted and the form substantially lengthened.
In the spotlight

In the following section we put the spotlight on a number of issues across the global construction and infrastructure sector…

- South Africa: New Financial Provision Regulations under NEMA 24
- Australia: Unfair terms in Australian small business contracts 29
- Brazil: Introduction of the Programme of Investment Partnerships to Combat Corruption 32
- Singapore: The Asian Infrastructure Investment Bank Opens – Early indications for the construction industry 33
- UK: Remind Us – What was the Northern Powerhouse? 35
- UK: What do construction firms need to know about the Insurance Act? 39
- France: French Contract Law Reform and the Impact on Construction Law 40
- Saudi Arabia: New Saudi arbitration centre signals the rise of a new regional and global arbitration hub 42
- India: In the spotlight 44
- Indonesia: PPP Regulatory Framework 46
- Key trends for 2017 51
The Financial Provisioning Regulations which were published under the National Environmental Management Act (“NEMA”) in November 2015 sent shock waves through the mining industry, as they drastically changed the approach to the calculation of the financial provision which companies are required to set aside for the rehabilitation of ground disturbed through mining activities, as well as the purpose for which financial vehicles could be used in making this financial provision. All persons affected by the Regulations were initially due to have brought the financial provision made by them into line with the new Regulations before February 2017, but this deadline was extended to February 2019 in a recent amendment. In light of the recent amendment to the Regulations in October last year, and the proposed amendments which were published in September 2016 but have not yet been finalised, it is an appropriate time to revisit the regulations, remind stakeholders of their impact and consider a number of potential issues players must be alive to.

The Purpose of the Financial Provisioning Regulations
The purpose of the Regulations is described as follows:
“…to regulate the determine [sic] and making of financial provision as contemplated in the Act for the costs associated with the undertaking of management, rehabilitation and remediation of environmental impacts from prospecting, exploration, mining or production operations through the lifespan of such operations and latent or residual environmental impacts that may become known in the future.”

Financial Provision
Prior to the Regulations, the required quantum for financial provision was determined through reference to Regulations 53 and 54 under the MPRDA, and the Guideline Document for the Evaluation of the Quantum of Closure-Related Financial Provision Provided by a Mine, prepared by the Department of Minerals and Energy (as it then was) and independent consultants in 2005. Although there had been a broad description of the types of rehabilitation and remediation which had to take place, no detail was provided as to exactly what this should entail, what standards should be achieved, and consequentially there was no established bench-mark for the value of a financial provision.

The Regulations provide more certainty on how to calculate the ‘financial provision’ required of all mining and prospecting rights applicants or holders (referred to herein as “mining companies” for ease of reference).

The Regulations list three plans which must be included in the Environmental Management Programme: an Annual Rehabilitation Plan; an Environmental Risk Assessment Report; and a Final Rehabilitation, Decommissioning and Mine Closure Plan. The minimum contents for each plan are attached to the Regulations.
as Appendixes 3, 4 and 5. Each activity listed in the plans must be itemised, and the cost of immediate implementation thereof must be calculated. The financial provision (either in the form of a single vehicle, or a combination of vehicles) must, at any given time, equal the sum of the actual costs of implementing the plans put in place by the mining company for a period of at least 10 years going forward.

A new component of the Regulations is the provision which must be made for annual rehabilitation (including a minimum requirement for the annual rehabilitation plan), which must take place on an on-going basis (as opposed to waiting until the closure of a mine).

A further requirement is that the provision made for latent or residual environmental impact must specifically address the pumping and treatment of extraneous or polluted water. Prior to the transfer of environmental governance provisions into NEMA, a mining rights holder’s liability ended upon the issuing of closure certificates. NEMA now specifically provides that liability, including the responsibility for extraneous or polluted water, continues after closure. The inclusion of this provision in the regulations setting out how to calculate the financial provision is a clear indication that the quantum of the provision will necessarily increase substantially.

The adequacy of the financial provision must be reviewed and assessed annually. The result of this assessment must now also be audited by an independent auditor, and submitted to the Minister. Any excess must be deferred against subsequent assessments, and any shortfall must be remedied by increasing the financial provision, within 90 days from the date of signature of the auditor’s report.

A failure to comply with the Regulations relating to the determination, making available, keeping available, and review and required increase of financial provision will constitute an offence, which carries a fine of up to R10 million, or up to 10 years’ imprisonment, or both such fine and imprisonment.

The financial vehicles which may be used for financial provision

The financial vehicles which are to be used for financial provision remain the same: contributions to a trust fund; financial guarantees (either provided by banks or registered insurers); or deposits into an account administered by the Minister responsible for mineral resources (the Minister).

The financial vehicles through which an applicant or holder of a right or permit must make financial provision, either individually or in combination, are described as follows:

- “Financial guarantee from a bank registered in terms of the Banks Act, 1990 (Act No. 94 of 1909) or from a financial institution registered by the Financial Services Board as an insurer or underwriter;
- Deposit into an account administered by the Minister responsible for mineral resources; or
- Contribution to a trust fund established in terms of applicable legislation…”

A proviso to the vehicle of the trust funds, which was previously the most popular choice (being tax deductible) is that a trust fund may now only be used for financial provision relating to remediation of latent or residual environmental impacts which become apparent after a mine’s closure. It should also be noted that the envisaged trust fund must be established by a deed of trust in the format set out as an Appendix to the Regulations.

This means that there will now necessarily be more appetite for financial guarantees provided by insurers, since cash flow is a scarce and highly valued commodity in today’s mining environment, and bank guarantees and deposits of cash would tie up large sums for the entire life cycle of the mine.
The Financial Guarantee

Financial guarantees must now accord with a standard form, which is Appendix 1 to the Regulations.

The guarantee wording pursuant to which payment is triggered provides:

“2. The Guarantor hereby unconditionally undertakes, as a principal obligation, to pay to you the Guaranteed Sum by no later than 2 working days (Mondays to Fridays, excluding weekends and public holidays) after receipt of a written claim from you (or made on your behalf) to do so, which claim:

2.1 Must state that the holder of the right or permit:

2.1.1 Has failed to execute the plans used to determine the financial provision in accordance with its terms; and/or

2.1.2 Has failed to commence execution of the final rehabilitation, decommissioning and mine closure plan or the environmental risk assessment report within 10 working days (Mondays to Fridays, excluding weekends and public holidays) of the earlier of (i) the date on which such commencement is required by law or (ii) the date of written notice to the holder requiring such commencement, in circumstances in which prospecting, mining, exploration or production operations, (as the case may be) have ceased; and/or

2.1.3 Has commenced execution of the final rehabilitation, decommissioning and mine closure plan or the environmental risk assessment report but has failed to make adequate progress with execution of such final rehabilitation, decommissioning and mine closure plan or environmental risk assessment report at any time prior to its completion in accordance with its terms; and/or

2.1.4 Has become subject to an order of court placing him/her/it in or under sequestration, liquidation or bankruptcy (in any case whether voluntary or compulsory, provisional or final) or any analogous order is granted or resolution taken in any jurisdiction in relation to the holder of a right or permit...”

Claims may be made at any stage commencing from the date of signature of the guarantee, until the guarantee expires upon the issuing of a closure certificate in respect of the whole mine. Payment is also automatically triggered without the need of the above written claim, in circumstances where a financial institution gives notice of withdrawal from the guarantee and the holder of a right or permit fails to put in place an alternative arrangement. All that is required in such an instance is a written notice (see below).

Some practical issues that we identified when the Regulations were first published included:

Payment within two (2) business days:

- This tight deadline is problematic, as an assessment of the call will have to be made by the financial institution (either a bank or insurer), and payment will have to be made into the Department of Mineral Resources’ (‘DMR’) account, within this time period

Vague threshold for calls

- One of the bases on which a call may be made is vague. Clause 2.1.3 (see above) provides that a call may be made where rehabilitation or decommissioning is being carried out, but “adequate progress” has not been made

- It is unclear whether it is only within the discretion of the Minister to decide whether the progress is adequate, or whether some objective test will be applied

Automatic trigger

- A financial institution may withdraw from a guarantee, but must give at least 4 months’ written notice to the holder, the Minister responsible for mineral resources and the Minister responsible for environmental matters, prior to such withdrawal. The holder of a right or permit must also, within 7 days, communicate this to the relevant Minister. If the holder of a right or permit fails to provide the Minister, within 60 days, with alternative arrangements, the Minister is obligated to call on the financial guarantee, and to deposit the proceeds into a bank account controlled by the Minister

- No more than a written notice calling up the guarantee is required (without any allegations of a failure on the part of the right or permit holder), and the financial institution is obliged to make payment of the amount within the same two (2) day period
This provision in effect restricts financial institutions from effectively withdrawing from guarantees where they suspect that the holder of a right or permit may be in financial distress. This is so because, where a beneficiary is indeed experiencing financial difficulties, it will be unable to put in place alternative arrangements, and the no-fault call will necessarily have to be made by the responsible Minister.

