

International Construction Newsletter

This Issue:

2 When International Standards Meet Local Laws
by Owen Delaney

4 Understanding English Law When it Governs the Contract
by Nick Henchie

6 Long-Term Contracts in Developing Countries Are at Risk of Being Set Aside Due to Financial Hardship
by Alden Atkins

11 Building in China — Some Legal Considerations
by Nick Molan

13 The UK Bribery Act: Cleaning Up — But at What Cost?
by Mark Beeley

15 Shielding MENA Construction Projects from Political Risk
by Tim Tyler, Susanna Fidoe, and Gareth Jones

24 Amending FIDIC Contracts — A Dozen Key Issues
by Nick Henchie

27 Construction Practice Update

Welcome to the inaugural Vinson & Elkins International Construction Newsletter produced by members of V&E's International Construction practice group.

V&E's Construction Practice Group is comprised of industry leaders who have a long standing track record, and deep experience of representing project owners, developers, contractors, architects, engineers, subcontractors and vendors in construction-related projects and disputes around the world.

Their experience includes: onshore and offshore oil and gas facilities; refining and desalination facilities; industrial gas production; chemical; petrochemical; and other manufacturing plants; pipelines; nuclear and fossil fuel power plants; commercial projects; residential projects; government contracts; and municipal projects, including convention centers and roads.

This inaugural edition includes contributions from five of our global offices reflecting the breadth of our recent experience and depth of the team.

For those that are not familiar with some of its more distinctive characteristics, we have an article considering some of the pitfalls of contracting under English law which seems to be the choice of governing law for so many international projects these days. We also have the first in a series of articles which will follow in subsequent editions of this newsletter on construction contracts in the UAE. This is followed with contributions concerning the risks of long-term contracts in developing countries and some legal considerations when doing business in China. We also have an article explaining how companies might protect against the political risk inherent in many construction projects and we have a short report on the UK Bribery Act, which is currently generating a lot of concerning publicity for those that might be contracting with UK companies or might be incorporated in the UK. Finally, we look at some of the most common current amendments being sought both by owners and contractors to the FIDIC International Standard Forms of Contract.

When International Standards Meet Local Laws

Part 1: Construction Contracts in the UAE and Middle East

While it is still common in the UAE for construction contracts to be governed by English law, the Abu Dhabi government passed Law No. 21 of 2006 to mandate prescribed standard forms of construction contract for projects initiated by government entities. International contractors may have taken heart at the time to discover that these forms were heavily based on FIDIC forms. However, familiarity with one contract form can lead to a false sense of security and unexpected surprises when applied in another jurisdiction. Whether FIDIC, any other standard form or bespoke, the contract itself is only half the story. Construction contracts governed by UAE law will always be subject to the UAE Civil Code, and (not unlike many other Civil Codes) there can be unwelcome surprises for the unwary.

For example, Article 390 of the UAE Civil Code permits contracting parties to agree in advance what compensation will be payable in the event of a breach, in much the same way that English law has developed to

The real sting in this is that it can apply even if the contract is governed by a law other than UAE law. If the property in question is situated in the UAE, a UAE employer seeking the enforceability of decennial liability could expect reasonable prospects of success in the local courts.

permit the concept of liquidated or agreed damages clauses. However, Article 390 grants judges the discretion to vary the agreement downwards so that the levels of damages equal the actual loss suffered. There are similar provisions giving judges such discretion in many other Middle Eastern Civil Codes including in some (the Jordanian for example) arguably the discretion to vary the damages upwards as well as downwards to reflect the true loss. While common law judges usually refrain from interfering with the parties' freedom to agree on commercial terms (whether imprudent or otherwise) under the Civil Codes of many Middle Eastern countries,

a judge has the discretion to reduce the amount to be paid to zero or to some other sum which it considers to be appropriate. How, in practice, such discretion is exercised in local courts is not always clear and such precedents as there are from local courts can be very hard to follow or

The general position under Article 267 is that a contract may be terminated in three ways: mutual consent; court order; or by force of law (even though this Article appears to be directed at cases where the contract is silent on the matter).

draw any reliable conclusions from. Discerning the true effect of such provisions can be far from easy and consequently it is perhaps no surprise that, notwithstanding that they have the power to do so by applying the governing law, Arbitral Tribunals are often more reluctant to interfere with the bargain and exercise such discretion than judges in the local courts.

Perhaps one of the major differences between the common law and civil jurisdictions in a construction context is the notion of decennial liability which can still come as an unwelcome surprise to many international contractors. For example, Article 880 of the UAE Civil Code imposes a joint liability on the contractor and the designer for a period of 10 years for the total or partial collapse of a building or for a defect which threatens the stability of the building. This liability is strict; even if the contractor can be shown to have used reasonable skill and care and complied with recognized standards, or if the defect was unforeseen, decennial liability still applies, irrespective of any shorter defects liability period or other such contractual limitation. The real sting in this is that it can apply even if the contract is governed by a law other than UAE law. If the property in question is situated in the UAE, a UAE employer seeking the enforceability of decennial liability could expect reasonable prospects of success in the local courts. Again, it might be considered >

When International Standards Meet Local Laws

Part 1: Construction Contracts in the UAE and Middle East – *cont.*

that such arguments would have less prospects of success before an Arbitral Tribunal composed of common law arbitrators who might be expected to give effect to the express bargain agreed including limitations on liability in preference to applying the local, but non governing law of the contract.

While on the subject of limitation, parties should be aware that under Article 473 of the UAE Civil Code, the limitation period for contractual claims in civil matters in the UAE is 15 years from the date the cause of action arises (and generally 10 years in commercial matters under Article 95).

The issue of unilateral termination of a contract still provokes debate in the UAE. Termination is addressed in several articles of the UAE Civil Code. However, depending on interpretation (and with the absence of clarity provided by binding precedent) a court order may be required for a unilateral termination to be enforceable. The general position under Article 267 is that a contract

Time and again Arbitral Tribunals show themselves to be reticent to apply what might be considered to be alien concepts quite as freely as applied by local courts.

may be terminated in three ways: mutual consent; court order; or by force of law (although this Article appears to be directed at cases where the contract is silent on the matter). While strong arguments can be made (for example, under Articles 246 and 258) for the legality of unilateral termination where the contract provides for such, if a challenge is made it will often be submitted to the courts. The position can also be complicated if disputes (including as to termination) have been agreed to be submitted to International Arbitration rather than the local courts.

UAE law has similar principles to English law on mitigation. However, in the UAE context, mitigation could

be even more crucial. A positive duty is placed on the innocent party to mitigate losses to the extent that recoverable losses are those which cannot be avoided by exerting reasonable effort. Furthermore a judge can reduce the level of compensation (even to zero) where the innocent party participated in or aggravated its own loss. When things go well, a construction contract itself seems to be relegated to simply a procedure manual for managing the associated project, and it's only when things go wrong, that it comes to the fore. When familiar precepts are placed in different jurisdictions, the impact of the local law can fundamentally alter their treatment. Contractors and employers alike should always consider the impact of local law and take appropriate measures to mitigate such risks. One such measure can be to consider International Arbitration for the resolution of disputes. Time and again Arbitral Tribunals show themselves to be reticent to apply what might be considered to be alien concepts quite as freely as applied by local courts. This is particularly so where the application of such concepts drives the proverbial coach and horses through the express terms of the bargain. **VE**



Owen Delaney

V&E Associate, Abu Dhabi

+971.2.412.0702

odelaney@velaw.com

Understanding English Law When it Governs the Contract

English law is widely regarded as a well-developed governing law with a good deal of precedent case law which means that parties can enter into a contract knowing, or having a pretty good idea, how their agreement will be construed. However, English law regularly throws up surprises for contracting parties, particularly in construction contracts. Indeed, some of the more crucial terms that are found in most international construction contracts, may not be construed or interpreted in the same way under English law as they would under many other laws.

One of the most common mistakes made when negotiating contracts governed by English law, relates to the limitation of liability clause. It is usual for contractors to try and limit their liability in respect of any indirect and

English law, like many legal systems, provides that the parties may agree set damages for specific events such as delay liquidated damages.

consequential loss arising as a consequence of a breach of the contract. In doing so, the typical types of losses which a contractor usually seeks to exclude are the losses of revenue, production and profit which an owner may suffer by reason of the contractor's default. However, many of those very losses are not actually excluded if all that is excluded are "indirect and consequential losses" because under English law such losses are often categorised as direct losses. Careful and special attention needs to be given to a limitation of liability clause under a contract governed by English law to ensure that it does exclude the very loss which the party actually seeks to exclude.

Another quirk of English law is the concept of "time at large." English law recognises that if an owner wishes to preserve its right to deduct liquidated damages for delay to completion, then there has to be an adequate mechanism in the contract to protect those liquidated damages in circumstances where the contractor is delayed through no responsibility of his own. Thus, for example, where the owner prevents the contractor from

entering the site, with the consequence that the contractor could not complete by the agreed date, unless there is a mechanism in the contract to allow time for completion to be extended, the owner's right to deduct liquidated damages would be lost, and time would become at large, meaning that effectively the contractor had a reasonable time to complete the works. It is not unusual to see owners seeking to negotiate a construction contract with very limited grounds for extending time, but rarely would it be in the owner's interest to circumscribe the grounds for extensions of time so narrowly that in an event of default for which the owner is responsible, there are no mechanics to extend the time for completion. Doing so invariably leads to "time at large" arguments and the potential failure of the liquidated damages clause.

English law, like many legal systems, provides that the parties may agree set damages for specific events such as delay liquidated damages. Such damages are enforceable under English law where they represent a "genuine pre-estimate" of the loss that will be suffered as a result of the breach of the primary obligations.

Although it is acknowledged to be very difficult to challenge a liquidated damages clause under English law, unreasonable clauses often give rise to penalty arguments.

However, there are circumstances where such damages can be challenged, most usually where they result in what is regarded under English law as a penalty. Whilst other legal systems positively embrace "penalty clauses," a penalty under English law is unenforceable. Although it is acknowledged to be very difficult to challenge a liquidated damages clause under English law, unreasonable clauses often give rise to penalty arguments creating uncertainty. The most likely circumstance where a clause will be held to be a penalty is where the agreed sum is found to be an extravagant and unconscionable amount in comparison with the greatest loss that could conceivably be proved to have flowed from the breach. Another common ground for challenge is whether the agreed sum is a lump sum >

Understanding English Law When it Governs the Contract – *cont.*

made payable by way of compensation on the occurrence of one or more certain events, some of which may occasion serious damage and others only minor. In such circumstances it can be hard to justify the clause as being

Thus, for international construction contracts, governed by English law, unless the contract contains an express right to suspend for non-payment, it is unlikely that the contractor has the right to do so.

a genuine pre-estimate. Particular care should be taken when drafting such clauses where there is a possibility of sectional completion or partial possession under the contract. The contract ought to provide a mechanism to allow the liquidated damages to be pro-rated in such circumstances, otherwise the clause for liquidated damages may fail.

