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Year in review

2018

Legal developments in the global construction and infrastructure sector

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Introduction

We are pleased to present our "Year in review" for 2018, a Clyde & Co guide which sets out legal developments in the construction and infrastructure sector globally over the past 12 months, as well as insights into what you need to be aware of in 2019.

We hope that our guide will be a valuable reference in helping you respond to and understand legal and industry developments and how they will affect your business in 2019.

Please don't hesitate to contact one of our lawyers via our contacts webpage or infrastructure@clydeco.com if you have any questions or require further information.

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The 'Smash & Grab' adjudication loses its sting: *Grove Developments Limited v S&T(UK) Limited* [2018] EWHC 123 (TCC) *and S&T(UK) Limited v Grove Developments Limited* [2018] EWCA Civ 2448

In the UK, parties to construction contracts are entitled to refer disputes to adjudication at any time. Adjudication is a fast tracked dispute resolution process whereby parties submit written position papers to a nominated adjudicator to determine the construction dispute (usually) within a 28 day timeframe. The Housing Grants, Construction and Regeneration Act 1996 (as amended) (the Construction Act) exists to govern the adjudication process and establishes rules to ensure that payments are made promptly. At a high level, it includes, among other things, provisions dealing with the right to be paid in interim, periodic or stage payments, notification requirements regarding amounts due and amounts to be withheld, the right to suspend performance for non-payment and the right to adjudicate.

'Smash & grab' adjudications have been the bane of employers' existence in the UK for a number of years. The term describes a scenario where a contractor makes an interim application for a specific sum (the 'notified sum') and the employer fails to issue a valid payment and pay less notice in response. As a result, the employer becomes liable to pay the notified sum, right or wrong, without the true value of the claim being assessed. In such cases, employers would have to wait until the next interim payment cycle or, in the worst case, the final payment, to challenge the value of the work. This had been the accepted position following a number of key cases which considered that the operation of the Construction Act required this result.

However, in February 2018, the Technology and Construction Court (TCC) looked to put a stop to the practice. It held that, provided an employer paid the contractor the sum stated as due in its interim application, the employer may then seek, in a second adjudication, to dispute that the sum paid was the 'true' value of the works. Coulson J set out a number of reasons for this, which are summarised **here**. Ultimately, he took the view that previous decisions were wrongly decided, being contrary to first principles and other authorities in the Court of Appeal.

Coulson J considered that this decision would not disadvantage the contractor. Its cash flow would be preserved as the employer would still be required to make the payment before commencing an adjudication to determine the 'true' value of the amount claimed and paid. The employer was simply afforded a quicker route to recover any overpayment – particularly in the context of the penultimate payment application, where an employer (under previous authorities) would be required to wait until the final account stage to rectify the overpayment.

The decision was appealed. However, in November 2018, much to the relief of many employers, the Court of Appeal delivered its judgment upholding the decision at first instance. See our detailed article **here**.

No oral modification: *Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] UKSC 24*

In May 2018, the Supreme Court confirmed that parties must comply with any applicable contractual requirements if they want to vary the terms of their contract. The decision came as a surprise to many, departing from earlier decisions (as recent

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as 2016), which confirmed that the courts would be prepared to permit variation by conduct and reject anti-oral variation arguments, even where the relevant contract contained a 'no oral variations' clause. The rationale for this was seen as the need to uphold party autonomy and the importance of contracting parties' freedom to agree terms.

The Supreme Court rejected this approach, taking the view that the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation. While the importance of party autonomy was acknowledged, Lord Sumption was of the view that it operated up to the point when the contract was made and thereafter only to the extent the contract allowed it. It was held that an oral variation would not be effective unless it complied with the requirements of the contract, or unless the 'no oral variations' clause was itself removed or suspended by written agreement. Such approach was considered to reflect the parties' autonomy to bind themselves as to their future conduct, whilst preserving their ability to release themselves from the inhibition.

'No oral variations' clauses are common in construction contracts. So too are arguments that a construction contract has been varied orally or by conduct. Following this decision, it is unlikely such arguments will be successful, unless the doctrine of estoppel can be relied on. The importance, therefore, of efficient and accurate contract management throughout the duration of a project is paramount.

See our detailed article **here**.

Allocating concurrent delay risk:
North Midland Building Ltd v Cyden Homes Ltd [2018] EWCA Civ 1744

Traditionally, most UK construction contracts are silent on how concurrent delay impacts a contractor's entitlement to an extension of time. In such cases, the position under English law is generally considered to be that the contractor will be entitled to an extension of time but no loss and expense. However, it has become more common in recent years for employers to include provisions in their contracts seeking to allocate the risk of concurrent delay to the contractor.