Guarantees cannot be used for post-closure financial provision

- Whilst the Regulations do not limit the use of guarantees to any particular aspect of the environmental rehabilitation and decommissioning process, it is clear that this vehicle cannot practically be used in the post-closure stage.
- The first reason is that the pro forma wording states that the guarantee expires upon the issuing of a closure certificate. Yet financial provision must be made for the remediation of latent or residual environmental impacts which may become known after closure.
- The second reason is that provision must specifically be made for the pumping and treatment of polluted or extraneous water in order to avoid Acid Mine Drainage. Such pumping is required indefinitely, and any guarantee provided for this purpose would have to be open-ended (with the quantum being re-assessed annually).
- A trust fund is therefore the appropriate vehicle for the post closure phase. It is hoped that this oversight will be amended in due course.

Comment on Financial Guarantees

The required financial provision will necessarily increase in light of: the requirement of a very detailed itemisation of the cost of carrying out all planned rehabilitation and remediation; the annual rehabilitation requirements; that sufficient funds must be in place to cover the implementation of plans for 10 years; and the express requirement for post-closure provision for the treatment and pumping of polluted or extraneous water. This will also be so for existing provision because such provision must also be reviewed and re-assessed in order to ensure that it complies with the Regulations. Financial provision will also have to be re-assessed annually, and may therefore increase annually.

The prescribed guarantee is an on-demand guarantee and the established principles in relation to on-demand guarantees will apply. This means that a guarantor undertakes to pay provided only that conditions specified in the guarantee are met. The only basis upon which the guarantor can escape liability is proof of fraud on the part of the beneficiary.

A call on a guarantee triggers an obligation on the Minister to step into the shoes of the right or permit holder and to execute the final rehabilitation, decommissioning and mine closure plan or environmental risk assessment report. The Minister must also, within one year from the date of the payment by the Guarantor, give account to the Guarantor, in reasonable detail, of how the money was utilised. Any portion which remains unutilised must be refunded to the Guarantor, with compound interest at the prime overdraft rate.

On-demand bonds typically provide that payment will not be made unless the original guarantee is presented upon the making of a demand. Two considerations apply here:

- The prescribed wording of the guarantee provides that the original guarantee need only be returned to the guarantor when giving account to the Guarantor of how the guaranteed sum was used.
- The question as to what the position is in relation to on-demand bonds in circumstances where the original guarantee is lost is not settled in South African law. The prescribed guarantee wording specifically addresses this issue as it provides that, where the original guarantee is lost, a statement that the guarantee is lost and that the beneficiary indemnifies the guarantor against any direct loss which it may suffer as a direct result of the original document not being returned to it, must accompany the account. That statement alone will then suffice.

Industry concerns following implementation of the Regulations

Following the publication of the Regulations and their implementation over the past year, it has become clear that some major changes may be required due to problems experienced in their implementation, the amount of work needed to bring all parties into line with the Regulations, and the consequential amendments which will need to be made to other legislation (such as the Income Tax Act).
Various discussions have taken place between industry and government, leading to the publication by the DMR in August 2016 of a clarification note. This was followed, on 9 September 2016, by a release by the Department of Environmental Affairs (DEA) of a call for comments on proposed amendments to the Regulations.

The proposed amendments to the Regulations reflected some of the major concerns in the industry:

- One of the biggest concerns raised by the industry was the fact that the Regulations drastically minimised the type of rehabilitation for which trust funds could be utilised. Mining houses have built up enormous trust funds over the lives of their mines, with the intention of carrying out the substantial environmental rehabilitation required in order to close such mines. However, in terms of the Regulations, these trust funds can now only be used for post-closure rehabilitation and water treatment, and because the Income Tax Act has not been amended, substantial tax fines may be imposed should the funds be withdrawn from these trusts in order to place them into alternative vehicles which are not contemplated for the on-going and closure rehabilitation. This concern was addressed in the proposed amendments by proposing that existing trust funds would be excluded from the limitations on the use of this vehicle.

- Another major concern in the industry is that the financial provision made by the mining rights holder cannot be decreased as the life of the mine nears its end, despite ongoing rehabilitation having taken place throughout the life of the mine. The proposed amendments attempt to rectify this apparent oversight.

- The third major issue is the pro forma wording which is prescribed for financial guarantees and trust deeds. Various concerns were expressed in regard to both pro forma wordings, and the proposed amendments simply deleted the Appendixes in which they were contained (although the requirement that such pro forma wording be used was not proposed to have been removed from the body of the Regulations, which would have proved problematic).

However, when the amendment to the Regulations was published on 26 October 2016, none of the above amendments were adopted. The only change to the existing Regulations was an extension of the transitional period within which all mining rights holders are obligated to bring their financial provision into compliance with the Regulations. The February 2017 date has now been pushed out to February 2019.

Due to the detailed and extensive amendments proposed previously by the DEA, the discrepancies within the Regulations and inconsistencies with other legislation (most importantly the Income Tax Act), and the widespread unhappiness in the industry, it seems likely that further amendments to the Regulations will be released shortly.

This article does not purport to address the Regulations in all their respects. The Regulations are detailed and address important aspects not considered here, for example the responsibilities of a holder of a right or permit, the various powers of the Minister, timeframes relative to consideration of financial provision, plans and reports, care and maintenance and transitional arrangements. Care must be taken to comply with the Regulations as the penalty for non-compliance is substantial.

Rob Scott
Partner, Johannesburg
T: +27 10 286 0335
E: rob.scott@clydeco.com

Kate Swart
Senior Associate, Johannesburg
T: +27 10 286 0337
E: kate.swart@clydeco.com
In November 2016, the Treasury Legislation Amendment (Small Businesses and Unfair Contract Terms) Act 2015 (Cth) ("the Act") was introduced to extend the unfair contract terms regime to small businesses who enter into standard form contracts. The Act prohibits the use of unfair terms in standard form contracts entered into by small businesses, or renewed or varied, after 12 November 2016 and, by doing so, aims to alter the power imbalance between small and large businesses.

In a nutshell, a term in a standard form contract entered into by a small business may be declared unfair by a court if it meets certain criteria (discussed in more detail below). If a court declares a term to be unfair, it will be rendered void (i.e. unenforceable). The remainder of the contract will continue to bind the parties only if it is capable of operating without the unfair term.

These changes are likely to impact certain industry specific contracts, including construction industry contracts. The extension of the unfair terms regime will also have implications for a wide range of business-to-business standard form contracts across other sectors including IT and IP licensing agreements, as well as terms and conditions of supply with smaller suppliers or distributors.

**What are the key features of the Act?**

The Act applies to ‘standard form contracts’:

1. For the supply of goods or services, or the sale or grant of an interest in land;
2. That are entered into with a ‘small business’ (i.e. one with less than 20 employees at the time of contracting, including casual staff employed on a regular and systemic basis); and
3. Which have an upfront contract price of:
   a. AUD 300,000 or less; or
   b. AUD 1,000,000 or less (where the term of the contract is for more than 12 months)

The upfront price payable under the contract is the definite price payable for goods and services obtained under the contract which is disclosed at, or before, the time the contract is entered into, and excludes any contingency fees or amounts, and any interest payable.