Many contractors seek to avoid giving warranties as to fitness for purpose or that the completed product or work will be reasonably suitable for the purpose for which it is required. However, for an EPC contract where the contractor is responsible for design and construction, it is highly likely that even without an express warranty of fitness for purpose there is still an implied term that the finished work would be reasonably fit for purpose. That implied term can be rebutted where the specific standards to which the work is to be carried out are expressly stated in the contract.

Surprisingly, the contractor's remedies for non-payment under English law are vague and somewhat lacking. Whilst the situation in UK domestic construction projects is improved by a statutory right to suspend, that does not apply to contracts where the only reason the law of the contract is English is because the parties have agreed it. Thus, for international construction contracts, governed by English law, unless the contract contains an express right to suspend for non-payment, it is unlikely that the contractor has the right to do so. Indeed, the contractor would possibly commit a repudiatory breach of the contract if it did suspend for non-payment. Similarly, a failure to make payment does not necessarily give rise to a

right for the contractor to terminate. Case law has held that the failure to make successive periodic payments does not, of itself, give rise to a right to terminate the contract. Nevertheless, a contractor would acquire a right to terminate once it is clear the employer has no intention to ever make payment and has effectively repudiated the contract. When that right actually arises is often very difficult to tell, meaning the contractor takes a risk if it chooses to terminate for non-payment. For these reasons, it is often sensible to negotiate express rights to suspend and/or terminate in a non-payment situation.

An interesting and little known statute outside of the UK is the Contracts (Rights of Third Parties) Act 1999. Although, when referred to in a contract it is usually simply to say that it does not apply, it is useful to bear it in mind since it can be used to confer rights on third parties that are not actually a party to the contract. Typically, the situation where this has been used, is to extend the rights of enforcement to third parties who have the benefit of indemnities under the EPC contract. Equally, it can be used as a mechanism by owners to have rights written into sub-contracts, particularly with major suppliers or consultants with design responsibility, to give remedies to the owner when there is default under the sub-contract.

Finally, often when a contract is governed by English law, one finds that the parties provide for arbitration in London. This will usually mean that the Arbitration Act 1996 would usually apply and the parties should be aware that by virtue of Section 69 of that Act, the parties have the right to appeal an arbitral award to the Courts in England, although that provision can be contracted out of. [VE](#)



Nick Henchie

Head of V&E's International Construction Practice - London
+44.20.7065.6087
nhenchie@velaw.com

Long-Term Contracts in Developing Countries Are at Risk of Being Set Aside Due to Financial Hardship

Major construction projects in emerging and developing economies can be risky. They typically require the investment of enormous amounts of cash, mostly borrowed, to be repaid by the long term operation of the facility being built. This means that the investors and lenders are exposed to long-term political and economic risks in the host country. Although the current climate may be favorable, the political and economic conditions may not always have been so stable. While the project participants all expect the project to generate sufficient revenues to repay debt and earn attractive returns, a revival of past conditions would likely cause the project to collapse.

To mitigate those risks, project participants and lenders frequently look to host country entities for financial protection. The form of the protection is limited only by the imagination of the business people and lawyers, but in general they are designed to provide a financial backstop if the project's revenues fall short of its needs. The protection may be a take-or-pay contract, guarantees, minimum payment requirements, or contingency payments. The financial support might be provided by the host government itself or by a local company, such as a state-owned enterprise.

In many civil law countries, however, those financial support provisions may not provide as much protection as investors intend. They are designed to become effective

Contracts are not so easily set aside in the US, which explains why the civil law hardship statutes come as a surprise.

only when the unexpected happens — when the project revenues fall short. Depending on the form of the financial support, the obligations might be quite burdensome, often made worse by other strains created by the same economic conditions that triggered the financial support. Companies that promised to provide economic support may be tempted to look for ways to ease their obligations. They would have little likelihood of success in the U.S. or England, because courts in those countries are reluctant to set aside obligations due to financial hardship. In many civil law countries, however, there are so-called hardship

statutes which allow courts to set aside — or sometimes even “rebalance” — contracts that are perceived as unduly burdensome due to unexpected events.

Impossibility and Impracticability Under U.S. Law

Contracts are not so easily set aside in the U.S., which explains why the civil law hardship statutes come as a surprise. In the U.S., contracts are normally governed by

Historically, under U.S. law, contracts could be set aside only if they became impossible to perform.

state law. While the laws vary somewhat among states, in general contracts are to be enforced as written, and the parties must accept the consequences of their allocation of risks, even if unexpected events make the allocation more burdensome than expected.

Historically, under U.S. law, contracts could be set aside only if they became impossible to perform. Much litigation ensued over how impossible performance really was. More recently, the standard has been eased somewhat to excuse performance that has become “impracticable.” According to the Restatement (Second) of Contracts, a contract is discharged when “performance is made impracticable without [that party’s] fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made.”¹ The Uniform Commercial Code contains similar language excusing performance when it has become “impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made” or by compliance with applicable law.²

Although the term “impracticable” suggests a more relaxed standard than literal impossibility, in practice the courts apply it very strictly. New York courts, for example, excuse performance for impracticability “only in extreme circumstances.”³ Financial hardship is not enough, “even to the extent of insolvency or bankruptcy.”⁴ Similarly, courts in other jurisdictions have held that contract performance is not made impracticable just because performance has become more economically burdensome than anticipated.⁵ U.S. courts will rarely excuse performance due to economic hardship. >

Long-Term Contracts in Developing Countries Are at Risk of Being Set Aside Due to Financial Hardship – *cont.*

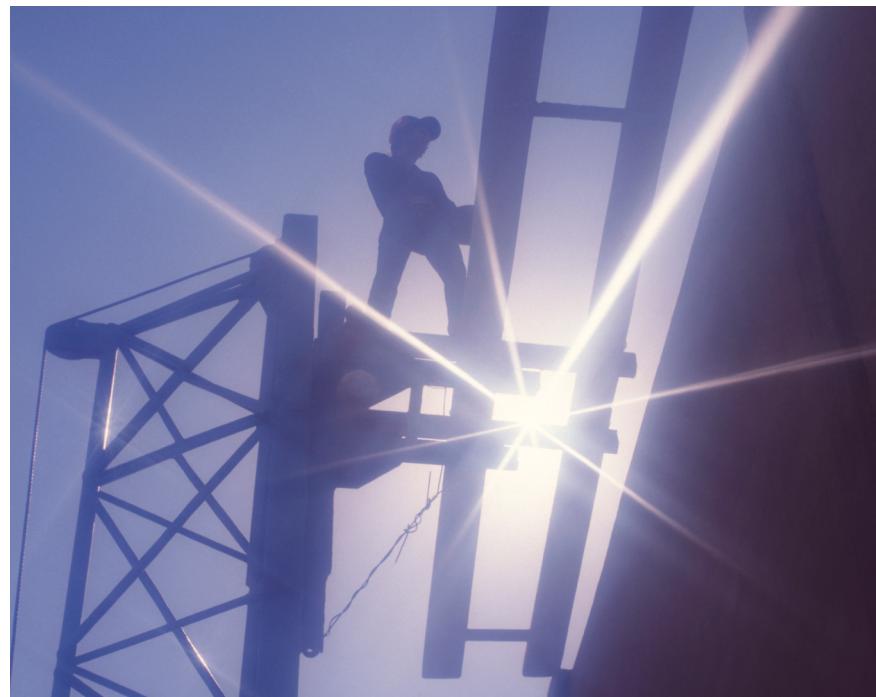
Frustration under English Law

In England, as in the U.S., the courts generally take the view of “freedom of contract,” and contracts are not easily set aside. As a general rule, if performance of a contract becomes more difficult or even impossible, the party who fails to perform is liable in damages.⁶ A party may be relieved from further obligations only if an event results in the ‘frustration’ of the contract. A contract may be

If a party has gained a valuable benefit under the contract before the frustrating event, the court may require it to pay a “just” sum for the benefit regardless of whether any money was paid or payable before the frustrating event.

discharged on the ground of frustration when an event occurs, after the contract has been formed, which is so fundamental as to strike at the root of the contract.⁷ The event must be entirely beyond what the parties contemplated when they entered the contract, must not be the fault of either party and must render further performance impossible, illegal or radically different from that contemplated by the parties at the time of the contract.⁸ If the contract contains a force majeure clause that covers the particular event, then the frustration doctrine will not apply.⁹

If a court finds a contract has been frustrated, the general rule is that the “loss lies where it falls” and no claim can be made for the value of a partially completed contract.¹⁰ The ability of a party to recover money paid under a contract before the frustrating event occurred depends on the applicability of the Law Reform (Frustrated Contracts) Act 1943. Under the Act, money paid before the frustrating event can be recovered, and money due but not paid ceases to be payable.¹¹ If a party has gained a valuable benefit under the contract before the frustrating event, the court may require it to pay a “just” sum for the benefit regardless of whether any money was paid or payable before the frustrating event.¹² If the Act does not apply, the parties must then rely on common law rules which provide that money paid before the frustrating event is recoverable only if there is a total failure of consideration.¹³ In practice, it is difficult to set



aside contracts under the English doctrine of frustration, and it is very unlikely that a court would set aside a contract for a change in economic conditions that was unexpected but not entirely unforeseen.¹⁴

The Civil Law Doctrine of Hardship and Unforeseeability

In contrast, many civil law countries have statutes that allow courts to set aside long-term contracts for financial hardship arising from unexpected events. In general, the doctrine applies where “the balance of a contract is upset” due to unforeseeable events which make performance “intolerably onerous” even if not literally impossible.¹⁵

The formulation of the hardship doctrine varies between countries. In France, where the concept was first developed, it has been limited to administrative contracts with the government because the government retains the power to modify or terminate its contracts.¹⁶ German courts apply a concept of imbalance between the parties. They allow contracts to be set aside where