At the end of 2017, the TCC confirmed that parties are free to allocate concurrent delay risk in their contracts. The TCC held that such provisions were not contrary to the prevention principle* and that there was no rule of law that would prevent the parties from agreeing that concurrent delay be dealt with in any particular way.

In July 2018, the Court of Appeal was asked to reconsider the position. In dismissing the appeal, the Court put beyond doubt its views on the matter. It found that the prevention principle was simply not engaged on the facts of the case and rejected the suggestion that it was as an overriding rule of public or legal policy which could operate to rescue the contractor from the relevant clause to which it had agreed. Relying on previous authorities, the Court held that the prevention principle has no obvious connection with the separate issues that may arise from concurrent delay and that parties are free to contract out of any or all of the effects of the prevention principle and allocate concurrent delay risk as they see fit.

*Note: The prevention principle effectively prevents an employer from enforcing a liquidated damages regime where it causes the relevant delay and there is no adequate mechanism under the contract to extend the completion date.

See our detailed article **here**.

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The end of PFI for public infrastructure as we know it

In his budget speech, delivered on 29 October 2018, the Chancellor announced that the Private Finance Initiative (PFI) and Private Finance 2 (PF2) will not be used for the future delivery of privately financed infrastructure projects.

PFI was introduced in the 1990s and the following years saw a strong pipeline of projects coming to the UK market across a broad spectrum of sectors. However, during the 2000's the pipeline of projects began to tail off naturally and criticisms of the model increased, both within the media and politically. In November 2011, the UK Treasury announced it was to review PFI with a view to finding an alternative model that provided greater flexibility and was quicker and cheaper to procure. In December 2012, PF2 was introduced. However, PF2 has only been used six times since its introduction, with both models continuing to be criticised for their inflexibility.

In October 2018, it was announced that "the Government will abolish the use of PFI and PF2 for future projects", although it was also confirmed that private sector investment will continue to play a key role in the delivery of infrastructure projects via other appropriate mechanisms – what remains to be seen, however, is the details of what model(s) will be used for such projects and when the projects will come to market.

What does this announcement mean for existing PFI/PF2 projects, of which there are approximately 700? Such projects will not end as a consequence of the announcement. However, a new "Centre of Best Practice" will be piloted, alongside both a continued push by the UK Government to enhance value for money in existing PFI contracts and ongoing contract management training being undertaken in the public sector. See **here** for our detailed article.

General Data Protection Regulation (GDPR)

The Data Protection Act 2018 (DPA) came into force on 25 May 2018, replacing the Data Protection Act 1998. The new DPA was introduced to ensure that the standards set out in the EU's General Data Protection Regulation (*EU 2016/679*) (GDPR) have effect in the UK. The GDPR introduces a range of new rules and obligations applicable to organisations when they are processing personal data.

Organisations operating in the construction industry should be alive to how the GDPR may impact on their relationships both up and down the supply chain. At a high level, the GDPR will only apply where 'personal data' is being processed as part of the parties' arrangement. As a reminder, 'personal data' means data that can be used to identify a living individual. It includes information such as names, addresses and email addresses, in addition to other data such as IP addresses and other online identifiers.

Under the GDPR, an organisation that is 'processing' personal data (including using, storing, sharing and transferring – essentially doing anything with personal data) may be either (i) a 'controller', which means that it determines how and why personal data is being processed; or (ii) a 'processor', which means that it is responsible for processing personal data on behalf of a controller.

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It is important to note that processing can still be carried out by a controller. The fact that an organisation processes personal data does not necessarily render that company the processor for GDPR purposes. The key factor is whether or not the processing is undertaken on behalf of another entity.

Controllers and processors have different obligations under the GDPR, with serious consequences and sanctions for non-compliance. Whether or not GDPR specific provisions are required in a construction agreement (e.g. building contract, appointment, etc.) will depend on the relationship that exists between the relevant parties, as controller or processor, as the case may be. Whilst there are four types of relationships that may exist, the most common in the construction industry are likely to fall into two main camps: 'controller to processor' and 'controller to controller'.

Where a controller to processor relationship exists (i.e. where one company processes personal data on behalf of the other), Article 28 of the GDPR mandates extensive provisions that must be included in contracts between these parties. Where a controller to controller relationship exists (i.e. where two or more controllers are processing personal data for their own distinct purposes), the GDPR does not require any specific clauses be included in contracts between these parties. However, for clarity, the parties may seek to set out in writing their respective obligations in relation to personal data.

Organisations will need to assess, on a case by case basis, if and how the GDPR applies to their existing and future contracts. While the transfer and use of personal data is not inherent to typical construction contracts (and ancillary documents), personal data may still be required to be included and may be prescribed for use in such documentation - for example, where specific provisions identify individuals or where the actual performance of works or services requires a party to deal with personal data. Organisations will need to consider the specific requirements of each separate arrangement to determine the roles of the parties, the obligations that apply and whether any GDPR specific provisions will need to be incorporated to govern the parties' relationship.