The Act is not limited by the type of goods and services being provided by the small business under the standard form contract.
What are ‘standard form contracts’?
The Act does not define the phrase ‘standard form contracts’. Considerations are likely to include whether:
– The relevant contract was effectively a template contract, pre-prepared by one of the parties prior to any negotiation;
– The relevant contract was subject to negotiation or if it was offered on a ‘take it or leave it’ basis; and / or
– There was inequality of bargaining power between the parties

Unfair contract terms
Under the Act, a contract term will be unfair if it:
– Would cause a significant imbalance in the parties’ rights and obligations under the contract;
– Is not reasonably necessary to protect the legitimate interests of the advantaged party (it is automatically presumed that this is the case unless the advantaged party proves otherwise); and
– Would cause detriment (financial or otherwise) to a party if it were to be applied or relied on

In determining whether a term is unfair, a court may also take into account the contract as a whole, the extent to which the term is transparent, the likelihood of detriment and any other matter the court thinks is relevant. There is no requirement to demonstrate reliance or actual detriment by the small business counterparty on the contractual term.

Terms that will be subject to the most scrutiny are terms that permit one party to:
– Avoid or limit the performance of the contract;
– Vary, renew or terminate the contract;
– Vary the price or characteristics of what is to be supplied (without the other party being able to terminate the contract);
– Unilaterally determine if the contract has been breached;
– Penalise the other party for breach or termination;
– Limit the other party’s right to sue;
– Impose the evidential burden on the other party in proceedings relating to the contract;

– Limit the evidence the other party can adduce in proceedings relating to the contract; or
– Assign the contract without consent

It is worth noting that the above list of terms that may be subject to scrutiny is not definitive. Judicial proceedings may determine that other categories of terms in standard form contracts are unfair and unacceptable.

An application for a declaration that a term is void can be made by the other person to the contract, the Australian Competition and Consumer Commission (‘the ACCC’), or the Australian Securities and Investments Commission (‘ASIC’). Interestingly, the terms which define the subject matter of the contract and the relevant upfront price (which determine whether the Act will apply to the contract) are exempt.

Unfair terms in construction contracts
The changes are likely to impact certain industry specific contracts, including construction industry contracts. Construction contracts are already subject to legislation regulating the inclusion of certain terms. Security of payment legislation exists in each state and territory to address certain unfair payment terms. Examples include ‘pay when paid’ provisions, provisions allowing payment after a certain number of days; and other provisions prescribed by the regulations.

In addition, security of payment legislation in Western Australia and the Northern Territory imply certain provisions into construction contracts where they are either not included in the relevant contract or, if they are included, do not meet the minimum standard set by the relevant legislation. Examples include provisions about variations of a contractor’s obligations, a contractor’s entitlement to claim progress payments, how a party makes claims for payment, how a party responds to claims for payment, the time for payment, interest on overdue amounts, ownership of goods, unfixed goods on insolvency and retention money.

The new Act applies more generally than the security of payment legislation and, depending on the circumstances and drafting of the relevant provision, may operate to prohibit certain terms in standard form construction contracts that may otherwise be considered ‘normal’.

Commonplace terms in construction contracts that may be considered unfair include:
– **Time bars:** Time bars require, as a precondition to a party’s entitlement to make a claim, that the relevant party notifies the other of its claim within a set timeframe. Things to consider when determining whether or not a time bar is unfair within the meaning of the Act include the length of the notice period (a short notice period is more likely to be unfair) and how onerous the notification requirements are (if an unreasonable amount of supporting material is required).

– **Variations to scope:** Variations may be considered unfair if one party has the power to unilaterally vary the scope of work or services to be supplied. Relevant considerations include if there is a requirement to comply with a variation prior to an agreement on price and time.

– **Termination for convenience:** Such provisions usually give the principal the power to unilaterally terminate the relevant contract in the absence of default by the other party (e.g., ‘for any reason’ or ‘for its convenience’). In determining whether the clause is fair, relevant considerations include the procedure for termination for convenience and what entitlements the terminated party can claim on termination.

Other examples of terms that may be considered unfair are broad indemnity clauses, broad exclusions of liability, terms that allow a party’s representative to make unfair unilateral determinations and warranties in design and construct contracts that make a contractor liable for preliminary design work by others.

Parties should also bear in mind implications for pass through provisions and the potential ‘gap’ between head contracts and subcontracts where, for example, provisions included in head contracts that sit outside scope of the legislation cannot be included in smaller contracts down the line.

**Consequences**

Terms which are found to fall foul of the Act will be unenforceable and may be declared void. If the relevant contract can operate without the unfair term then the term will be severed from the contract. If not, the entire contract will be void.

**What now?**

The extension of this regime to small businesses who enter into standard form contracts follows a 12 month transition period. The ACCC has been active in enforcing the regime in relation to consumer contracts and we expect it will also look to score some early runs in seeking to protect small businesses.

As a starting point, and if in doubt, you should seek further information about your counterparty to determine whether they fall within the definition of ‘small business’.

If you are engaging with small businesses in Australia and relying on standard form contracts you should assess the terms of your standard form contracts.

In preparing new standard form contracts, renewing standard form contracts, or varying terms within an existing standard form contract, you should now be asking:

– What is the justification for a term?
– What legitimate interest is the term trying to protect?
– Is there an alternative way to protect that legitimate interest?
– Can the term be drafted in a more balanced way?

If terms in your standard form contracts are, or have the potential to be, unfair, you should consider amending or removing the term. Where there is uncertainty about the fairness of a standard form provision, you could consider using a tiered approach. For example, a limitation of liability clause could be drafted so that certain limits applied, unless those limits were found to be unfair, in which case higher limits would apply. This concept has not yet been tested but it may provide a practical option for clauses where there is uncertainty.

---

Beth Cubitt  
Partner, Perth  
T: +61 8 6145 1720  
E: beth.cubitt@clydeco.com

Glen Warwick  
Partner, Perth  
T: +61 8 6145 1715  
E: glen.warwick@clydeco.com

Avryl Lattin  
Partner, Sydney  
T: +61 2 9210 4425  
E: avryl.lattin@clydeco.com

Rebecca Evans  
Professional Support Lawyer, London  
T: +44 20 7876 4914  
E: rebecca.evans@clydeco.com
Brazil: Introduction of the Programme of Investment Partnerships to Combat Corruption

Due to the so-called “car wash operation” (operação lava-jato) corruption scandal, Brazil and its construction market have been facing a very turbulent political and economic situation since the beginning of 2015. Brazil’s major construction companies have been at the centre of these investigations on bribery and misuse of public funds, and have therefore, suffered from lack of credit and lack of opportunities. As a result, there was a decrease of public financing for infrastructure projects.

In view of this, the government created the Programme of Investment Partnerships (Programa de Parcerias de Investimentos) (“PPI”) to increase the contribution of private capital to infrastructure projects in Brazil. On 13 September 2016, the Law which created the above mentioned Programme of Investment Partnerships (Programa de Parcerias de Investimentos), Law nº 13.334/2016, was enacted.

The purpose of the PPI is to expand and strengthen the relationship between the state and the private sector through partnership contracts (including concessions, public private partnerships, and permissions or leasing of public assets and any other public private arrangements that have the same legal structure). Law nº 13.334/2016 aims to foster the development of new infrastructure projects in Brazil and prioritise public-private projects, which are not only feasible but also attractive to private investors.

The projects included in the PPI should be treated as a “national priority” by all public agents of execution and control of the Federal Government, the states, the Federal District and the municipalities. According to the government, the program guarantees legal certainty to private investors. In addition, it establishes stable rules, broadens the interaction between the State and the private sector through the conclusion of partnership contracts for the execution of public infrastructure projects and other privatization measures.

In addition, the Federal Law nº. 13.303/2016 (enacted on 30 June 2016) governs state owned companies’ procurements and contracts. The act provides for state-owned companies to instruct the private sector, not only to execute construction projects, but also to prepare basic engineering projects and construction tasks (such as integrated contract).

In view of the above legislation, and of the fall of the major construction companies involved in the “car wash” operation, there is likely to be an increase in activity of medium-sized construction companies in the construction market, especially in the concession of highways nationwide.

Another big trend for the next few years relates to projects in the energy sector. The government intends to increase the supply of energy and strengthen the transmission system to ensure that energy is supplied at competitive prices and give priority to clean and renewable sources. During the first half of 2016, the government auctioned 3,042 km of transmission lines to be built up to 2020.