Long-Term Contracts in Developing Countries Are at Risk of Being Set Aside Due to Financial Hardship – *cont.*

a “fundamental disequilibrium in the contracts” imposes an “undue burden” on one party.¹⁷ Italy incorporated the concept into its Civil Code of 1942.¹⁸ Many countries > with significant investment and construction projects have also adopted the concept, including Argentina, Brazil and the United Arab Emirates.¹⁹ Similar concepts are incorporated in the UNIDROIT Principles, a set of rules

If a party receives a request to renegotiate under the hardship statute, it is probably obligated to engage in good faith negotiations.

intended to guide international commercial contracts. Article 6.2.2 excuses performance due to “hardship” which arises when the occurrence of events which “fundamentally alters the equilibrium of the contract either because the cost of a party’s performance has increased or because the value of the performance a party receives has diminished.”²⁰

The statutes vary, but they have common themes. Literal impossibility — the test under traditional common law in the U.S. — is not required. Nor is impracticability or frustration necessary. Rather, it is sufficient if performance has become “excessively onerous,”²¹ “oppressive,”²² “fundamentally alters the equilibrium of the contract,” or the “value of performance a party receives has diminished.”²³ In addition, the events leading to the hardship must not have been foreseeable at the time of contracting, those events must have been beyond the disadvantaged party’s control, and the parties must not have allocated the risks of those events in their contract.²⁴

The remedies for hardship also vary. The statutes begin by encouraging the parties to renegotiate the contract. If a party receives a request to renegotiate under the hardship statute, it is probably obligated to engage in good faith negotiations. If the parties are unable to reach an agreement, then a court or arbitral tribunal is authorized to terminate the contract. Some statutes, like Brazil, create incentives to reach an agreement, because they make the termination effective retroactively to the date the lawsuit was commenced.²⁵ Some statutes go even further and allow the court or arbitral tribunal to rewrite the contract to impose their sense of a new

“equilibrium.”²⁶ Thus, a hardship statute can upset the carefully structured allocation of risks and obligations in the original contract.

Implications for Participants in Long-Term Projects

These civil law statutes have enormous implications for participants in project financed construction projects. The projects are almost always designed to ensure enough cash flow to pay for the project and a return on investment. To protect against the economic and political risks inherent in emerging market economies, parties to projects in those countries often include financial support provisions to fill any unexpected revenue shortfalls.

Consider the example of a power plant in a developing country. The government wants international investors to build a plant to provide badly needed power for consumers and to support industrial growth. Developers are willing to construct and operate the plant, but the host country risks are too great without some protection. The protection is provided in a carefully crafted agreement in which a local state-owned company agrees to provide contingency payments if certain events occur. Construction begins, and the first phase of the plant

Financial support provisions are designed to be invoked under conditions that the parties hoped would not occur, which means the events are susceptible to being characterized as unforeseeable.

commences operation, but then the economy suddenly turns sour. The project participants invoke the financial protections of their contract. The state-owned company never expected it would have to pay contingency payments, and current conditions suggest the obligation may last for months or years. The company finds itself in financial distress due to the economic disruption, and — because the company is state-owned — it may be politically unpalatable to spend local money to pay foreign investors. It looks for a justification to resist paying.

The statutory hardship provisions may provide that legal justification. Financial support provisions are designed to be invoked under conditions that the parties

Long-Term Contracts in Developing Countries Are at Risk of Being Set Aside Due to Financial Hardship – *cont.*

hoped would not occur, which means the events are susceptible to being characterized as unforeseeable. The state-owned company may view its obligations as onerous compared to the benefits it is actually receiving. >

The possibility that the contingency payments could be excused under a hardship statute may jeopardize the entire project. Without the contingency payments, there may not be enough cash to finish the construction. Later phases of the project may be suspended. And the economics of the entire project over a period of years or decades is at risk. The careful allocation of risks and obligations could be left in ruins if a court or tribunal finds the hardship statute applicable.

Although claims under hardship statutes are not often successful, the assertion of them can bring a project to a standstill. It can take months or years to resolve the dispute in litigation or arbitration, leaving the project in limbo in the meantime. Although the statutes usually do not permit a party to withhold performance during the

Therefore, the financial protection provisions should be written as broadly as possible to say that they are intended to protect against economic change or political unrest.

dispute, the reality is that the state-owned company probably will withhold payment anyway. The economic stress on the project and resulting uncertainty can create significant leverage for the party seeking to eliminate or modify its obligations. And all of this will be in the face of contract provisions that were designed to protect investors, lenders and developers from precisely that type of economic duress.

Those risks can be mitigated, but not eliminated. The best solution is to choose U.S. or English law to govern the contract, but that might not be palatable to the host country or state-owned enterprises providing financial support. If local civil law must be chosen, the foreign participants should evaluate any hardship statutes under local law. Contracts should be drafted to minimize the risk of hardship claims. Foreign investors may be tempted to include waivers of the hardship statute, but there is significant doubt that such a waiver would be enforceable. A better approach is to draft the



Long-Term Contracts in Developing Countries Are at Risk of Being Set Aside Due to Financial Hardship – *cont.*

contract to minimize the opportunity for hardship claims to be raised. Hardship statutes apply only when the events were unforeseeable, the risks were not allocated in the contract, and the contract becomes imbalanced. > Therefore, the financial protection provisions should be written as broadly as possible to say that they are intended to protect against economic change or political unrest. In addition, contracts should be written to explain the benefits that the party is receiving in return for providing financial support to the project, thus making it harder to argue in hindsight that the benefits and burdens are imbalanced.

Finally, contracts should be drafted to require support payments to be made even if the party challenges the obligation in court or arbitration. To be even stronger, the provision should say that the payment provision can be enforced with a preliminary injunction or interim measures in arbitration. It still might take several months to obtain an award of interim measures requiring the party to make the disputed payments, but the provision may discourage hardship claims. At the very least, such a provision will moderate the harm that could arise if a hardship claim is asserted.

Conclusion

The parties to construction contracts in emerging market countries may be taking risks they thought they had eliminated in their contracts. They may have written their contracts to include financial protection against the economic or political risks often found in developing countries, but under local civil law those provisions might not provide as much protection as hoped. Because the financial protection is probably triggered only by events that the parties hoped would not occur, they are at risk of being challenged under hardship statutes. The party obligated to provide the support may claim that the events leading to its liability were unforeseeable, and the resulting obligations are imbalanced and unduly onerous. To mitigate that risk, contracts should be drafted to make clear that the risks of economic or political turmoil are being assumed by the party providing support. Further protection can be obtained by requiring parties to pay financial support while the obligation is being challenged. Nevertheless, the hardship statute provides a mechanism for a party to resist paying financial support, which can be used as leverage in efforts to

renegotiate protections for which the parties had bargained before investing large sums of money. **VE**



Alden Atkins

V&E Partner, Washington
+1.202.639.6613
aatkins@velaw.com

- 1 Restatement (Second) of Contract § 261.
- 2 Uniform Commercial Code § 2-615(a)(1978).
- 3 *Kel Kim Corp. v Central Markets, Inc.*, 519 N.Y.S.2d 384, 385 (N.Y. 1987).
- 4 *406 East 61st Garage, Inc. v Savoy Fifth Avenue Corp.*, 23 N.Y.2d 275, 281 (N.Y. 1968).
- 5 *E.g., Valero Transmission Co. v Mitchell Energy Corp.*, 743 S.W.2d 658, 663 (Tex. App. 1988).
- 6 *Paradine v Jane* (1647) Aleyn 26.
- 7 *J.Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1.
- 8 *Bank Line Ltd v Arthur Capel & Co* [1919] AC 154; *Taylor v Caldwell* (1863) 3 B&S 826; *Denny, Mott and Dickson v James Fraser* [1944] AC 265; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675.
- 9 *Jackson v Union Marine Insurance Co Ltd* [1874] LR 10 CP 125.
- 10 *Appleby v Myers* [1867] LR 2 CP 651.
- 11 Section 1(2) Law Reform (Frustrated Contracts) Act 1943.
- 12 Section 1(3) Law Reform (Frustrated Contracts) Act 1943.
- 13 *Chandler v Webster* [1904] 1 KB 493.
- 14 *Gold Group Properties Ltd v BDW Trading Ltd* [2010] EWHC 323.
- 15 Abdul F. Munir Maniruzzaman, "State Contracts with Aliens: The Question of Unilateral Change by the State in Contemporary International Law," 9 J. Int'l Arb. 1992 Volume 9 Issue 4, p. 152 (citing J.L. Delvalve, "The French Law of 'Imprecision' in International Contracts," 2 Int'l Cont. Law and Finance Rev., 3, 5 (1981)).
- 16 Wolfgang Peter, *Arbitration and Renegotiation of International Investment*, 189 (1995).
- 17 Norbert Horn, *Changes in Circumstances and the Revision of Contracts in Some European Laws and in International Law in Adaptation and Renegotiation of Contracts in International Trade and Finance* (Horn ed. 1985).
- 18 Italian Civil Code of 1942, Arts. 1467 & 1468 (allowing a party to terminate a contract when "extraordinary and unforeseeable events" make performance "excessively onerous").
- 19 Brazil Civil Code §§ 478 & 479; Argentina Civil Code Art. 1198; UAE Civil Code Art. 249.
- 20 Art. 6.2.2, UNIDROIT Principles 2010.
- 21 Brazil Civil Code § 478.
- 22 United Arab Emirates Civil Code Art. 249.
- 23 Art. 6.2.2, UNIDROIT Principles 2010.
- 24 Art. 6.2.2, UNIDROIT Principles 2010.
- 25 Brazil Civil Code § 478.
- 26 United Arab Emirates Civil Code Art. 249; Art. 6.2.3(4)(b), UNIDROIT Principles 2010.

Building in China – Some Legal Considerations

Recent data on the Chinese construction market confirmed it as the second largest in the world, and it is expected to surpass the U.S. to take the number one spot by 2020. Since the Central Government identified the significance of the construction industry for China's modernisation plans during the early 1980s, the industry has boomed to the point that today construction-related output is valued at US\$1.4 trillion, equivalent to approximately 24 percent of China's GDP. The current strength and expected growth of the construction market is underpinned by China's rapid population growth, an accelerated trend towards urbanization, increased industrial output and the increased infrastructure and other capital needs stemming from the foregoing.