Ban on Combustible Cladding

As one of the ongoing consequences of the Grenfell Tower tragedy in June 2017, the Building (Amendment) Regulations 2018 came into force, on 21 December 2018, banning the use of combustible materials in the external walls of buildings at least 18 metres in height and which contain (i) one or more dwellings; (ii) an institution; or (iii) a room for residential purposes.

Capturing flats, hospitals, residential care homes, dormitories in boarding schools and student accommodation, the Regulations will apply to all new buildings that fall within the above categories. They will also apply to any existing buildings which come within the above categories as a result of material alterations or following a material change of use.

In addition to the new Regulations, the Government has issued guidance regarding the presence of Aluminium Composite Materials (ACM) cladding on existing buildings. The guidance, issued under the Housing Act 2004, identifies the presence of ACM cladding (or any other cladding and filler or core that is combustible) as a deficiency contributing to a 'Hazard' (i.e. a risk of harm to the health or safety of an actual or potential occupier) that would require rectification. The guidance suggests that such rectification should be undertaken either

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by the private landlord of the building or by intervention of the local authority, with the cost of emergency remedial action by local authorities recoverable from private landlords.

An immediate criticism of the Regulations was whether the minimum height requirement was appropriate. Commentators also questioned the scope of the Government's guidance. At the time of writing, further consultations were taking place and additional guidance is anticipated.

Unfair payment and retention practices

The issue of unfair payment and retention practices in the UK construction industry has been a hot topic for 2018. The past year saw the Government take a number of steps to implement new processes and procedures to ensure fair payment within the industry. Key developments include:

- Construction (Retention Deposit Schemes) Bill: Published on 23 April 2018, the Bill seeks to protect retention deposits under construction contracts by requiring retentions to be placed in a Government approved retention deposit scheme, which would ensure that monies were secure and available to be released on time. It is proposed that a failure to do so would render any clause in a construction contract allowing the deduction of cash retentions invalid.

  As at the date of publishing, the Bill is still under consideration, and there are many details still to be worked through. It is not currently clear what boxes employers may have to tick to have recourse to retention and/or whether contractors will have a right to object. It may well be that the Retention Bill will have the effect of reducing the value of cash retentions and increasing parties' reliance on other forms of security, such as bonds.

  If the legislation is enacted with retrospective effect (as is currently proposed), we would expect this to cause significant practical issues, as all parties who currently hold retention proceeds will have to account for and transfer them to the deposit scheme or risk invalidating their security.

- Late Payment of Commercial Debts (Amendment) Regulations 2018 (S1 2018/117): Enacted on 26 February 2018, the Regulations allow certain representative bodies to challenge in the High Court the use of grossly unfair payment contract terms and practices in business to business contracts for the supply of goods and services. Provisions dealing with payment periods, interest on late payments and compensation arising out of late payments may all be subject to challenge. If the High Court considers them 'grossly unfair' (a term not defined by the Regulations), it may order an injunction to prevent a party from relying on them.

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New Releases…

The past year has seen a number of updates to and new versions of standard form contracts and other industry documents, which include:

- RIBA Professional Services Contracts 2018: The 'RIBA Agreements 2010 (2012 revision)' have been updated and revised in 2018 to bring the content in line with best practice, make necessary changes to the legal content, update the Schedule of Services to align with the RIBA Plan of Work, change the format of the printed forms for ease of use (with less components) and enhance and improve digital delivery.
- BIM Protocol: On 10 April 2018, the Construction Industry Council (CIC) issued the second edition of its BIM Protocol. The first edition was published in 2013 in response to the Government's BIM Strategy and following the 2011 mandate from the Government that BIM Level 2 was to be used on all publicly procured projects by 2016. Following consultation with the industry, the CIC promotes the second edition as introducing "updates to reflect current practices and standards regarding the use of BIM".

  Some key criticisms of the first edition have been addressed – for example, the Protocol no longer takes complete precedence over the main contract terms but just those that deal specifically with BIM. The new edition is also now closely aligned with PAS 1192-2, which is the standard for information management used in BIM environments and sets out the framework, roles and responsibilities for collaborative BIM working and the scope of the Common Data Environment.
- NEC4 Alliance Contract & Guidance on Off-Site Modular Construction: On 20 June 2018, the NEC launched the new NEC4 Alliance Contract (ALC). Promoted as marking the 'next step in NEC collaboration', it is 'designed for use on major projects or programmes of work, where longer-term collaborative ways of working are to be created'.

  In addition, on 25 September 2018, the NEC published guidance on using the NEC4 suite of contracts with off-site modular construction. The guide aims to help companies take advantage of the benefits of off-site construction, such as increased speed, reduced waste and improved quality. Among other things, the guidance considers which NEC4 main payment options are appropriate, when title to goods passes, and issues surrounding design and quality.