Stirling Leech
Partner, Sao Paulo
T: +55 11 2768 8721
E: stirling.leech@clydecom
What is the AIIB?
The AIIB is a multilateral development bank ("MDB") based in Beijing.

MDBs are international organisations created by multilateral treaties. In essence they are international financial institutions that facilitate national development. Each MDB is a separate entity, has its own focus and its own rules and procedures.

The AIIB will focus on the development of infrastructure and other productive sectors in Asia, including energy and power, transportation and telecommunications, rural infrastructure and agriculture development, water supply and sanitation, environmental protection, urban development and logistics. It is not the only MDB with such an aim. For example, in 2011, the Asian Development Bank created the ASEAN Infrastructure Fund, which to-date has made USD 485.3 billion in equity contributions.

In 2014, in recognition of the significant overlap that exists between infrastructure-focused MDBs, the G20-backed Global Infrastructure Hub was established. The Global Infrastructure Hub seeks to coordinate and consolidate the efforts of MDBs dedicated to infrastructure investment, and that will now include the AIIB. Clyde & Co’s Global Projects & Construction practice has been following the development of the Global Infrastructure Hub closely.

The case for the AIIB
The AIIB was proposed by the government of China in 2013 due to the infrastructure funding gap in the Asia. In 2010, the Asian Development Bank Institute estimated that the Asian region required USD 8 trillion to be invested in infrastructure over 10 years for the region to continue economic development. To that end the bank’s Articles of Agreement disclose that it has two primary purposes:

1. Fostering sustainable economic development, creating wealth and improving infrastructure connectivity in Asia by investing in infrastructure and other productive sectors; and

2. Promoting regional cooperation and partnerships in addressing development challenges by working in close collaboration with other multilateral and bilateral development institutions

From a global perspective, the OECD has estimated that the global infrastructure gap is set to reach USD 70 trillion by 2030. The AIIB aims to reduce Asia’s share of this gap by creating a nexus between the strong capital markets in the region and the significant requirement for infrastructure development.
The structure of the AIIB
Of the 57 founding members of the AIIB, China is the top contributor, with a 29.78% stake in the AIIB’s share capital. It invested a further USD 50 million at the opening ceremony of the bank. Australia contributed USD 720 million for a 3.69% stake, making it the sixth largest contributor, behind India, Russia, Germany and South Korea. Pending its own parliamentary endorsement, Singapore will become a member of the AIIB by contributing USD 250 million, or 0.25%, of AIIB’s authorised capital of USD 100 billion.

Notably, the United States and Japan – the first and third largest economies in the world – have declined to join the bank, citing concerns over potential operational practices and policies, and the competition it could provide to existing MDBs. However, China insists the AIIB will address regional development challenges by working collaboratively with other MDBs and that it will promote regional cooperation, despite concerns that it will compete with, rather than complement the work of the World Bank and the Asian Development Bank.

The function of the AIIB
The AIIB intends to facilitate sustainable economic growth, improve infrastructure networks across Asia and create wealth by promoting and encouraging public and private investment in infrastructure and other productive sectors such as energy and power, transportation and logistics.

It will focus primarily on financing specific projects or investment programs, equity investments and guarantees. It is mandated to make, co-finance or participate in direct loans, as well as:

- Invest in the equity capital of an enterprise;
- Guarantee loans for economic development;
- Deploy donor funds in accordance with the agreements determining their use; and
- Provide other types of financing as may be determined by the Board

In addition to the capital provided by its members, the AIIB will benefit the regional debt capital market by raising funds primarily through the issuance of bonds in financial markets and through inter-bank market transactions.

As well as financial assistance, the AIIB may also provide technical advice and assistance.

What does the AIIB mean for the construction industry and the region?
Only time will tell whether the AIIB will live up to its vision of taking Asia’s infrastructure into the 21st century, whilst all the while promoting regional cooperation and partnerships. On one view, the bank is merely seeking to replicate the way in which other MDBs currently operate in the region, albeit with a strong Chinese influence. On the other hand, given the strong influence of China on the AIIB, it is likely to prove to be the most effective vehicle to mobilise Chinese investment in the developing states of Asia.

Going forward
The bank’s Board of Governors and Directors held their first meeting on 16 - 18 January 2016 and approved key policies, such as the 2016 business plan and budget. Mr Jin Liqun, a Chinese banker and politician, was also elected as President of the bank for a five year term. The first projects are expected to be submitted for approval in the second quarter of 2016 and the AIIB is aiming to lend USD 10-15 billion a year for the first five or six years of operation.

Recent reports suggest that senior management positions within the AIIB will be occupied by nationals from a variety of countries. The five vice-president positions are expected to be filled by nationals from Germany, Britain, India, South Korea and Indonesia, with the German vice-president anticipated to hold the position of chief operating officer.

The AIIB’s progress will continue to be of interest to all regional players in the construction industry. Clyde & Co’s Global Projects and Construction team has extensive experience advising on infrastructure and other projects in Asia and will provide updates as they arise. Please contact us if you require any further information in relation to this article.

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

Glen Warwick  
Partner, Perth  
T: +61 8 6145 1715  
E: glen.warwick@clydeco.com
One thing was certain - plans for investment in Manchester and the other core cities in the region was at the very heart of the plan. Manchester, relative to much of the North at least, had already attracted some significant investment and is at the geographical fulcrum of the heavily populated parts of the North (situated roughly at the centre of a cluster of the other major cities - Leeds, Liverpool and Sheffield) and had cultivated an enviable pot of political, educational and cultural capital, enabling it to be marketable both at home and overseas.

The economic plan would be supported by a devolution agenda with the election of mayors for city regions, starting in the Manchester City Region. The city regions would take responsibility for the allocation and spending of certain public funds, allowing a departure from the centralised spending and investment controlled at Whitehall which is almost unequalled in the developed world. Although greater accountability for fiscal control at a regional level would clearly be a double edged sword, the theory is that allocation of funds at a local level would permit targeted spending and investment, avoiding inefficiency and waste perceived where decisions are made in Whitehall. Control over spending at a local level would encourage entrepreneurial initiatives to attract private sector investment.

Investment was to be attracted in a number of areas, but all forms of the plan place a particular emphasis in rail projects to improve connectivity. Other important issues would be digital communications (perhaps just as important as physical connections in the modern age) and ensuring that there would be enough energy available to support growth.

Perhaps most importantly the intention was to generate co-operation between local authorities to encourage investment decisions which would benefit entire city regions and, ultimately perhaps, the North as a whole. The first body set up to take a pan-northern view being Transport for the North, which is due to become incorporated by statute in 2017. Whether sufficient coherence at a city region level in the key settlements, let alone across the North as a whole, is possible remains to be seen.

Things were looking up for some of those people of the North.
When historians look back at this time, it may be that the high water mark for the economic plan behind the Northern Powerhouse occurred in June 2016 with the publication of a report authored by SQW Ltd and Cambridge Econometrics entitled “The Northern Powerhouse Independent Economic Review”. This had been commissioned by Transport for the North and, although clearly having a focus on transport, provided a detailed assessment of the difficulties the North of England had encountered over the last few decades which had led to a substantial ‘performance gap’ when compared to the rest of England. The report goes on to identify the comparative advantages which benefited the North and the framework of a plan to close the performance gap.

The report is well worth reading but it can be summarised as follows:

- The North has a persistent ‘performance gap’, with its average GVA (Gross Value Added) per capita averaging about 25% below the rest of England, and 10 to 15% when London is removed. Although these figures would be significantly skewed by the presence of the genuine, extant powerhouse which is the South East in these figures, it is worth noting that the anticipated trend is for this performance gap between the North and the rest to widen rather than to close if a ‘business as usual’ approach to growth was to continue in the North.

- When the North is compared with industrial regions in Europe the North fares even worse, with a performance gap of 30-35% when compared with the Rhine Ruhr region in Germany, the Randstad region of the Netherlands and the Lombardy region of Northern Italy.

- This ‘performance gap’ is very significant for the UK economy as a whole given that the North of England is home to 16 million people – nearly one quarter of the UK population.

- Relatively low productivity is responsible for a large proportion of the ‘performance gap’ (accounting for around 17 percentage points) with the employment rate accounting for around 5 percentage points.