However, although China's economy has become increasingly open, particularly since China's accession to the World Trade Organization in 2001, the construction industry remains relatively protected by a combination of

Mainland China is governed by a multi-tiered civil regime which is constantly evolving at the hands of the central, provincial and municipal governments.

legal, political and economic mechanisms which must be understood and managed by foreign construction and services firms hoping to tap into this market. In this article we set out some of the legal considerations which should be borne in mind when considering the relative advantages and disadvantages for foreign construction companies of seeking to do business in China.

Legal Barriers to Foreign Construction Companies
According to the National Statistics Bureau of China, there are approximately 59,000 construction enterprises in China, but only 351 foreign firms (not including firms from Hong Kong or Macau) that have registered activity on the Mainland. Interestingly this number has been steadily decreasing since 2004, when the number stood at 386. The majority of these foreign companies are based in Beijing and Shanghai, they employ (on average) approximately 300 people, and realised a combined total profit in 2009 of almost US\$350 million.

However, focusing on wholly foreign-owned companies can be misleading, given that (as a general rule) foreign companies must team up with a local partner (either in joint venture or by creating a special purpose company) to be eligible to work in the Chinese market. This obviously involves a degree of risk, both in selecting a suitable partner and forming a cohesive working unit with that partner on an ongoing basis. Nonetheless, it also reflects a general underlying symbiosis between foreign companies, whose strength often lies in their technical and management know-how, and local companies, whose strength often lies in their manpower, local knowledge and connections.

A key exception to this general prohibition on foreign construction companies operating in China in their own right is that foreign firms may be awarded contracts for construction projects financed by foreign governments, international and multilateral organizations (most notably, the World Bank and the Asian Development Bank) or foreign companies. This is generally a good fit, given that in scope and technicality these projects are often complex, which provides sophisticated foreign contractors with an advantage over their lower cost domestic competitors for such work.

Legislative Framework

Mainland China is governed by a multi-tiered civil regime which is constantly evolving at the hands of the central, provincial and municipal governments. The following laws passed by the central government are of particular significance for the construction industry (and apply equally to local participants, foreign companies and foreign/local joint ventures):

- The *Contract Law of the PRC*, notably Chapter 16 which defines a construction project contract to include survey contracts, design contracts and project construction contracts. Chapter 16 also sets out certain general principles for tendering, contractual terms, supervision and inspection of the site and works, and remedies;
- The *Construction Law of the PRC*, which regulates construction licensing, contracting, supervision of construction projects, occupational health and safety, project management and quality regulation; and >

Building in China — Some Legal Considerations – cont.

- The *Invitation and Submission of Bids Law of the PRC*, which standardizes the procurement process (including bid invitation and submission) for projects with a bearing on public interest, including large-scale infrastructure and public utility projects, and projects which are funded by the Chinese government, foreign governments or multilateral organizations.

In addition to these laws of general application, there are a number of laws which have been prepared by the Ministry of Construction (the Central Government Ministry which has general oversight for construction activities and the construction industry in China) specifically targeting foreign firms operating in China.

These include:

- The *Regulations on Administration of Foreign Invested Firms*;
- The *Regulations on Foreign Invested Construction and Engineering Firms*; and
- The *Regulations on the Management of Foreign Funded Urban Planning Service Enterprises*, each of which seeks to reconcile the general construction laws described earlier with various laws governing foreign investment in China, including the *Sino-Foreign Equity Joint Ventures Law* and the *Wholly Foreign-Owned Enterprises Law*.

The above represents a sample of the major legislation which is likely to apply to a foreign-owned construction company doing business in China. It is important to remember, however, that behind this are a significant number of further laws, regulations, directives, issues papers and memoranda issued by different levels of China's bureaucracy which must be considered in

reaching a decision about whether to participate in a particular project. However there is a growing number of law firms and other specialist advisers, both inside China and elsewhere, who are able to assist companies in navigating this complex field.

Standard Form Contracts

As with many jurisdictions, standard form contracts have been introduced within the Chinese construction industry to improve the efficiency of the contract negotiating process and to manifest certain generally accepted principles about the way business is done in the market.

Foreign contractors generally draw comfort from the fact that FIDIC conditions of contract have been widely used in China for the delivery of major construction projects for a number of years now. It is important to recognize, however, that the FIDIC form is primarily used for projects financed by foreign governments, international and multilateral organizations or foreign companies.

For projects procured by the Chinese public sector or state-owned enterprises, there are a significant number of Chinese standard form contracts, and their use in a project may be influenced by the industry in which the project is situated or the nature of the procuring entity. The most important general form of construction contract is the *Model Conditions of Contract for Works of Building Construction*, released by the Ministry of Construction and the State Industrial and Commercial Administration Bureau in 1991 and re-issued in a revised second edition in 1999. This general form of agreement and related forms are constantly being revised and refined with reference to prevailing international trends and developments in relevant laws. >



Building in China – Some Legal Considerations – *cont.*

Most recently, the National Development and Reform Commission released draft versions of the *Standard Project Design and Construction Main Contractor Bidding Documents* and the *Simplified Standard Construction Project Bidding Documents* (which are basically simplified versions of the *Standard Documents for Tendering of Construction Projects* issued in 2007). The public consultation process regarding these drafts closed at the end of December 2010, and many had been expecting final versions to be released in the first half of this year. However, at the time of writing this article, these were yet to be published.

In addition to the forms of contract published by the government bodies identified above, many other public bodies and state-owned companies have also created standard conditions of contract for their works, including (by way of example) the Ministry of Water Conservancy, the Ministry of Electricity and the State Industrial and Commercial Administration Bureau.

To Build or Not to Build?

The Chinese economy has become synonymous with boundless enthusiasm and potential, and few people challenge the fundamental role which the construction

industry has played and will continue to play in the future of that growth.

This article has discussed some of the preliminary legal issues which a construction enterprise should consider when deciding whether to pursue business opportunities in China. Of equal importance will be considerations regarding the economics and commerciality of such opportunities, cultural constraints to doing business in China and the organizational fit (in the case of a joint venture structure) within an enterprise's broader structure. That said, in light of prolonged economic difficulties in more familiar markets, it may be timely for skilled foreign construction companies to consider a foray into China. **VE**



Nick Molan
V&E Associate, Hong Kong
+852.3658.6432
nmolan@velaw.com

The UK Bribery Act: Cleaning Up – But at What Cost?

On 1 July 2011, the long delayed and much talked about Bribery Act 2010 (Act) came into force in the UK. The Act will have a significant practical impact on any company which is either incorporated in the UK or does business with companies based there. In addition, on an individual level, any person who holds any form of UK citizenship or who resides in the UK is also exposed to liability under the Act, regardless of where in the world they might be currently operating.

Given the perceived high risk environments of many modern major international construction projects, and also the degree of opportunity in the procurement and permitting life cycles, corruption has always been a

concern in this field; but the Act puts a new emphasis on this, going beyond the US Foreign Corrupt Practices Act (FCPA) by focussing on commercial as well as public official corruption, and by making it an offence to receive a bribe as well as to offer one.

The Act replaces the existing UK legislation and is intended to be a "one stop shop" as far as UK bribery law is concerned. It was also intended to be deliberately aggressive and at the leading edge of the global anti-bribery scene. While the enforcement intent has been somewhat softened by recent guidance from the UK Ministry of Justice, no changes have been made to the Act itself, which continues to represent an >

The UK Bribery Act: Cleaning Up — But at What Cost? – *cont.*

uncompromising stop sign to any corrupt activities — including against the facility payments that the FCPA has traditionally still allowed.

Four new offences have been created:

- The giving or offering of a bribe;
- The receiving or soliciting of a bribe;
- The bribing of a public official; and
- The so-called ‘corporate’ offence.

The first three of these might be considered the ‘active’ offences. Any company incorporated in the UK and any individual who either holds any form of UK (or its dominions) citizenship or is resident in the UK can commit

Anything (be it money, favor, hospitality etc) can constitute a bribe, if it is offered with the intention that the receiver will act improperly as a consequence — remembering that this applies to corporate decision makers as well as public officials.

one of these offenses regardless of where in the world any corrupt payment might be offered. In addition, if the offence is carried out in the UK, then any person/company involved in its commission can be prosecuted, regardless of nationality.

In terms of what might qualify as a bribe, there is no minimum threshold or requirement that envelopes of cash must be involved. Anything (be it money, favor, hospitality etc) can constitute a bribe, if it is offered with the intention that the receiver will act improperly as a consequence — remembering that this applies to corporate decision makers as well as public officials. While the Ministry of Justice has clarified that the intention is not to prevent normal corporate hospitality etc., clearly any company engaged in any form of tendering process or who is negotiating a contract etc., will have to look very closely to their corporate entertainment and gifts policies to ensure that there is no appearance of impropriety which might spark a lengthy, and no doubt expensive, investigation. The biggest impact on business, however, is likely to be the corporate offence, which any company that is either incorporated in the UK, or which carries on a business (or part of a business) in the UK will be directly liable under. Equally, many companies who are not directly

caught will be dealing with counterparts who will expect increased guarantees as to behaviour and conduct in order to avoid their own liability.

A company liable under the corporate offence is guilty under the Act if a person associated with the company (which could include a subsidiary, contractor, agent, joint venture partner, consultant etc.) bribes another person intending to obtain or retain business for the company, or to obtain or retain an advantage for the company in the conduct of its business. This is drafted as a strict liability offence, so if your agent offers a bribe to win you business or to speed up a permit, irrespective of whether this is sanctioned behaviour or not, then an offence has been committed. The only defence to this crime is to have in place “adequate procedures” designed to stop events like this from happening.

The need for such adequate procedures is likely to be the highest corporate cost of adapting to the new regulatory environment. While the Act does not define what procedures will be adequate, certain limited guidance has been released by the Ministry of Justice, which indicates that this will be assessed on a case by case basis, with six core principles at the heart of the examination: (1) having procedures in place proportionate to the risk environment of the company; (2) demonstrating a top-level commitment to preventing bribery; (3) engaging in periodic and documented risk assessment; (4) performing suitable due diligence of agents etc; (5) demonstrating good internal communication and in particular regular training; and (6) monitoring and review.

While it will be incumbent on those corporations directly liable under the Act to put in place and implement such procedures, those not subject to the Act, but who

For those major construction owners and contractors operating in high risk countries the Act is certainly not to be ignored, as those who breach it risk up to 10 years imprisonment and unlimited fines.

deal with UK companies or operations should expect to be increasingly asked (as part of the UK company’s own compliance) to ensure that their behaviour is in >

The UK Bribery Act: Cleaning Up – But at What Cost? – *cont.*

accordance with the Act, and where the risk profile makes it necessary to implement their own similar internal procedures.