Innovation in construction: Off-site manufacturing

The UK construction industry has struggled for years with deeply ingrained structural flaws, giving rise to low margins and low productivity. However, there is a growing perception that technological advances and new methods of construction are gaining traction and have the potential to drive productivity gains and increase capacity, while still delivering on quality.

The tipping point has not yet come, particularly when it comes to using advanced off-site manufacturing (OSM) techniques, but we anticipate a substantial shift in the not too distant future.

In a recent survey of over 30 C-suite executives from the UK's top 50 construction firms, we obtained a useful 'pulse check' of the industry's direction of travel with regards to OSM over the next 5 years:

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- 68% of survey respondents said that their organisations were very seriously considering the use of new and emerging construction-related technology.
- 80% of survey respondents' organisations currently use OSM for just 20% or less of their construction work. However, in 5 years' time, 61% expect to double the amount of work that they carry out on this basis, up to 40% of the total.
- Not surprisingly, therefore, 74% of survey respondents were of the view that OSM would change, to a large extent, how construction is carried out in their organisations over the next 5 – 10 years. Survey respondents also ranked OSM as the technology / development that will have the biggest impact on their organisations (followed by BIM, off-site 3D printing of bespoke components, and pre-furnished volumetric solutions).

Click **here** to access our detailed Innovation in Construction Report 2018 and find out more about the survey results, the legal perspective and key considerations, as well as some regional perspectives from the Middle East and Australia.

New disclosure pilot scheme in the TCC

A radical reform of the procedure for disclosure of documents in litigation has been proposed. Commencing in the Business & Property Courts, including the TCC, from 1 January 2019, the reforms are scheduled to run for a mandatory two year pilot scheme.

The reforms arise from the recognition that, in recent years, the volume of data and documents disclosed in property and construction claims has increased exponentially, often at a level disproportionate to the value and/or complexity of the claim. A working group was set up in May 2016 to consider the issue, and concluded that the current regime of standard disclosure, primarily intended for hard copy documents, is not fit for purpose when dealing with extensive electronic disclosure.

The Civil Procedure Rules Committee therefore approved a new Rule and Practice Direction on 13 July 2018, providing for initial disclosure at an early stage and removing full standard disclosure as the usual default option. Parties will be required to discuss and complete a joint Disclose Review Document prior to the initial case management hearing, listing key issues in dispute and exchanging information regarding storage of documents and how they may be searched or reviewed. Parties and legal representatives now have duties relating to disclosure expressly set out, including a duty to avoid disclosing documents that have no relevance to the issues. If the reforms proposed are embraced, the changes have the potential to have a dramatic effect on the future of construction litigation in the UK.

Brexit: What does the future hold for UK construction?

The UK is scheduled to leave the European Union on 29 March 2019. At the time of writing there is much uncertainty in the UK as to whether or not Parliament will approve the Brexit deal presented to them or if a 'no deal' Brexit will take place.

There has been much speculation as to the impact Brexit will have on the construction industry in the UK – particularly, with regard to the supply of labour (further exacerbating the skills shortage already prevalent in the industry

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and accelerating the threat of a demographic time bomb for the industry's labour force), and the supply and price of materials (due to additional customs duties and potential delays, and fluctuating exchange rates).

Employers and contractors should undertake a careful review of their existing contracts, in order to properly understand their position (and, potentially, their exposure) in the context of Brexit, including whether any entitlements may exist by way of, for example, change in law provisions or force majeure.

For future contracts, parties should carefully set out what relief (if any) should be afforded, if there are delays or additional costs incurred as a result of Brexit. Obviously, the approach taken will depend on the specific circumstances of each project, but we are starting to see a pattern of employers seeking to push this risk down the line, with provisions that expressly preclude contractors from relying on Brexit to claim additional time or money, or as a trigger to terminate, whether on the basis of a change in law or a force majeure event or otherwise.

It is imperative that parties fully understand what risks they may be facing on their various projects as a result of Brexit, and, where necessary, put in place practical (if not contractual) strategies to mitigate their exposure.

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New French contract law

French contract law, which had remained unchanged since the Civil Code was enacted by Napoleon in 1804, has recently undergone a massive reform. The long awaited reform aims, in particular, at simplifying and modernizing French contract law, as well as rendering it more attractive to international companies.

This reform dates back to a decree published on 11 February 2016, which came into force on 1 October 2016. With this decree, the Government mostly codified a number of well-known principles which had already been decided by the courts for some time (such as the necessity of complying with good faith during the pre-contractual phase, specific rules for price calculation, and the notion of material breach), whilst also introducing new concepts such as hardship.