- The factors which are driving low productivity are numerous but it is clear that poor connectivity and transport, and a corresponding lack of ‘agglomeration’ between the major urban areas of the North, was a significant culprit.

- Other issues contributing to the ‘performance gap’ relate to relative shortfalls in terms of technology, investment, enterprise and skills.

- Having said this the North has a comparative advantage in four key ‘Prime’ areas, namely in Advanced Manufacturing, Health Innovation, Energy and Digital. These are supported by three ‘Enabling’ capabilities, namely Financial and Professional Services, Logistics and Education (primarily Higher Education). These areas together currently account for around 30% of all jobs in the North and just over 35% of GVA for the region and, together with the quality of life in the North (read - the low cost of housing), combine to create a distinctive and coherent offering as a platform for growth.

- The report envisaged several scenarios for future growth in the North, focussing on the development of the Prime and Enabling capabilities described above with an associated effect on suppliers and local spending. To achieve this the report stated that “transformational improvements to the North’s transport connectivity are critical, both between and within cities” along with “substantial improvements in the skills base and graduate retention and attraction, innovation performance, and inward investment [being] necessary across the North.”

- The anticipated outcome of this transformational approach to the fortunes of the North would be great indeed. An HM Treasury analysis in 2014 suggested a difference in output of some £37 billion in real terms by 2030 when compared to ‘Business as Usual’ (i.e. growth without interference). The SQW report anticipated that the effects of this ‘transformed’ future (again when compared with ‘Business as Usual’) would lead to an additional increase of 15% to the GVA for the region (around £97 billion in today’s prices), an additional increase in productivity of 4% and 850,000 additional jobs by 2050.

- Although the report does not deal with the effect on the investment itself upon the local economy, spending upon infrastructure and related services is likely to be a significant boon to the industries involved in delivering the projects and the surrounding economies generally, particularly during the planning and construction phases of those projects.
How are we Going to Get there?
- Agglomeration and Connectivity

The report looks hard at the beneficial effects of agglomeration and connectivity, noting that a lack of agglomeration between the of medium sized (but physically close) cities means that the North is failing to capture its economic potential. Evidence from the UK, US, Europe and Japan implies that taking steps which effectively double a city’s ‘agglomeration’ is associated with an increase in productivity in the range of 3-8% generally and up to 20-30% in the service sector. The individual cities of the North are said to be too small to take advantage of the positive effects associated with the concentration of economic activities, and its population is spread out across a number of cities and city areas. To maximise agglomeration would allow “the North to boost its economic performance more than if each part of the North acted independently”.

The report is clear; this agglomeration benefit is not yet felt because “the North is fragmented by poor transport links between key settlements”. The report states unequivocally that “it is no longer the case that the North has spare transport capacity to accommodate growth”. In reality the North “has some of the most crowded rail services in the country, rail journey times are slow (and correlated with low levels of longer-distance commuting), and the road network is also becoming congested increasingly.” The report concludes on this issue that this lack of capacity “is creating a real constraint on the ability of the North to respond to changes in the global market and enable the greatest possible rate of growth, especially in the North’s ‘Prime’ and Enabling’ capabilities.”

SQW therefore made several recommendations for harnessing this ‘agglomeration effect’, including targeted investment in new road infrastructure, enhanced public transport connectivity within city regions/towns, enhanced city-centre to city-centre links, along with global connectivity (ports and airports) to allow people to meet customers, suppliers and collaborators, and for the import and export of goods. This investment would have to be long term with the effects building up over some 20 to 25 years.

This all sounds great – when is it going to happen?

June 2016 was not only notable for the publication of the SQW report. Readers may also recall that on 23 June 2016 the EU in/out referendum took place in the UK. If you search carefully you may be able to find articles discussing the outcome and effect of this event, which we will not deal with here. The political classes and intelligent media poured much scorn on the voting patterns in the North, whom Mr Osborne was said to be doing his best to help, for casting their votes against the interests of the nation. One of the many easy dichotomies formed in public sentiment was that, in England at least, there was a split between metropolitan and sophisticated London voting remain and the rest, particularly those in the North, who voted to leave the EU.

The reality is not so clear. Within the North, Manchester voted clearly to remain (with a 60/40 split), as did neighbouring Stockport and Trafford. Leeds also voted to remain (along with its wealthy hinterlands of York and Harrogate), Liverpool (along with Sefton and the Wirral) and Newcastle. It may be the case that these were the city regions for whom, to a greater or lesser degree, the pre-June 2016 settlement was working, with further optimism for the future being generated by the promise of additional investment and attention. The relationship of these city regions to the areas that surround them (the smaller towns and less urban areas often having been deeply affected by de-industrialisation) is perhaps a microcosm of the relationship between London and the rest of England.

In one sense the outcome of the vote in individual areas can be seen as a litmus test for the level of inclusion in the modern democratic and economic system in the UK. Reading between the lines of the SQW report, the Northern Powerhouse as envisaged at the time may well have been a cause for optimism in those city regions, perhaps at the expense of the balance of the North. Although the objective of the report was clearly designed to cover the whole of the North, the majority of the solutions (the development of the high value ‘Prime’ and ‘Enabling’ capacities, the proposals for the agglomeration of the city regions, higher education etc) will be based around the cities/their regions, rather than the smaller towns and less urban areas.
What is less clear was the benefit, if any, to those outside those city regions. For instance, the report ominously acknowledges that the project “would also imply a substantial restructuring of the North’s economy” and, furthermore, that “as skills, productivity, and average earnings increased across the North as a whole, firms engaged in lower value added activities that are also tradeable (notably in manufacturing) would come under increasing pressure to change their product ranges and processes to be able to compete in a higher labour-cost environment.”

As the report further acknowledges “the metropolitan districts of Leeds, Liverpool, Manchester, Newcastle upon Tyne and Sheffield together account for some 20 – 25% of the North’s GVA and employment in services” and would therefore benefit most from the Northern Powerhouse project. This raises the issues – is this just the same 20 to 25% of the population of the North who largely voted to remain within the EU, i.e. those who passed the litmus test as to the level of inclusion in the pre-June 2016 economic and democratic settlement? If so, what of the other 75%?

So what to do?

It seems that there is a clear tension between the steps which might make economic sense for the North (as set out in the SQW report) and redressing the political and social issues in the North disclosed to a degree by the outcome of the referendum. In addition, the Northern Powerhouse was lucky in that it had a powerful proponent in the person of George Osborne. There was often a sense during that time that any investment directed at the North (and Manchester in particular) would leave other less prosperous regions, such as the South West, behind.

As reported in the Financial Times on the 5 August 2016, since taking office Theresa May has refused to mention the Northern Powerhouse and talked instead of spreading wealth beyond “just one or two cities”, with the apparent view that the plan is too “Manchester-centric”. Time will tell whether the Northern Powerhouse project will come to fruition, in whole or in part. Of course the infrastructure plan is just facet of the wider steps needed to make the project work. For the project to get off the ground a substantial level of political will and co-operation is necessary, including at all levels of central and regional government, between the local authorities of the North and on the part of the private sector, both domestic and overseas. That requires the alignment of a number of potentially obstinate stars.

However, it cannot be in the interests of the nation as a whole for the gap between the North and the rest of England, and the developed world beyond, to continue to widen.

Steve Cannon
Partner, Manchester
T: +44 161 240 2871
E: steve.cannon@clydeco.com
In the spotlight

On the one hand construction firms should benefit as insurers’ ability to refuse claims is restricted, a completely new and additional remedy of proportional claims payments is now made available to policyholders.

However, another key change in the Act is the new duty of fair presentation of the risk. The insured construction firm is now required to disclose material circumstances which it knows or to give insurers sufficient information to put a prudent insurer on notice that it needs to make further enquiries.

**Big difficulties?**

What an insured construction firm “knows” will include what should have been reasonably revealed by a search of information available to the insured.

Both of these aspects of the Act have the potential to cause difficulties for a large construction company. It is currently unclear what the extent of a reasonable search would be, but it would appear to be drawn very widely and to include agents.

Therefore, it may be necessary for an insured construction firm to seek information, for example, from architects or engineers who are not employees of the firm.

The potential here is for insurers and insureds to agree what should generally be disclosed as part of a fair presentation of risk. However, it may often be difficult for such information to be agreed, given the nature of large construction companies which often have an international aspect.