While it is as yet unclear whether the Act will have the effect of encouraging the world to change its attitude to certain practices (e.g. facilitation payments) or whether it will put British business at a competitive disadvantage remains to be seen. However, what is clear is that the Act is aggressive, and that the UK Serious Fraud Office has given significant indications that it intends to see that the Act is enforced to the maximum extent possible, and will no doubt be looking for headline grabbing cases to push the zero tolerance message forward. For those major construction owners and contractors operating in

high risk countries the Act is certainly not to be ignored, as those who breach it risk up to 10 years imprisonment and unlimited fines. [VE](#)



Mark Beeley

V&E Associate, London
+44.20.7065.6046
mbeeley@velaw.com

Shielding MENA Construction Projects from Political Risk

As the “Arab Spring” unfolds, construction project owners, managers, and investors have doubtless responded to the immediate physical risks. Now, they should look to their medium and longer-term legal protections. This guide outlines where to look and what to look for.

The Risks: Even if MENA Projects Emerge Physically Unscathed, New Regimes Could Present Political Risks

Volatility in parts of the MENA is especially significant to the construction industry because there are a substantial number of large projects active there. In much of the region, the primary risk remains the impact of actual or potential civil unrest upon the project. In Bahrain, for example, a number of significant public works projects are at risk of disruption, including the Qatar-Bahrain causeway, the Al Dur IWP plant and an extension to the Bahrain monorail. In Yemen, the construction of a power and irrigation dam is underway and in Syria the mixed use Khams Shammat development and the Homs Trade Centre are threatened by escalating violence. If unrest spreads to Algeria, its US\$60 billion worth of public works projects will be exposed to similar risks (though this now seems unlikely).¹

Of the countries that have already witnessed regime change, Egypt has one residential development (known as “Hanging Gardens”) and one airport upgrade project (at Cairo Airport) underway. More recently, in Libya, work on a large mixed use development, Tower 69 in Tripoli, is likely to have been disrupted by the violent overthrow of Colonel Gaddafi; if the development was not physically damaged in the violence, its construction will almost certainly have been stalled by a probable lack of labour and the ongoing shortages of water and electricity in the capital.

Once a regime has changed, the nature of the risks become more numerous. Investors are protected, to some extent, by International law and the principle of continuity of the State against the most obvious risk that, in the political upheaval following the overthrow of the previous regime, a revolutionary government may seek to avoid the obligations of its predecessor. According to this principle, a change of government, even a revolutionary change of government, does not affect the State’s obligations in international law; the State always remains bound, so long as the relevant government was exercising sovereign powers over the territory at the time of the act. This principle covers both treaty and contractual obligations. >

Shielding MENA Construction Projects from Political Risk – *cont.*

Other risks are more subtle. Will the new regime undertake nationalization of sectors of the economy? Will the new government be able to maintain security?



Will it seek to alter the economic and fiscal environment into which the investment was originally made? Will it seek to modify existing concessions or contracts?

Tools to Mitigate the Risks

Three sets of protections are available to participants in MENA construction projects: contractual protections, political risk insurance, and protections under international law.

1. The Contract

The primary, obvious protections stem from the contracts that govern a given project. Construction projects in MENA countries frequently adopt either a FIDIC² contract or a FIDIC-based contract.

In general, for the political risks now facing MENA construction projects (*i.e.* rebellion, terrorism, revolution, insurrection, military or usurped power,

Most basically, however, if the government is not a party to the contract, and it is governmental acts (or omissions) that impair the project, the contract does no good.

civil war, riot or commotion by persons other than the Contractor's/sub-contractor's personnel/employees),³ the FIDIC contracts tend to favor the Contractor over the Employer/Owner. These events are classed by FIDIC as both "Employer's Risks"⁴ and, potentially, as "*Force Majeure* Events."⁵

Allocating the risk of these events to the Employer has two main consequences; (i) the risk of any delay and/or costs of rectifying any damage

Those who have political risk insurance will be now considering the notice and other provisions of their policies.

to the Works, Goods or Contractor's Documents caused by these events falls on the Employer/Owner;⁶ and (ii) the Employer/Owner must provide an indemnity against "*all claims, damages, losses and expenses*" for all risks arising from these events.⁷ This Employer need not give an indemnity if the risk of these events is not insurable on reasonably commercial terms.⁸

The FIDIC contracts also class these events as the kind of exceptional events or circumstances which may amount to a *Force Majeure*. Consequently, if an event or circumstance qualifies as a *Force Majeure* Event,⁹ prevents the Contractor from performing,¹⁰ and is correctly notified,¹¹ the Contractor may: (i) be excused from performance of the obligations affected,¹² and (ii) be entitled to time and costs for delay to completion.¹³ Indeed, if the event continues for long enough the >

Shielding MENA Construction Projects from Political Risk – cont.

Contractor may have the right, upon notice, to terminate the contract.¹⁴

However, there will be instances where a Contractor may decide to look outside the Contract, to the risk-mitigating tools discussed below. This might happen when for example: (i) the Contractor has failed to comply with the notification provisions in the Contract and

For those who are without cover, the lesson is for the future: regardless whether cover is bought, analyzing and pricing political risk cover focuses the mind of the foreign investor.¹⁵

therefore cannot seek contractual relief; or (ii) the situation falls outside of the relevant contractual provisions. Two possible examples of situations falling outside the contract illustrate when other risk-mitigation tools are necessary. First, an event may not be *Force Majeure* because the Employer/Owner substantially contributed to the event. Second, the loss or damage occurs because of events taking place outside of the country where the contract is performed.

Most basically, however, if the government is not a party to the contract, and it is governmental acts (or omissions) that impair the project, the contract does no good. This is one way the other protections come into play.

2. Insurance

Beyond the usual comprehensive insurance policies, there is also insurance for political risk. There is public-sector insurance: from national-government agencies such as the UK's Export Credits Guarantee Department or the US' Overseas Private Insurance Corporation. In addition, the World-Bank-affiliated Multilateral Insurance Guarantee Agency underwrites certain categories of political risk for qualifying entities. There is also private-market political risk insurance, covering many of the perils discussed above.

The details of risk transfer through insurance go beyond this short overview. Those who have political risk insurance will be now considering the notice and other provisions of their policies. For those who are without cover, the lesson is for the future: regardless whether cover is bought, analyzing and pricing political risk cover focuses the mind of the foreign investor.¹⁵

3. Investment Treaty Protection

The third set of protections comes from a network of over 2,600 investment-protection treaties, called "bilateral investment treaties" (BITs).¹⁶ An example makes this clear: if a UK company has invested in a project in Egypt, and there is an Egypt-UK BIT (there is), the BIT provides concrete protections for UK investors in Egypt (and vice versa) these protections are largely independent of contractual remedies and of the national law of the host state. Moreover, BITs give an investor access international arbitration, a neutral forum outside the host country, bypassing the risks associated with litigation in local courts. Finally, BIT awards are enforceable *directly against the host state itself* under treaties that make it very hard to challenge the arbitrators' decision. Many nation's free-trade agreements also embed BIT-like protections.

The MENA region has been the source of many claims in construction projects.¹⁷ In connection with the risks to construction projects arising from political upheaval or civil unrest, two typical BIT clauses are immediately relevant (outlined below).

(a) War clauses

First are "war clauses," in many BITs with MENA nations. The Egypt-UK treaty is substantially similar to the Sri Lanka-UK BIT, which was considered at length in an important arbitral award:

(1) *Nationals or companies of [Sri Lanka or the UK] whose investments in the territory of the other [country] suffer losses owing to war or other conflict, a state of national emergency, revolt, insurrection or riot in the territory of >*

Shielding MENA Construction Projects from Political Risk – cont.

the latter [country] shall be accorded by the latter... treatment, as regards restitution, indemnification, compensation, or other settlement, no less favorable than that which the latter [country] accords its own companies or nationals or to companies or nationals of any third State.

(2) Without prejudice to paragraph (1) of this article, nationals and companies of [Sri Lanka or the UK] who in any of the situations referred to in that paragraph suffer losses in the territory of the other [country] resulting from (a) requisitioning of their property by its forces or authorities, or (b) destruction of their property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation, shall be accorded restitution or adequate compensation... [which shall be] freely transferable.

Clauses like this create a two-tiered compensation scheme. Paragraph 2 of the BIT above would give greater compensation if the armed forces of the host state act particularly

There is a further risk of political upheaval following regime change. Investors are protected, to some extent, by the principle of continuity of the State against a revolutionary government seeking to avoid the obligations of its predecessor.

badly. If they do not, Paragraph 1 comes into play: a tribunal holds the host State to the highest level of protection accorded to other property owners (whether nationals of the host State or third country investors) in respect of the claimant investor. This second-tier protection, in Paragraph 1, does not require state actors to act badly; it is engaged merely when the investor has suffered losses in the context of war, riot, etc.

In *AMT v Zaire*, the war clause was found to provide a remedy to the investor when Zaire's

armed forces looted its facilities. Although finding other reasons to require Zaire to pay damages, the war clause would have provided yet another reason to do so. Similarly, the “war clause” in the Sri Lanka-UK BIT helped an investor in the *AAPL v Sri Lanka* case.¹⁸ There, AAPL’s shrimp farm was destroyed in a battle between the Sri Lankan security forces and Tamil Tigers. The arbitrators had to decide whether Sri Lanka had to pay damages to AAPL for destroying the shrimp farm. The arbitrators held that Sri Lanka had to pay substantial damages, though the analysis turned on the interrelation of the war clause and the “full protection and security” (FPS) clause (see below).

(b) Full protection and security

Closely related to the war clause in the two cases mentioned above was the full protection and security (FPS) clause. This appears more commonly in BITs than war clauses. FPS clauses, and similarly worded protections, were originally aimed at the physical protection of investors’ installations. However, in addition to physical security (e.g., protection from local law enforcement officers’ taking over a factory) this protection has also been held to cover intangible rights as well, requiring the host state to protect investments from harmful laws or acts perpetuated by its entities.¹⁹ The provision in the Tunisia-US BIT, is typical:

Investment shall at all times be accorded fair and equitable treatment and shall enjoy full protection and shall in no case be accorded treatment less than that required by national law.