The 2016 decree was recently ratified by a law of 20 April 2018 which, contrary to usual practice, also amended certain aspects of the decree, such as, for example, the definition of 'adhesion contract', and the notion of unfair contract terms. The 2018 reform came into force on 1 October 2018.

Therefore, in practical terms, there will be three different sets of rules which will apply to contracts, depending on the date on which the contracts have been entered into:

- Contracts concluded before 1 October 2016: the old version of contract law will apply.
- Contracts concluded between 1 October 2016 and 30 September 2018: the law applicable will be the 2016 decree in its original version.
- Contracts concluded on or since 1 October 2018: the law applicable will be the 2016 decree in its amended version, as set forth by the 2018 Act.

Fundamental changes to French construction regulations

Current regulations in France lay down mandatory construction methods to be followed by employers (maîtres d'ouvrage). However, the French Parliament has now introduced fundamental reforms.

The Act of Parliament for a "State supporting a society based on trust" (pour un État au service d'une société de confiance) of 10 August 2018 (the Act), has prompted a review of construction regulations which the French Government is empowered to fast-track by means of special orders (ordonnances).

Both Parliament and the Government want to implement changes in order to encourage innovation. The outcome is that the new regulations will focus on the end result an employer is required to provide, rather than prescribing the method that it has to follow. An order is due to be issued by the French government before 2020 to prepare for this change.

In the meantime, employers will be able to derogate from some of the existing construction regulations. Under a Government order dated 30 October 2018, if an employer can prove that its project will achieve similar end results, using "methods of an innovative nature" from a technical or architectural point of view, it will be granted a certificate of "equivalent means" which will allow it to proceed with its project using these new methods. Projects allowed to proceed on this basis will be verified, so that a certificate can be delivered on completion stating that the means used by the employer were correctly implemented.

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A study prepared ahead of the Act to assess its impact forecast that the exemption-based regime could lead to savings of up to EUR 700 million per year, and that the change to result-based regulations could save EUR 1.4 billion in costs per year.

Code of Public Procurement

The legislative and regulatory parts of the Code of Public Procurement ("Code de la commande publique") (the Code) were published on 5 December 2018. Comprising 1747 articles, the Code includes all of the rules applicable to projects tendered via public contracts. These rules were previously scattered between various legal instruments.

The Code, which will come into force on 1 April 2019, notably includes provisions relating to relationships between public owners and private contractors, to subcontracting, and to payment deadlines.

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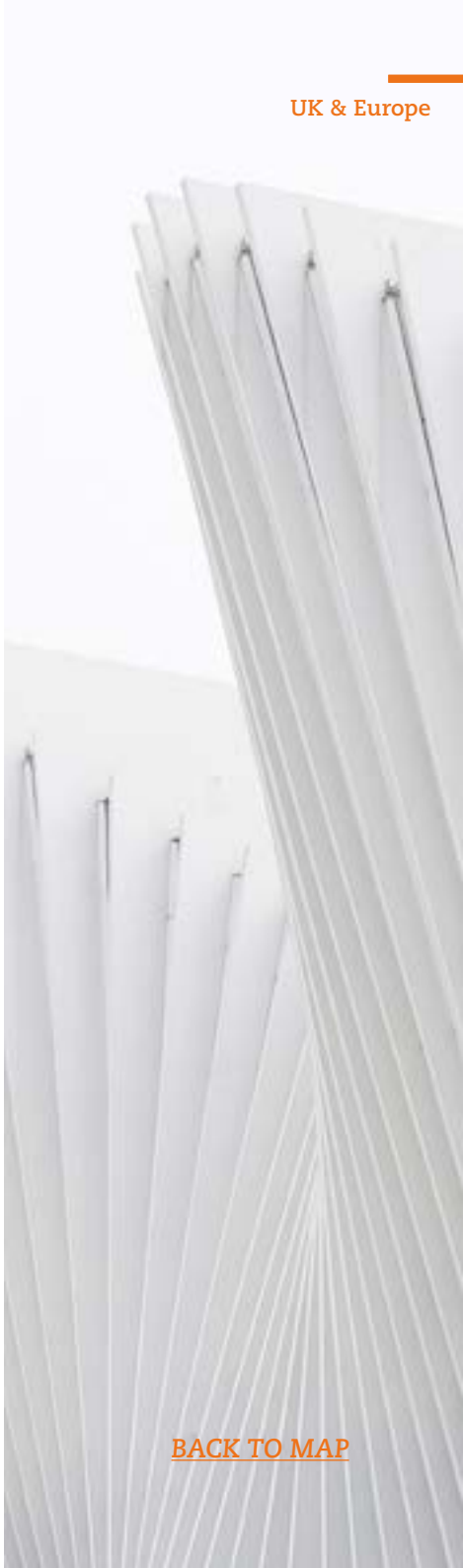

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"PIC" – Extraordinary Road Investment Plan: Improvement for road infrastructure in Spain

In July 2017, the Rajoy Administration approved "PIC" (which translates as "Extraordinary Road Investment Plan"), a bill to promote the evolution and improvement of road infrastructure in Spain. PIC is based on collaboration between the public and private sector for the reduction of the public deficit and the expansion of private sector investment. As per the last information released by the Sanchez's Administration in January 2019, it will be developed through availability payments, meaning that private companies will be responsible for the construction and maintenance of the infrastructure for a period of 10 years.