This information may be needed in order for the insurer to fully assess the risk and the level at which to set the premium. This could mean that an insured construction firm may need to disclose contracts undertaken by subsidiaries, the level of fees paid to sub-contractors and sub-consultants and any contractual limitations of liability agreed with designers, which is a tall order for a large construction companies.

**What do construction firms need to do?**

Like all new statutes, the full impact of the Act will not be appreciated until some of the provisions are interpreted by judicial precedent. Over the coming years we will see further definition of the Act as it is put into practice.

At this stage it is key that construction firms are in close contact with their brokers about the new provisions of the regime, and what is now required of them at renewal.

Further, this may necessitate a comprehensive review of the firm’s internal processes for searching for and collating information to disclose to insurers on renewal. For insurance managers at large international firms, this could be quite a substantial undertaking.

---

**UK: What do construction firms need to know about the Insurance Act?**

The Insurance Act 2015 came into force on 12 August 2016. The new act represents the greatest change to insurance contract law in the UK in over 100 years. It has the potential to have a significant effect on construction firms’ insurance policies.
France: French Contract Law Reform and the Impact on Construction Law

France has seen in 2016 the biggest reform in contract law since the promulgation of the famous Civil Code in 1804 by Napoleon. This reform entered into force on 1st October 2016 and is applicable to all contracts concluded after that date.
The section of the Code dedicated to construction contracts has not itself been changed, but many general provisions of contract law that impact construction works have been modified substantially, particularly by the incorporation of many well-known French Supreme Court (Cour de Cassation) decisions. For example and to name just a few:

- The wrongful termination of contractual negotiations (by which is meant a failure to terminate in good faith) can lead to the award of damages; however these damages will not compensate any alleged loss of profits which were expected from the operation.

- If one party is found to have exploited another party’s position of what is called ‘economic dependence’ in order to obtain a beneficial position under a contract, then the victim will be entitled to seek the cancellation of the contract. This concept is referred to as ‘economic violence’.

- The concept of force majeure has at long last been defined: ‘In contractual matters, there is force majeure where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor’ (Article 1218).

It should be noted, however, that this reform goes beyond simply enshrining well-known contractual concepts as elaborated by the French courts. In fact, the Government has decided to innovate and in some cases go against well-established principles of private contract law, in an attempt to reflect modern contractual practices. The most frequently discussed innovation is probably the possibility to renegotiate the contract when a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party. This is a clear departure from a famous 19th century decision of the supreme court (Civ., 6 mars 1876, Canal de Craponne), according to which a contract cannot be amended under any circumstances if the parties did not provide for the possibility of amendment in their agreement.

The Code now provides for renegotiation by the parties or, alternatively, amendment of the contract by the court. The new provision (Article 1195) is worth quoting in full:

‘If a change in circumstances that was unforeseeable at the beginning of the contract renders performance of the contract excessively onerous for a party that had not agreed to accept such risk, then the said party may request the other contracting party to renegotiate the contract. The existing contract terms must continue to be performed during such renegotiation. If however such request is rejected or renegotiation is unsuccessful, then the parties may decide to terminate the contract on a date and subject to conditions to be fixed by them. Alternatively the parties may jointly request the judge to adapt the contract. If no such agreement is reached within a reasonable time, the judge may, at the request of a party, either adapt the contract or declare it terminated with effect from a date and in accordance with conditions to be decided by him.’

David Brown
Partner, Paris
T: +33 1 44 43 89 71
E: david.brown@clydeco.com

Michael Conrad
Legal Director, Paris
T: +33 1 44 43 89 79
E: michael.conrad@clydeco.com
Saudi Arabia: New Saudi arbitration centre signals the rise of a new regional and global arbitration hub

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”). 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 by the below:

1. **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”.

2. **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.

3. **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.

4. **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.

5. **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 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.

6. **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.

7. **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.

8. **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.

9. **Awards** – In addition to the usual procedures for the making of awards under UNCITRAL, the SCCA Rules state that the final award 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.

10. **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 a shift towards a recognition by Saudi parties that arbitration is a commercial, robust and reliable method for dispute resolution that should considered and embraced.

---

**Ben Cowling**
Partner, Riyadh
T: +966 11 253 2111
E: ben.cowling@clydeco.com
There have been a number of important changes in India over the last year, the most important of which are considered below.

**Enactment of the Real Estate (Regulation and Development) Act, 2016 and Real Estate Rules in India**

To protect the interest of the buyers and infuse some uniformity in diverse state enactments in India, the Government of India has passed the Real Estate Regulatory Act, 2016 ("the Act") which seeks to protect the interest of the buyers of residential and commercial real estate units by promoting transparency, accountability and efficiency in the construction and execution of real estate projects by developers/promoters. The major portions of the Act have been made effective from 01.05.2016 kick-starting the process of making rules as well as putting in place institutional infrastructure to protect the interests of the consumers.

Some of the salient features in the legislation can be summed up as follows:

- It establishes the State Real Estate Regulatory Authority for every state in India as the government body to be approached for redressal of grievances against any builder/promoter

- The legislation obligates the developer to park 70% of the project funds in a dedicated bank account. This will ensure that developers are not able to invest in numerous new projects with the proceeds of the booking money for one project, thus, delaying completion and handover to buyers

- The legislation makes it mandatory for developers to post all information on issues such as project plan, layout, government approvals, land title status, subcontractors to the project, and schedule for completion with the State Real Estate Regulatory Authority and then in effect pass this information on to the consumers

- The current practice of selling on the basis of ambiguous super built-up area for a real estate project will come to a stop as this law makes it illegal. Carpet area has been clearly defined in the law

- The developer cannot make any changes to the plan of the project that had been sold without the written consent of the buyer
Real Estate Regulation Rules:
In addition to the Act, The Ministry of Housing and Urban Poverty Alleviation, Government of India has also enacted the under the Act on 31.10.2016. The salient features of the rules are:

a. 70% of unused amounts collected for ongoing projects to be kept in a separate bank account (escrow);
b. Promoters to declare original sanctioned plans, changes made later, fresh timeline for completion of ongoing projects;
c. Registration of projects with Regulatory Authorities incentivized by reducing fee substantially;
d. Interest to be paid both by promoters and allottees is State Bank of India's Marginal Cost Lending Rate plus 2%, and
e. Promoters to make public a host of information and report quarterly progress to enable informed decisions by buyers.

Currently these rules have been notified for five Union Territories of India which are Andaman & Nicobar Islands, Dadra & Nagar Haveli, Daman & Diu, Lakshadweep and Chandigarh.

Implementation and amendment in the Real Estate Investment Trusts in India
The Securities and Exchange Board of India (“SEBI”), vide its notification dated September 26, 2014, notified the SEBI (Real Estate Investment Trusts) Regulations, 2014 (“REITs Regulations”) towards regulating investments in REITS. The REITs Regulations, inter alia, set out the registration requirements, procedure of registration, and eligibility requirements of REITs as well as that the primary players.

RBI has also taken important steps to make REITs popular among foreign investors. Vide its notification on February 15, 2016, it has excluded REIT from the definition of “real estate”. As matter of fact, FDI is not permitted in the real estate sector which makes the exclusion a significant move to lure foreign investment in REITs. It has also permitted, vide its Circular on April 21, 2016, non-resident to directly be a unit holder or sponsor in a REIT.

Lastly, SEBI, on November 30, 2016, rolled out the much awaited amendments to the regulation which will ease investments in REITs. A key amendment introduced by SEBI was a two-level SPV structure, which allows REITs to hold shares in SPVs through a holding company.

Another vital amendment was the introduction of the concept of sponsor group for REITs and removal of the cap on the number of sponsors. The revised norms have also increased the extent of investment in under-construction project to 20% from 10%. This will provide the necessary stimulus to under-construction assets which are currently facing a huge cash-crunch.