In the *AAPL v Sri Lanka* case, the Tribunal found that it was immaterial whether Sri Lanka’s liability was founded on the FPS clause (identical to the Tunisia-US language) or the war clause. The host state’s obligation and the amount of damages would be the same either way. In any event, under the FPS clause the host state was required to exercise due diligence; but that duty was not absolute. A further gloss was added in the >

Shielding MENA Construction Projects from Political Risk – *cont.*

LESI v Algeria case, in which it was held that the level of diligence required in relation to protected investments was simply that which was accorded to the protection of the property of host state nationals.²⁰

In short, investors in the region may have concrete BIT remedies for property destruction in the course of the unrest this year, but must plan carefully to ensure that the investment is structured so as to attract BIT protection.

In the medium term, other BIT protections guard against potential vagaries of regime change.

If the new order wishes to re-negotiate existing contracts in a manner which is at least formally lawful, change tax regimes, or engage

The decisive issue in determining whether an investment has received fair and equitable treatment is the impact of the host state's acts on an investor's legitimate expectations.

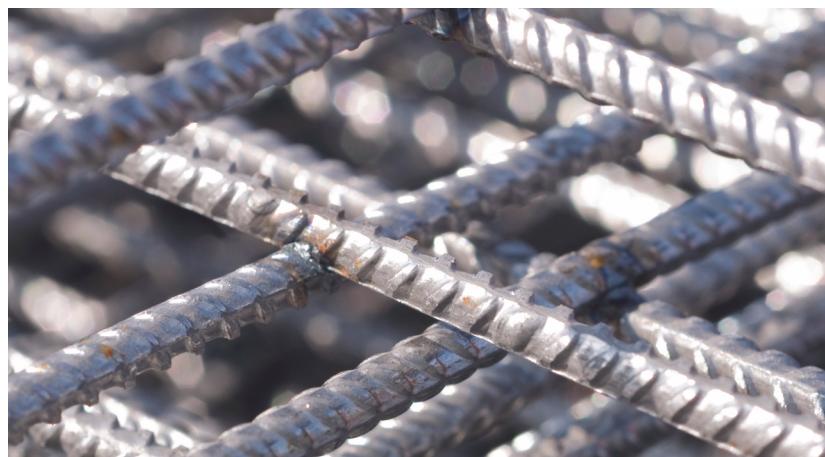
in nationalization campaigns, the applicable BIT may still offer some protection against these less dramatic, but equally destructive changes. The BIT protections of importance to energy projects include protection from the following:

- **Expropriation or measures tantamount to expropriation.**

BITs protect investors against non-compensated, discriminatory expropriations without due process.

The expropriation prohibition extends not only to direct takings of property but also to any series of measures that deprive an investor of a substantial part or all of the value of its investment, called indirect or "creeping" expropriation. Although formulations differ, the nub of expropriation is the effect the measures have on the investor's investment. Expropriation occurs if the measures deprive "*in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property.*"²¹

- **Fair and equitable treatment.** This is a broad protection whose contours are still being clarified in individual arbitrations. The wording providing this protection in individual BITs is generally straightforward (see the Tunisia-US BIT quoted above). The decisive issue in determining whether an investment has received fair and equitable treatment is generally the impact of the host state's acts on an investor's legitimate expectations. Fair and equitable treatment "requires the Contracting Parties [i.e., the state parties] to



*provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment."*²² A state violates this protection when its acts "eviscerat[e]... the arrangements in reliance upon with [sic], which the foreign investor was induced to invest."²³ As an empirical observation, claims for denial of fair and equitable treatment often succeed as an alternative to expropriation claims, that have failed.

- **Full protection and security.** See above.
- **Non-discrimination.** Protects investors against State measures which have the effect of adversely affecting the relevant investor in particular. The UK-Jordan BIT provides a common formulation of such a clause: >

Shielding MENA Construction Projects from Political Risk – cont.

“Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures against the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party.” This provision might provide a remedy where, for example, the investor can prove that the government had created a market environment where an enterprise owned by a foreign national could not compete with local enterprises in the same field.²⁴

- **National treatment and most-favoured-nation treatment.** Such provisions are self explanatory and require the host state to treat investments made by nationals of the BIT counterparty to be treated according to a standard which is accorded to its own nationals or to nationals of third states (not necessarily with which the host has a BIT or similar arrangement). A typical formulation is found in the Jordan-US BIT: *“With respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments, each Contracting Party shall accord treatment no less favourable than it accords, in like situations, to investments in its territory of its own nationals or companies or to investments in its territory of nationals or companies of a third country.”*

- **Observance of other obligations (the “umbrella clause”).** The effect of clauses, often drafted in terms similar to those in the UK-Egypt BIT: *“Each Contracting Party shall observe any obligation it may have entered with regard to investments of nationals or companies of the other Contracting Party”* and are intended to bind States to obligations which they undertake in addition to their treaty-based obligations. It is, however, doubtful whether they can elevate every obligation in contracts entered into by organs of state into treaty obligations (see below).²⁵

BIT Protections come to those who plan (or who are lucky).

These powerful treaty protections accrue only to investors who fulfill the BIT’s requirements. In general, an “investor” must have (i) the nationality of a country that is a party to the BIT and (ii) a qualifying investment in the host country’s territory.

For companies, this frequently entails holding an investment through one or more entities incorporated in countries that are party to BITs



with the host state. For construction projects, in general, one planning tool seems well advised: creating an ownership chain with an in-country contracting or license-holding subsidiary which, in turn, is owned or controlled by one or more intermediate companies (with BITs with the host country), which in turn can be owned or controlled by the ultimate parent in a structure appropriate for the parent’s corporate and tax goals.

So, as an example: to enjoy the benefit of the Egypt-UK BIT, at least one company or individual in the ownership chain must be within the jurisdiction of the UK. This usually means, at the minimum, that a company is incorporated or organized under the laws of a jurisdiction in the UK. Under the Egypt-UK BIT, if the majority of >

Shielding MENA Construction Projects from Political Risk – cont.

shares of a local Egyptian company are owned by the English company, the local Egyptian company is treated as English. Now, if the investor were interested in creating an additional layer of BIT protection, it could create a structure to “stack” treaty protection with respect to Egypt. If there is an appropriate Egypt-Netherlands BIT, a Dutch holding company could own the British company, and so on. There are limits to this practice, addressed elsewhere,²⁶ but the main point



remains that because shares in down-chain companies can qualify as “investments” (in certain conditions the down-chain company may also qualify as an “investor”), multiple levels of protection under multiple BITs are possible.

However, there are some specific pitfalls that arise more often in construction cases than in other BIT cases.

(c) The Consortium Caveat

Many, though not all, BIT's require an investor to be a “juridical person.” In instances in which the project is performed by a consortium, this has caused problems. The most common reason for which a tribunal has declined jurisdiction over a construction claim has been when a contractual

consortium (formed to carry out the project but not party to the relevant contract) has erroneously brought proceedings in the name of the consortium, rather than each contracting entity bringing a claim in its own right.²⁷ Contractors should be aware of this basic formal trap and, to the extent they do plan to perform the contract in a consortium, be aware that such consortium may not be the party to the relevant contract, a consideration which is equally important in formal communications during performance (such as *Force Majeure* notices, etc) as in bringing proceedings. Of course, forming a local legal entity, shares of which are held by the consortium members for example, may well be one solution. Awareness of the consortium caveat will lead to a suitable solution.

(d) The Commercial Caveat

BIT claims are brought by qualifying investors, whose “investments” have been impaired. Because “investments” are protected, that implies a category of non-protected activities. “Mere commercial contracts” or activities are not protected. In a case against Egypt, for example, there were various guarantees given by an English company in connection with an agreement for the procurement and installation of mining equipment. Certain performance guarantees issued in connection with the contract were

A final set of hurdles, which could be described as the “contract trap,” stems from the fact that many construction projects involve a contract between the investor and a ministry of the host state government or some other emanation of the host state.

withheld in Egypt, by a state-owned company, whilst performance testing of the equipment (necessary for reducing the balance on the bank guarantees) was hindered. There were two salient findings. First, the arbitrators characterized the >

Shielding MENA Construction Projects from Political Risk – *cont.*

dispute as essentially the “entitlement of [the investor] to have the bank guarantees released.” This entitlement was not an “investment,” causing the arbitrators to decline jurisdiction. Second, the terms of the contract pursuant to which the guarantees were issued were “entirely normal commercial terms,” and thus were not a qualifying investment either.²⁸

The result in that case suggests that contractors may be able to structure sale of complex systems of equipment and services, not as “sales” backed by guarantees that are drawn down as milestones are passed, but rather perhaps as “loans” that are paid off over a time frame mirroring those milestones. The formalistic reasoning of the tribunal in the Egyptian case may give investors some ways to structure a transaction that is more “investment-like.”

(e) The Contract Caveat

A final set of hurdles, which could be described as the “contract trap,” stems from the fact that many construction projects involve a direct contract between the investor and a ministry of the host state government or some other emanation of the host state. The transnational contract structure is different from the situation that obtains in many investment cases where the investment is concretized in a local, host-state-incorporated company. By contrast, in many construction cases, where the contract is directly with the state, the “investment”, for practical purposes at least, is the contract itself and the investor’s activities thereunder. Contrast this with other typical investment structures where there is a more clearly defined asset (e.g., a permit, licence or concession or shares in a local company) and that asset is held by a local company and an upstream chain of companies. In these latter cases, the conceptual distinction between an “investment case” and a “breach of contract” is clearer than in the construction context, when the two are closely interrelated. In many cases, the same acts may give rise to both a breach of the contract and a breach of an

applicable BIT, though tribunals are anxious to avoid finding that the “mere” breach of contract is, itself, a treaty breach.