It is expected that PIC implies a significant investment having a great impact on road infrastructure, improving a significant number of Spanish roads noteworthy considering that, in Spain, 93% of goods are transported by road, and 90% of passengers travel by road. Furthermore, it would lead to a substantial increase in the Spanish employment rate.

The Minister of Public Works, José Luis Ábalos, recently stated that around EUR1 billion will be tendered during 2019, but there is still no official confirmation in this regard as the annual public budget 2019 has not been approved yet. PIC has been included within the general budget for improving roads which target is to invest around EUR2.3 billion during 2019 (14.1% more than the previous year).

"IAJD" – Transfer of Assets and Documented Legal Acts: Regulatory changes which impact the construction sector

A significant change in Spanish taxation law is currently taking place, which will have a major impact on all areas of law, including construction. The Supreme Court (Chamber 3, section 2) discussed the payment of the tax on the "Impuesto sobre Actos Jurídicos Documentados" (hereinafter "IAJD"), which translates as "Transfer of Assets and Documented Legal Acts". The ruling stated that banks will now be responsible for the payment of IAJD. Given the importance of the matter, it was raised to the Supreme Court Plenum, which determined that the taxpayer should no longer be required to pay IAJD.

On 8 November 2018, the Sánchez Administration, after having notice of the Supreme Court's decision, published Royal Decree-Law 17/2018, amending the Consolidated Text of the law imposing the payment of IAJD tax on banks.

IAJD tax applies to arrangements involving a mortgage or the provision of a loan guarantee (article 29 RDLeg. 1/1993), and thus has a direct relationship with the real estate and construction sectors. Following the legislative change, banks have advised that they will raise their interest rates or commission in order to offset the taxation impact. This will have a significant impact on both companies and individuals, as it will be more difficult to obtain bank financing, whatever the purpose.

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It is important to note, however, that the opposition to the Sánchez Administration is considering the possible elimination of this tax by modifying the Law of Real Estate Credit Contracts, promoting changes in the distribution of mortgage expenses. We will keep you appraised of any developments.

BIM: Its application to public tenders

Building Information Modeling (BIM) is a collaborative process that allows design and project management through the use of a 3D digital program. BIM was created to reduce project cost and time, and improve the quality of construction projects.

In 2014, the EU issued Directive 2014/24/EU urging country members to implement BIM methodology in their legal systems. As a result, in 2015, the Spanish Administration created the BIM Commission, developed by agents and organisers from the public and private sectors, with the aim of transposing the Directive into Spanish law and enforcing the use of BIM in publicly-financed construction projects.

As a result, from 17 December 2018, BIM is mandated for use in Spain on all public works tenders for buildings and, from 26 July 2019, will be mandated for use on all public works tenders for infrastructure.

Madrid Sur Airport – A new airport in the capital

"Madrid Sur Airport" could become the second airport in Madrid. Air City Madrid Sur Ltd (ACMS) (comprising companies with significant experience in the area, such as Grant Consultancy, European Flyers and Desarrollo) is seeking approval for the project from Madrid and Castilla-La Mancha regional authorities.

At an estimated cost of EUR148 million, ACMS plans to redevelop the private aerodrome of Casarrubios-Álamo (30km south of Madrid), through an extension of the airport facilities, thus assuming a location between Madrid and Castilla-La Mancha.

Madrid is now the only European capital with a single airport, and so Air City Madrid Sur is being promoted as a way to connect and facilitate air mobility in Madrid, as well as being environmentally sensitive. The project will involve the construction of a new 3,200 metre runway, a 15,000 square metre terminal and more than 50,000 square metres of space for aircraft maintenance.

One of the most important objectives of ACMS is to attract low-cost businesses to Madrid. Low-cost flights only account for 32% of traffic at Madrid's current airport, compared to 69% at Barcelona's Prat airport.

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Madrid Nuevo Norte – A new urban development area

Madrid Nuevo Norte is an urban regeneration project that will be developed in the north of the city of Madrid with the purpose of restructuring and developing the area. Private financing for the project has reached EUR6 billion, with the construction to be carried out by the Castellana Norte Limited Company District (San José Group and BBVA).