Cabinet Committee of Economic Affairs approves initiatives for revival of Construction Sector in India
On 31 August, 2016, the Cabinet Committee of Economic Affairs (“CCEA”), under the Chairmanship of the Prime Minister of India has approved the initiatives to revive the Construction Sector in India. Amongst various recommendations, CCEA has tabled a recommendation that the concerned Government Agencies are obliged to pay three-fourth (75%) of the Arbitral Award amount to an Escrow account against margin free Bank Guarantee, in the cases where the arbitral award is challenged. The Escrow account will be used to meet ongoing projects while also servicing the bank loan. These new announcements have been promulgated within the Indian Government’s recent ‘ease of doing business’ initiatives.

The aforementioned initiatives include:

i. Public Sector Undertakings (PSUs)/Departments may seek the consent of the contractors/concessionaries to transfer the Arbitration cases initiated under the pre-amended Arbitration Act to the amended Arbitration Act, wherever possible;
ii. In case of claims where the PSU/Department has challenged the Arbitral Award, 75% of the award amount may be paid by the PSU to the contractor/concessionaire against margin free Bank Guarantee;
iii. All PSUs/Departments issuing public contracts may consider setting up Conciliation Committees/Councils comprising of independent subject experts in order to ensure speedy disposal of pending or new cases;
iv. Item-rate contracts, may be substituted by Engineering Procurement and Construction (“EPC”) contracts, and PSUs/Departments may adopt the Model EPC contracts for constructions works;

Department of Financial Services, in consultation with the Reserve Bank of India, may evolve a suitable one-time scheme for addressing stressed bank loans in the construction Sector.
Parties wishing to invest in PPP projects in Indonesia should take cognizance of the Indonesian PPP regulatory framework, which is governed primarily by three general categories of laws and regulations as follows:

- **PPP regulations** – These are the regulations governing participation and investments in PPP projects;
- **Sector specific regulations** – These are the regulations specific to the specific infrastructure sectors of the particular PPP project; and
- **General Indonesian business regulations** – These are regulations governing Indonesian corporate entities and their business activities in general.

This article aims to provide a broad summary of the key regulations in each of the above categories.

### PPP Regulations

<table>
<thead>
<tr>
<th>Law</th>
<th>Key points</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Implementation of PPP Projects</strong></td>
<td>These regulations establish the cross-sector regulatory framework for implementing PPPs and sets out the provisions necessary for PPP implementation. These include tender procedures, project preparation, outline of cooperation agreements, cooperation schemes, unsolicited projects, direct appointment requirements etc.</td>
</tr>
<tr>
<td>Presidential Regulation No. 38 of 2015 on Cooperation Between Government and Business Entity in Procurement of Infrastructure</td>
<td>Permitted infrastructure types include airports, ports, railways, roads, untreated water supply/irrigation systems, drinking water, waste water, solid waste, information &amp; communications technology, electricity, oil &amp; gas, education facilities, sports and arts facilities, tourism, health and public housing.</td>
</tr>
<tr>
<td></td>
<td>PPP projects can be procured through the following avenues based on cooperation agreements with the relevant government contracting agencies:</td>
</tr>
<tr>
<td></td>
<td>- Tender process (on a solicited or unsolicited basis)</td>
</tr>
<tr>
<td></td>
<td>- Direct appointment where certain conditions are met (e.g. where only one developer possesses the requisite technology and/or expertise)</td>
</tr>
<tr>
<td></td>
<td>The Government may provide fiscal and/or non-fiscal support to improve the feasibility of the infrastructure project. Project companies must obtain financing within 12 months of signing the cooperation agreement. Projects shall be structured to allocate risk to the party best able to manage the risk.</td>
</tr>
</tbody>
</table>
### Procurement of Contingent Government Support

<table>
<thead>
<tr>
<th>Law</th>
<th>Key points</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Procurement of Contingent Government Support</strong></td>
<td>These regulations relate to the provision of government guarantees for PPP infrastructure projects through the Indonesia Infrastructure Guarantee Fund (IIGF), a state owned enterprise established by the Ministry of Finance to provide guarantee for infrastructure projects under the PPP schemes.</td>
</tr>
<tr>
<td>Presidential Regulation No. 78 of 2010 on Government Guarantee for Cooperation Project between Government and Business Entity provided by Infrastructure Guarantor Company</td>
<td>These regulations establish the procedure for requesting and provision of IIGF guarantee from the Ministry of Finance.</td>
</tr>
<tr>
<td>MOF Regulation No. 260 of 2010 on Implementation Guidelines for Guarantee in Infrastructure under PPP Model</td>
<td></td>
</tr>
</tbody>
</table>

### Operational Guidelines

<table>
<thead>
<tr>
<th>Law</th>
<th>Key points</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Operational Guidelines</strong></td>
<td>These regulations set out the operational guidelines for implementation of PPP projects based on the cooperation agreements with the relevant government contracting agencies:</td>
</tr>
<tr>
<td>The Minister of National Development Planning / Head of national Planning Agency Regulation No. 3 of 2012 on General Guidelines of Implementation of Cooperation between the Government and Business Entity in Infrastructure Provision</td>
<td></td>
</tr>
</tbody>
</table>
**Sector specific regulations**

It is pertinent to note that there may be sector specific regulations depending on the relevant sectors in which the PPP project is to be undertaken, summarised broadly as follows:

<table>
<thead>
<tr>
<th>Sector</th>
<th>Relevant Regulation</th>
</tr>
</thead>
</table>
| Airports                           | – Law No. 1 of 2009 on Air Transportation  
                                      – Government Regulation No. 40/2012 on Airport Construction and Environment Preservation |
| Ports                              | – Law No. 17 of 2008 on Water Transportation  
                                      – Government Regulation No. 61 of 2009 on Port Affairs  
                                      – Government Regulation No. 20 of 2010 Water Transportation |
| Railways                           | – Law No. 23 of 2007 on Railway Affairs  
                                      – Government Regulation No. 56 of 2009 on Implementation of Railway Affairs  
                                      – Government Regulation No. 72 of 2009 on Rail Traffic and Transportation |
| Electricity (Power Plant, Transmission, Distribution) | – Law No. 30 of 2009 on Electricity  
                                      – Law 27 of 2003 on Geothermal  
                                      – Government Regulation No. 59 of 2007 on Geothermal Business Activities  
                                      – Government Regulation No. 3 of 2005 on Amendment to Government Regulation No. 10 of 1989 on the Provision and Utilisation of Electricity  
                                      – Law No. 30 of 2009 on Electricity  
                                      – Government Regulation No. 14 of 2012 on Electricity Business Provision  
                                      – Government Regulation No.62 of 2012 on Electricity Support Business  
                                      – Ministry of Industry Regulation No. 54/M-Ind/PER/3/2012 on the Guidelines for the Use of Domestic Products in the Construction of Electricity Infrastructure |
| Water Treatment, Transmission and Distribution | – Law No. 7 of 2004 on Water Resources  
                                      – Government Regulation No. 16 of 2005 on Development of Drinking Water Supply |
| Roads                              | – Law No. 7 of 2004 on Water Resources  
                                      – Government Regulation No. 16 of 2005 on Development of Drinking Water Supply  
                                      – Government Regulation No. 44 of 2009 on amendment to Government Regulation No. 15 of 2005  
                                      – Law No. 22 of 2009 on Traffic and Road Transportation |
General Indonesian business regulations
This section sets out the general laws and government regulations governing aspects such as foreign investment, environmental protection, and land use and acquisition, the key ones having been listed below.