Arbitral tribunals have wrestled with how best to articulate this distinction, with varying results. Some have made access to investment arbitration difficult in cases in which they perceive the state acts complained of as “mere breaches of contract”, not BIT violations. For example, the tribunal in the *Salini v Morocco* case declined

Arbitral tribunals have wrestled with how best to articulate this distinction, with varying results.

jurisdiction because they discerned no breach of the applicable BIT. In effect, the arbitrators held the claimant should avail itself of the dispute resolution provision in the contract, which would provide an adequate remedy for the state counterparty’s breaches of contract.²⁹ Similar reasoning led a tribunal to make an award in favour of the host state in the *Consortium RFCC v. Morocco* case.³⁰ In both cases, the tribunal reasoned that it would be improper for a tribunal to permit claims alleging “simple breaches of contract” to be “elevated” to BIT claims, thus bypassing contractually agreed dispute resolution provisions. Another tribunal thought it was necessary to divide cases where the “essential basis” of the claim was a contract or a BIT.³¹ This has led to a lack of clarity. Contractors should, therefore, seek to determine whether the essence of the claim involves violations of the treaty, and to understand how those claims differ factually from contractual disputes. In this regard, investors should be especially aware that relying on an “umbrella clause” is unlikely to allow a claimant to elevate a breach of contract to a treaty breach.³²

Finally, however, there may be one footnote to the “contract caveat.” If a commercial arbitration award on a state contract is brought, and the >

Shielding MENA Construction Projects from Political Risk – cont.

investor fails, but the state courts interfere with the enforcement of the commercial arbitration award, there may be a claim under a BIT for a denial of justice. The latter situation arose in the *ATA Construction case*.³³ The investor had obtained an award in its favour in commercial arbitral proceedings initiated by the Jordanian counterparty pursuant to the relevant contract. The investor prevailed in the commercial arbitration but the award was subsequently overturned by the Jordanian courts, and the arbitration agreement was voided. Although timing problems limited the investor's BIT remedies, the tribunal acknowledged that the investor could, in principle, have succeeded on its claims that the Jordanian courts' interference with the enforcement of the arbitral award breached Jordan's BIT obligation to treat the investor fairly and equitably in relation to the investment. **VE**



Tim Tyler

V&E Counsel, Houston
+1.713.758.2170
ttyler@velaw.com



Susanna Fidoe

V&E Associate, London
+44.20.7065.6020
sfidoe@velaw.com



Gareth Jones

V&E Associate, London
+44.20.7065.6030
gjones@velaw.com

- 1 Whilst Iraq is host to by far the largest number of major projects, it is not mentioned here because the Republic of Iraq is not a signatory of the ICSID Convention and has a particular and well understood set of political risks.
- 2 International Federation of Consulting Engineers further information is available at www.fidic.org.
- 3 It is notable that these matters are stated (in relation to Employer's Risks) to only relate to events within the Country. In an international construction project it is likely that Plant/Materials may be produced and manufactured in a different country to where the Site was located. Therefore, even if these events cause loss of damage this will be outside the country and therefore the responsibility of the Contractor. The same restriction does not apply for *Force Majeure*.
- 4 Sub-clause 17.3 of the Red, Silver, Yellow and MDB Books. Sub-clause 17.1/17.3 of the Gold Book.
- 5 Sub-clause 19.1 of the Red, Silver, Yellow and MDB Books. Sub-clause 18.1 of the Gold Book.
- 6 Sub-clause 17.4 of the Red, Silver, Yellow and MDB Books. Sub-clause 17.1/17.3 of the Gold Book. The Contractor is entitled pursuant to a Sub-clause 20.1 claim to an entitlement to an extension of time claim or costs.
- 7 Sub-clause 17.1 of the Red, Silver, Yellow and MDB Books. Sub-clause 17.10 of the Gold Book.
- 8 For the Red, Silver, Yellow and MDB Books there is little guidance as to what would constitute commercially reasonable terms. In the Gold book (Sub-clause 17.10(b)) the indemnity does not include the qualification that the event should not be insurable.
- 9 An exceptional event or circumstance which is (a) beyond a Party's Control; (b) which such Party could not have reasonably provided against before entering the Contract; (c) which having arisen, such Party could not have reasonably avoided or overcome, (d) which is not substantially attributable to the other Party.
- 10 Note the MBD contract requires the prevention of performing "substantial obligations."
- 11 In accordance with Sub-clause 19.2 of the Red, Silver, Yellow and MDB Books. Sub-clause 18.2 of the Gold Book.
- 12 Sub-clause 19.2 of the Red, Silver, Yellow and MDB Books. Sub-clause 18.2 of the Gold Book.
- 13 Pursuant to a Sub-clause 20.1 claim.
- 14 Sub-clause 19.5 Red, Silver, Yellow and MDB Books. Sub-clause 18.5 of the Gold Book.
- 15 For more information on political risk insurance generally, see www.pri-center.com.
- 16 BIT-like protections are also in the investment-protection chapters of many free trade agreements.
- 17 The MENA states have been respondents in many construction claims: *Salini Construttori S.p.A. and Italstrade v Morocco*, (contract with a State-owned entity for the construction of an inter-city highway in Morocco, Italy-Morocco BIT, State win on the merits- breach of contract disclosed no BIT breach); *Salini Construttori S.p.A and Italstrade v Jordan*, (claims over the construction of a dam in Jordan, Italy-Jordan BIT, State win on jurisdiction in most claims- Umbrella and Most Favoured Nation clauses do not create ICSID jurisdiction where none would otherwise exist, State win on merits on remaining claims); *LESI S.p.A. and Astaldi S.p.A. v Algeria*, (dam construction project in Algeria experienced difficulties due to poor security in the region and a revision to the design of the dam by the Algerian state-controlled entity which had granted the concession, Algeria-Italy BIT, State win on merits- during times of war, FPS clause required host only to provide same level of security as to nationals of the host state); *Jan de Nul N.V. and Dredging International N.V. v Egypt*, (dredging project in the Suez Canal in which claimant encountered physical conditions at the site that differed significantly from state's representations, >

Shielding MENA Construction Projects from Political Risk – cont.

Belgium/Luxembourg- Egypt BIT, State win on merits-no breach of FET); *Desert Line Projects LLC v Yemen*, (road construction project in Yemen in which Yemen did not pay for completed works and Yemeni officials forced the investor to close its operations on other projects, Oman-Yemen BIT, Investor win); *Toto Construzioni Generali S.p.A. v Lebanon*, (road project in Lebanon, Italy-Lebanon BIT, State win on merits-claim dismissed for lack of evidence of loss or causation); *Malicorp Ltd v Egypt*, (construction and operation of an airport in Egypt, UK-Egypt BIT, State win on merits-no expropriation when concession validly terminated pursuant to contract); *ATA Construction, Industrial and Trading Co v Jordan*, (waterway construction project, Turkey-Jordan BIT, State win-State conduct pre-dated entry into force of BIT and investor should avail itself of contractual arbitration).

¹⁸ *Asian Agricultural Products Limited v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3.

¹⁹ CME, *supra* note 8 ¶ 613; see also *Siemens A.G. v Argentina*, *supra* note 8 ¶ 309 (same acts that violated fair and equitable provision also constituted failure to protect contract rights).

²⁰ *LESI S.p.A. and Astaldi S.p.A. v Algeria*, ICSID Case No. ARB/05/3.

²¹ *Metalclad Corporation v United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award of August 30, 2000, 40 I.L.M. 36 (2001), ¶ 103. See also, e.g., *KINNEAR ET AL.* at 1110-27-1110-32.

²² *Técnicas Medioambientales Teemed, SA. v United Mexican States*, Award of May 29, 2003, 43 I.L.M. 133 (2004), ¶ 154.

²³ CME Czech Republic B.V. (*The Netherlands*) v Czech Republic, UNCITRAL, Partial Award of September 13, 2001, ¶ 611; [hereinafter “CME”], available at

<http://italaw.com/documents/CME-2001PartialAward.pdf> (last visited Mar. 12, 2006); see also *Siemens A.G. v Argentina*, ICSID Case No ARB/02/08, (Award of February 6, 2007), ¶ 309 (finding Argentina breached fair and equitable standard in re-negotiating agreement for a national identification card system: “initiation of the renegotiation of the [agreement] for the sole purpose of reducing its costs, unsupported by any declaration of public interest, affected the legal security of Siemens’ investment”; coupled with delay in payment without legal basis and refusal to give investor information in Argentina’s renegotiation offer).

²⁴ For example, *Saluka Investments B.V. v Czech Republic*, UNCITRAL, Partial Award of Mar. 17, 2006 ¶ 498.

²⁵ These are outlined in detail in, among other places, “Protecting Energy Projects from Political Risk by Treaty Planning: Pitfalls and Guidelines”, ABA Energy Litigation Journal, 2009.

²⁶ See *id.*

²⁷ *Consortium RFCC v Morocco*, ICSID Case No ARB/00/06; *Consortium Groupement L.E.S.I. — DIPENTA v Algeria*, ICSID Case No ARB/03/08.

²⁸ *Joy Mining Machinery Limited v Egypt*, ICSID Case No ARB/03/11.

²⁹ *Salini Construttori S.p.A and Italstrade v Jordan*, ICSID Case No ARB/02/13.

³⁰ *Consortium RFCC v Morocco*, ICSID Case No ARB/00/06.

³¹ *SCS Société Générale de Surveillance SA v Islamic Republic of Pakistan*; ICSID Case No ARB/03/11.

³² See note 7, above.

³³ *ATA Construction, Industrial and Trading Co v Jordan*; ICSID Case No ARB/08/02.

Amending FIDIC Contracts – A Dozen Key Issues

This article examines some of the most commonly made amendments to the standard FIDIC Forms of Contract by both Employers/Owners and Contractors. For this purpose, we have considered FIDIC’s Silver and Yellow Books since these design and build contracts are the most commonly used forms of FIDIC Contract for major infrastructure and energy projects and are the pre-eminent form used in the Middle East and Africa.

In no particular order, Employers often seek to amend these FIDIC Contracts in the following ways:

1. The Silver and Yellow Books are both relatively light on warranties from the Contractor. Employers will often replace Clause 4.1 in both Silver and Yellow Books with a bespoke set of warranties. Whilst both Silver and Yellow Books provide a fitness for purpose warranty from the Contractor, further provisions are often added providing a design standard (notwithstanding the fitness for purpose obligation), adding warranties in relation to the

use of prohibited materials and that the Contractor has the requisite degree of skill, experience, capability and resources to execute the Works. A definition of “Prudent Industry Practices” is also commonly added.