The development of Madrid Nuevo Norte is divided into four areas: the new station, the financial center and two residential neighborhoods (Tablas Oeste and Malmea-San Roque-Tres Olivos). Madrid Nuevo Norte covers an area that exceeds 2.3 million square metres. Development will be mixed between small business, the financial sector and urban living, with a total of half a million square metres in parks and green areas. The project is expected to lead to the construction of 10,500 houses, of which 20% will be subsidized. More than half a million square metres will be used for the construction of new offices.

Madrid Nuevo Norte will modify the skyline of Madrid, as it will include the construction of three new towers - one of which will be the tallest tower in Spain.

It is estimated that there will be 120,000 jobs created during the construction phase of the project and 94,000 after its completion. Construction is scheduled to begin at the end of 2019 and is expected to be completed between 2021 and 2022.

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FIDIC 2017 – One Year On

The second editions of the FIDIC Rainbow Suite of contracts were released at the FIDIC International Contracts Users' Conference on 5 December 2017. Fast forward a year, is there a shift underway towards Employers in the Gulf embracing the changes introduced?

The key changes are identified in our Quick Reference Guide to the Red Book 2017, which can be accessed **here**. One of the most obvious changes is the almost doubling in length of the 2017 contracts, compared with the 1999 contracts. Whilst maintaining FIDIC's approach to balanced risk sharing, the additional words chiefly seek to:

- Incorporate increased administrative and financial discipline, in a desire for clarity and certainty; and
- Better regulate parties' rights and obligations in order to avoid disputes during the life of a project.

The core aims of these changes, namely improved clarity and certainty during the project delivery phase, are to be welcomed. The new provisions do, however, represent a departure from the flexibility and ease-of-use of the earlier editions. Employers may also question whether use of longer, more complex and more prescriptive contracts will facilitate quicker and more cost effective project delivery.

The slow uptake of the first edition of the FIDIC Rainbow Suite (1999) in the Gulf suggests there is little appetite for change. But, it is perhaps an acknowledgement by FIDIC of the success further afield of alternative, less adversarial forms of contract, that the second editions (2017) make space for some proactive contract management provisions. The FIDIC Rainbow Suite must stay relevant - not only in the Gulf but also in the global construction market that it serves.

FIDIC maintains that the 2017 books are "live" contracts to be developed over time by responding to market needs. FIDIC has now published errata to each of the 2017 books following user feedback. Evidently, further changes will be driven by the market. It is now for parties to decide whether they take advantage of the new contractual framework.

By adopting more collaborative provisions and putting the Engineer at the centre of their administration, FIDIC is putting its faith in the willingness of the Employer and the Engineer to adopt a more pro-active, management-led approach to administering construction projects and claims. Time will tell whether this faith is rewarded with a high take-up rate for the new contracts. However, in a contractual landscape that is still largely dominated by the older FIDIC 87 Red Book, and the predecessor 1999 versions, it will likely be some time before widespread acceptance and use of the new forms is seen in the Gulf.

UAE repeals Article 257

A controversial UAE Penal Code provision subjecting arbitrators to potential criminal proceedings was revised in October 2018. Article 257, which was implemented in October 2016, enforced the obligations of arbitrators to act in accordance with the fundament principles of fairness and impartiality. It provided for an arbitrator (as well as an "expert", "translator" or "investigator") to be imprisoned for a period of 3 to 15 years if it knowingly:

"…issues a decision or expresses an opinion or submits a report or presents a cause or proves an incident, in favour of a person or against him, contrary to the duty of fairness and unbiasedness…".

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The revision to Article 257, removing arbitrators from its scope, has been heralded by arbitration practitioners, who will see this as another reason to regard the UAE as an attractive seat for arbitration. It will also be welcomed by arbitrators, who will be more ready to accept (or continue) appointments in the UAE, no longer being at risk of criminal proceedings which could arise from allegations made by unsuccessful claimants or respondents.

Abu Dhabi Global Market

The Abu Dhabi Global Market (ADGM) is a broad-based international financial centre for local, regional and international institutions which comprises three independent authorities – the Registration Authority, the Financial Services Regulatory Authority and ADGM Courts.

It is established as a financial free zone in the Emirate of Abu Dhabi, with its own civil and commercial laws, and a judiciary which is modelled on the English common law system. The direct application of English common law makes ADGM the first jurisdiction in the Middle East to adopt a similar approach to that of Singapore and Hong Kong. Parties may opt in to the ADGM Courts' jurisdiction.

ADGM Courts, whilst in operation for 3 years, officially opened the world's first wholly digital court room on 9 December 2018, allowing sittings and any other court business to be conducted anywhere in the world.

The ADGM's pro-arbitration framework has been modelled on the UNCITRAL Model Law, which has been modified to ensure that it is a seat that reflects best international arbitration practice and accommodates the needs of users in the MEA region. ADGM's Arbitration Centre (ADGMAC) became fully operational in October 2018. ADGMAC is equipped with state-of-the-art technology and hearing facilities, available to all parties seeking to resolve their disputes through arbitration or mediation.