<table>
<thead>
<tr>
<th>Law</th>
<th>Key points</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Negative List for Investments</strong></td>
<td>The Negative List specifies business sectors that are;</td>
</tr>
<tr>
<td></td>
<td>- completely closed to foreign direct investment;</td>
</tr>
<tr>
<td></td>
<td>- partially open to foreign direct investment; and</td>
</tr>
<tr>
<td></td>
<td>- open to foreign direct investment but subject to certain conditions, e.g. requirements to secure additional governmental approvals,</td>
</tr>
<tr>
<td></td>
<td>to form partnerships or for specific regional location.</td>
</tr>
<tr>
<td></td>
<td>Generally, a business sector not on the Negative List will be deemed to be subject to 100% foreign direct investment.</td>
</tr>
<tr>
<td></td>
<td>The most recently updated Negative List, which came into effect on 18 May 2016, demonstrates the Indonesian Government’s commitments</td>
</tr>
<tr>
<td></td>
<td>towards boosting both foreign and domestic investment activities in Indonesia by providing for higher foreign shareholding</td>
</tr>
<tr>
<td></td>
<td>thresholds.</td>
</tr>
<tr>
<td></td>
<td>The maximum foreign ownership in a company carrying out an infrastructure business is as follows:</td>
</tr>
<tr>
<td></td>
<td>- Power Plant:</td>
</tr>
<tr>
<td></td>
<td>- &gt; 10 MW: 95%</td>
</tr>
<tr>
<td></td>
<td>- 1 MW to 10 MW: between 49% to 67%</td>
</tr>
<tr>
<td></td>
<td>- &lt; 1 MW: 0%</td>
</tr>
<tr>
<td></td>
<td>- Transmission of Electricity: 95% (Maximum 100% for PPP concession period)</td>
</tr>
<tr>
<td></td>
<td>- Distribution of Electricity: 95% (Maximum 100% for PPP concession period)</td>
</tr>
<tr>
<td></td>
<td>- Toll Road: 100%</td>
</tr>
<tr>
<td></td>
<td>- Piped Water Supply: 95%</td>
</tr>
<tr>
<td></td>
<td>- Port: 49%</td>
</tr>
<tr>
<td></td>
<td>- Airport: 49%</td>
</tr>
<tr>
<td></td>
<td>- Education: In accordance with the relevant laws relating to the national education system</td>
</tr>
<tr>
<td></td>
<td>- Operation of Telecommunications networks: 67%</td>
</tr>
<tr>
<td>Law</td>
<td>Key points</td>
</tr>
<tr>
<td>-----</td>
<td>------------</td>
</tr>
<tr>
<td><strong>Company law</strong></td>
<td></td>
</tr>
<tr>
<td>Law No. 40 of 2007 on Limited Liability Companies</td>
<td></td>
</tr>
<tr>
<td><strong>Utilization of Government Assets</strong></td>
<td></td>
</tr>
<tr>
<td>Government Regulation No. 6 of 2006 regarding State/Regional Assets Management as amended by Government Regulation No. 38 of 2008</td>
<td></td>
</tr>
<tr>
<td><strong>Land Acquisition</strong></td>
<td></td>
</tr>
<tr>
<td>Government Regulation No. 2 of 2012 regarding Land Procurement Provision for the Development of the Public Interest</td>
<td></td>
</tr>
<tr>
<td>Presidential Decree No. 30 of 2015 amending Presidential Decree 71/2012 on Land Procurement Provision for the Development of the Public Interest</td>
<td></td>
</tr>
<tr>
<td><strong>Cooperation with Regional Government</strong></td>
<td></td>
</tr>
<tr>
<td>Government Regulation No. 50 of 2007 on Procedure for Regional Cooperation</td>
<td></td>
</tr>
</tbody>
</table>
Key trends for 2017

Third party funding in arbitration:
Third party funding (‘TPF’) in arbitration was a key issue in 2016, with continued use of it by parties as a risk management strategy, as well as by those who require it to fund their dispute. The UK courts gave a considerable boost to TPF in 2016 by allowing its recovery as “other costs” in some arbitral proceedings, whilst Hong Kong and Singapore moved closer to legalising its use as a means of funding arbitration. There are a variety of different regulatory or legal approaches to TPF, with certain jurisdictions being far more attractive to funders than others. The natural and growing competition of the key arbitral centres around the world make it likely that this will continue to be an evolving topic, as other areas seek to try to keep pace and remain attractive as a location for arbitration. It is likely, therefore, that 2017 will see continued evolution of the regulations surrounding TPF.

Corruption in the construction industry:
Corruption in government infrastructure projects has been a long running concern globally. In 2016, certain jurisdictions made a renewed effort to take action, with Canada and Brazil’s progress discussed earlier. It will be interesting to monitor how the respective changes affect issues of corruption in those countries. The changes in Brazil mark a turnaround in recent years in the Latin American region, where public outrage has forced through change in areas where corruption was previously common practice. This is a continuing trend globally, where the industry is under increased scrutiny from lawmakers as to how contracts are procured.

Changing face of infrastructure funding:
The US, UK and Canada have separately considered the use of infrastructure investment banks. With Canada having announced plans to establish a bank, with at least CAN$ 35 billion worth of investment, during 2017. Donald Trump becoming president of the US has also increased hopes of such a bank opening there. Some countries have also considered the use of infrastructure bonds.
The global rise of adjudication: The success of the UK model of adjudication for construction disputes has led to many jurisdictions considering implementation of a similar form of dispute resolution. A number of jurisdictions have had similar regimes in place for a number of years, including Australia, Malaysia, Singapore, New Zealand and Ireland (to name a few), and both Hong Kong and South Africa continue to consult on legislation to bring it in as an option.

This reflects an increasing trend for jurisdictions to consider ways to resolve disputes in a quicker and cheaper manner. ADR has grown extensively in the last few years, but it is particularly important for construction, due to the specialised nature of some of the issues in dispute and the need to maintain cash flow down the supply chain. This is why statutory adjudication is so attractive for the industry, with its use likely to increase globally.

Key trends for 2017

Market insight: 2017 promises to be an interesting year in developed markets. In the US, Donald Trump has begun his presidency and it will be a case of waiting to see if he delivers on his campaign pledge of $1tn of infrastructure spending. There has already been a great deal of interest from global companies in the US market in light of the stated upcoming increase in spending.

In Britain, the Article 50 process to begin negotiations to leave the EU is scheduled to start in March 2017. The extent of Brexit’s impact on the British economy remains unclear, and the Government may be tempted to increase infrastructure spending, to try and combat any bearish economic outlook. The details of the Brexit debate need no repeating and ultimately remains an unknown as to what the deal for Britain leaving the EU will contain and what the resulting impact will be.

Canada and Australia have announced new major projects, with Canada in particular committing to a substantial new infrastructure budget. This was central to Justin Trudeau’s election campaign, although many critics have pointed out that it is now a year into his leadership and not many projects have actually begun. Some believe that it is tougher to stimulate the economy through infrastructure spending than many assume.

Investment across the African continent is likely to remain strong, especially if the industry faces a slowdown in developed economies. One of the headline projects agreed at the end of 2016, which may begin to take shape in 2017, is the gas pipeline from Nigeria to Morocco. This is a multinational project of substantial scale and, if successful, could encourage similar co-operation on projects in other regions of the African continent.

Elsewhere, Indonesia has recognised its critical need for an increase in infrastructure spending, but public finances remain constrained, making it difficult for the government to push on with such a model. The Latin American region also continues to focus heavily on infrastructure, given that previous investment has not kept pace with social growth.
Clyde & Co’s Firm Foundations programme informs and empowers in-house counsel and industry participants, by providing topical and commercially focused insights into requirements and developments in the law relating to construction and infrastructure.

The Firm Foundations programme provides training across a broad range of disciplines, focusing both on those who are new to a topic and on those who would like to refresh their understanding in a particular area. Aiming to go beyond the provision of technical legal advice, this complimentary programme provides real examples, practical tips and commercial perspectives that can be applied both on site and in the office.

What our programme offers
- Training by experienced members of our global projects and construction group who have detailed first-hand experience of the topics in question
- An engaging environment that allows attendees to participate fully and to interact with speakers and other attendees
- A forum that focuses on developing core knowledge on key construction and infrastructure law topics
- The opportunity to network with attendees at all levels and from all corners of the industry
- A tailored list of topics which is determined in advance by attendees, on the basis of real issues encountered in their day to day operations

Please email infrastructure@clydeco.com to express your interest in attending future Firm Foundations seminars.
Global projects and construction group

With over 150 lawyers across six continents, our global projects and construction group have an enviable track record, and combine global expertise with local knowledge. We are proud to have created an exceptionally strong group, both through organic growth and through attracting leading lawyers in the sector. Our global group advises across the whole industry, with expertise in all infrastructure sectors.

Boasting significant capabilities in both litigious and non-contentious aspects of projects and construction, we offer clients a rounded perspective – whether at the front end of developments or on the occasions when disputes occur. We work as an extension of our clients’ in-house teams providing support across the full project life cycle:

- Full project lifestyle
- Procurement & planning
- Project Finance & PPP/PFI
- Construction & development
- Operation & Asset management
- Dispute resolution