2. FIDIC requires the provision of performance security (see Sub-Clause 4.2). Particularly in recent times, the performance security provisions have been heavily amended by Employers seeking to protect themselves against the instability of the banking and financial institutions which typically provide the performance security. Therefore, adding provisions that the institution providing the performance security has a particular rating (say from Moody’s or Fitch or S&P) is increasingly common, as is adding related provisions as to what is to happen when there is a down rating of the particular financial institution which has provided the performance security. >

Amending FIDIC Contracts – A Dozen Key Issues – *cont.*

3. Employers will often look to amend the Silver Book to restrict sub-contracting, for example by providing that certain key equipment or materials are only provided from certain named sub-contractors. The Yellow Book envisages some advanced consent and permission being required for sub-contractors. Employers also often wish to give final approval to the terms of sub-contracts and/or to be copied on each sub-contract as it is entered into and to require certain provisions to be included within sub-contracts (including, for example, the requirement that sub-contractors be novated or assigned to the Employer in the event of termination), or that key sub-contractors with design responsibility provide a collateral warranty to the Employer so that the Employer has a direct contractual link to (and remedy against) the most important sub-contractors.
4. Both Silver and Yellow Books have a short provision (Sub-Clause 4.6) on co-operation, but commonly in particularly large scale projects which may involve expansion of existing facilities or work at existing premises, or in instances where the project has been

For many Contractors, if they could make only one amendment to either of these FIDIC forms then it would be to Sub-Clause 20.1...

- divided into a number of separate EPC Contracts, Employers prefer to include more extensive co-operation provisions providing that each Contractor must co-ordinate and co-operate with other Contractors employed by the Employer. Such provisions are becoming increasingly elaborate in placing the onus (and risk) on the shoulders of a Contractor to co-ordinate its works with other related Contractors.
5. In all major construction projects, programming lies at the heart of a successful project. Although FIDIC (see Sub-Clause 8.3) contains reasonably extensive programming requirements, it is not unusual to see Sub-Clause 8.3 re-written or substantially amended to provide additional programming obligations on the part of the Contractor, including the requirement

to provide electronic copies of the programme and to agree a baseline programme at the outset of the Contract with the Employer, which is required to be regularly updated as changes and other delays are encountered, to show a live critical path as the project progresses.

6. FIDIC Contracts, perhaps reflecting the contrasting positions under local laws, do not have any reference to decennial liability obligations which may be mandatory by reason of the local or governing law. It is, therefore, often advisable for the Employer to reflect that fact by including a provision (at the end of Clause 11) referencing the relevant part of the Civil Code and the Contractor's obligations in relation to decennial liability to avoid confusion.

We now turn to consider typical amendments that Contractors often seek to FIDIC's Silver and Yellow Books:

1. For many Contractors, if they could make only one amendment to either of these FIDIC forms then it would be to Sub-Clause 20.1 to delete the requirement that notice of claims must be given not later than 28 days after the Contractor becomes aware, or should have become aware, of the event or circumstance giving rise to the claim. Sub-Clause 20.1 is an absolute time bar, meaning that if the Contractor fails to give notice of a claim within that period then it will not be entitled to an extension of time or any additional payment. Whilst in some legal systems this might be regarded as unenforceable, many Tribunals do give effect to such a clause and the Contractor may lose significant rights and entitlements as a result if it is not complied with.
2. Both the Silver and Yellow Books have requirements that the Works, when completed, should be fit for the purposes for which they are intended, as defined in the Contract. Such fitness for purpose obligation may not be covered by a Contractor's professional indemnity insurance. Many Contractors will seek to avoid an obligation for fitness for purpose by deleting this reference in Sub-Clause 4.1, or, alternatively, at least seeking to define exactly what is meant by fitness for purpose within the context of the project. Although drafting meaningful fitness for purpose obligations is difficult, it can be preferable to a wide-ranging and unconfined obligation. >

Amending FIDIC Contracts – A Dozen Key Issues – cont.

3. Clause 5.1 of FIDIC's Silver Book has a potentially onerous obligation on the Contractor making it responsible for the accuracy of the Employer's Requirements (including design criteria and calculations). This can mean that the Employer is not responsible for any error, inaccuracy or omission in the Employer's Requirements, which he or his consultant may have drafted. The key to the acceptability of such clause is usually the ability of the Contractor to verify the Employer's Requirements during the tender stage. If the tender period is short and there is not sufficient time to do so, Contractors are often reluctant to take on this potentially unlimited obligation, and even where there is such time, will seek to push back on such an obligation.
4. The remedies which the Employer has for failure to pass the Tests on Completion or to remedy defects, are potentially onerous for a Contractor. In Sub-Clauses 9.4(b) and 11.4(c) of both FIDIC
5. Towards the very top of the list of important issues for the Contractor in any EPC contract will be limitation of liability (Sub-Clause 17.6). FIDIC's limitation of liability clause is often left intact but Contractors do usually seek to limit their liability to less than the contract price (which is the FIDIC default position). Depending on factors such as location, industry, market conditions, size and complexity of the project, overall liability limits may range from as low as 20 percent of the contract price to 100 percent (or no limit at all). The leading Contractors will rarely accept to contract, however, without the exclusion of all indirect and consequential losses that Sub-Clause 17.6 in its unamended form provides.
6. Increasingly, Contractors are being more protective over their intellectual property rights (IPR). However, Sub-Clause 1.10 (*Employer's Use of Contractor's Documents*) can be a negotiation battleground as Employers seek a wide-ranging ability to use and recreate the Contractor's IPR and Contractors seek to restrict this as much as possible to ensure that Employers cannot (without paying) re-use the IPR on future projects. The existing wording does need amendment if a Contractor is to adequately protect its IPR. In fact, it is surprising that the protection of IPR, and the degree of sensitivity to this subject, varies markedly across different contracting organisations.

The remedies which the Employer has for failure to pass the Tests on Completion or to remedy defects, are potentially onerous for a Contractor.

Contracts, the Employer has the right to terminate the Contract or reject the Works, if the defect or failure to pass the test deprives the Employer “*of substantially the whole benefit of the Works.*” In such circumstances, the Contractor may find itself having to repay all the sums which the Employer has paid for the Works. Whilst a notion of rejection or termination where there is a wholesale failure by the Contractor to provide what is required is not unusual, the difficulty with FIDIC's wording is that it is so general that disputes are inevitable over what is meant by depriving the Employer of “*substantially the whole benefit of the Works.*” This is why amendments to this clause are usually sought by the Contractor (and sometimes the Employer) to specify exactly what will be deemed to deprive the Employer of substantially the whole benefit of the Works, or to delete the rejection regime altogether.

Conclusion

The FIDIC forms represent a very sound starting point for the preparation of an EPC contract for a major construction project. However, they are routinely heavily amended and this article has identified a snap-shot of some of the most common amendments from both Employer and Contractor perspectives. There are, however, plenty of other common amendments which could have been mentioned, including, for example, changes to the insurance and indemnity provisions, dispute resolution and confidentiality clauses. [VE](#)

Nick Henchie

Head of V&E's International Construction Practice - London
+44.20.7065.6087
nhenchie@velaw.com

V&E Construction Practice Update

Over the past nine months, V&E's already impressive International Construction group has been further bolstered by the arrival of three leading industry partners, **Nick Henchie, Jon Nash, and Looaye Al-Akkas** to the firm.



Nick Henchie

+44.20.7065.6087

nhenchie@velaw.com

Nick, Head of International Construction and based in the firm's London office, is a well-known leading lawyer on FIDIC contracts, and has a construction practice which includes both contentious and

non-contentious work. His complex construction and engineering experience particularly focuses on international energy and infrastructure projects. "Acknowledged by market observers as a rising force, making waves wherever he goes" by *Chambers UK 2009*, and as a "brilliant strategist" by *Chambers UK 2010*, Nick is particularly recognized for his continued work advising the Panama Canal Authority on the construction and engineering aspects of the US\$5.25 billion Panama Canal Expansion project.

"V&E is well-equipped to handle a wide variety of construction projects and provides a comprehensive service to its construction industry clients" – *Chambers UK 2011*



Jon Nash

+971.2.412.0722

jnash@velaw.com

Jon, recognized by both *Chambers* and *Euromoney* as a leading project finance practitioner, is based in the firm's Abu Dhabi office and has significant knowledge in international project finance and development transactions in the energy, water, transportation, and infrastructure sectors, particularly in the MENA region. In addition to his extensive experience

with I(W)PP developments, Jon also advises on all manner of project documentation, including construction contracts, joint venture agreements, operating and maintenance agreements, power purchase agreements, water treatment agreements, and tolling agreements.



Looaye M. Al-Akkas

+966.1.250.0888

lalakkas@velaw.com

Looaye, is based in the firm's Riyadh office and has been involved in some of the Kingdom's most high-profile infrastructure, energy, and petrochemical projects.

He also advises clients on regional, international, and cross-border M&A and capital markets matters. In addition to acting for major Saudi corporations, Looaye has also counseled leading Saudi business families as they endeavor to restructure and diversify their businesses and seek out investment opportunities both within the Kingdom and around the world.

"UAE Construction Firm of the Year"

– *ACQ Legal Awards 2010*

In addition, to these three new arrivals the Group has also benefited from the relocation of **Kaam Sahely** to the Houston office from Dubai.



Kaam Sahely

+1.713.758.4459

ksahely@velaw.com

Kaam has advised on numerous construction transactions during his time with the firm, including representing the developers and subsequently the project company in connection with the development

and construction aspects of a US\$5.7 billion aluminium smelter, the largest single site aluminium smelter in the world which was named "EMEA Industry Deal of the Year 2007" by *Project Finance International* and "Middle East Manufacturing Deal of the Year 2007" by *Euromoney Project Finance*. >

Major Projects

Our team currently has major construction engagements relating to high profile engineering projects and disputes across the globe, including in Panama, Angola, Qatar, Turkey, Gambia, Oman, India and Iraq, including:

World's Leading EPCM Company

Obtained a reversal, in the Beaumont Court of Appeals, of a US\$100 million judgment entered by the trial court against the world's leading EPCM company, and one of its engineers, in which the court rendered a take-nothing judgment for the engineer and remanded for a new trial for the world's leading EPCM company. **VE**

"V&E is highly recommended, especially for energy and construction disputes"

— *Legal 500* 2009

Prior results do not guarantee a similar outcome.

For more information on these, or any other international construction topics, please contact editor Nick Henchie, or e-mail one of our Construction practice contacts. Visit our website to learn more about V&E's Construction practice.

International Construction News is published by Vinson & Elkins LLP. This newsletter is not intended to be legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information only. Prior results do not guarantee a similar outcome. Application of the information reported herein to particular facts or circumstances should be analyzed by legal counsel. We welcome your comments and requests for subscriptions. International Construction News is provided at no charge. To request a subscription or report a change in contact information, contact Amber Meyer at +44.0.20.7065.6054 or ameyer@velaw.com. ©Copyright 2011. Vinson & Elkins RLLP, CityPoint, 33rd Floor, One Ropemaker Street, London EC2Y 9UE, United Kingdom. All rights reserved.