As an affirmation of the increasing relevance of international arbitration in the MEA region, the International Chamber of Commerce has also established its first representative office in the Middle East, which is located in ADGMAC.

Dubai tightens HSE Regulations for the construction industry

The Department of Civil Defence in Dubai published an updated version of the 'UAE Fire and Life Safety Code of Practice' (the Code) on its website on 8 September 2018. We understand that, at the time of writing, the Code is being treated as in force by the UAE Civil Defence.

This revised version of the Code (which has been awaited since the beginning of 2016 and serves as the next update in a line of revisions to the original 2011 version) sets out minimum requirements and provides guidance to 'stakeholders' (comprising, amongst others, property owners, developers, contractors, designers and consultants) in relation to both active and passive fire protection, so as to ensure fire and life safety during the construction, maintenance, occupation and operation of all buildings and structures in the UAE.

Whilst we are yet to encounter its application in practice, the publication of this updated version of the Code reflects the region's ongoing commitment to improving the safety of buildings / structures and their occupants in the aftermath of several fires in high-rise buildings over recent years.

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The Modernisation of Dispute Resolution in Qatar

From a symbolic standpoint, there can be no better example of the continued progress which Qatar is making in improving dispute resolution systems than the opening of the branches of the Courts of Appeal and the Courts of Cassation in Lusail, Qatar's new, ultra-modern city. As these buildings, and those surrounding them, swing into action, disputes which arise through commerce and construction are beginning to be handled in different ways. The process around court proceedings is also being modernised, with new online based processes of granting powers of attorney, which standardize the powers which companies may grant to persons representing them.

In addition, Law No. 2 of 2017 (the Arbitration Law) is starting to change the way in which arbitrations are conducted. Under the Arbitration Law, either the Qatar International Court and Dispute Resolution Centre (QICDRC) or the domestic Qatar Court of Appeal may be regarded as the "Competent Court" for the enforcement of arbitral awards.

Other innovations under the Arbitration Law include making it more straightforward to enforce an arbitration award, and allowing the parties more certainty when choosing their ultimate dispute resolution forum. There are also now provisions which underline "ad-hoc" arbitrations should parties choose this process. Importantly, the Arbitration Law strictly limits the grounds for nullification of an award.

In November 2018, the UK Royal Institute of Chartered Surveyors (RICS) held an event with the Qatar International Centre for Conciliation and Arbitration (QICCA), aimed at highlighting the ways in which disputes in construction contracts could be avoided. RICS offers services which seek to avoid disputes on a global basis, and its focus on Qatar is not surprising given the unprecedentedly high level of development which the country is experiencing. Domestic bodies like QICCA and the Society of Construction Law (SCL) continue to host regular training events in order to provide training in spotting potential conflicts and finding amicable ways of dealing with them.

However, if conflicts cannot be avoided, or settled amicably a further dispute resolution option is the QICDRC (as defined above) which continues to attract internationally renowned judges. This year, Lord Phillips of Worth Matravers stepped down as President of the Court, to be replaced by the Lord Thomas of Cwmgiedd, both of whom were previously Lord Chief Justices of England and Wales.

The cutting edge venue facilities provided by the QICDRC for arbitrations and alternative dispute resolution such as mediation, are becoming busier, allowing parties to avoid travel outside of Doha for hearings.

Overall, these developments have spearheaded innovation in the handling of disputes in Qatar. We would not be surprised to see this continue into 2019, including the potential relaunch of a law which introduces adjudication into the construction sector – an almost entirely paper based, quick route to a binding decision. Such a law (which we understand is currently being reviewed by the Government) could change the landscape of construction disputes in Qatar.

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The use of BIM in Dubai

The Dubai Municipality became the first public authority in the Middle East to mandate the use of building information modelling (BIM) for construction projects. BIM is a collaborative design and information management tool that collates information from the various parties engaged in a construction project. It can streamline the processes involved in complex developments by facilitating a collaborative approach to building design and has been credited as a significant contributing factor to the success of regional mega-projects such as the Masdar HQ in Abu Dhabi, the Castle Kingdom at Legoland Dubai and the Midfield Terminal Complex at Abu Dhabi Airport.

The aim of BIM is to have a platform where the project team can have all of the information available for a building in a 3D model to drive cost and time efficiencies.

BIM requires investment and has achieved most success when imposed as a contractual requirement by governments - this is particularly so in the UK, which is a world leader in the use of BIM. Whilst the Dubai Municipality is leading the charge in the Middle East, we are also aware of a number of projects around the region which are utilising BIM as part of the project management.

However, the use of BIM creates a number of questions around the ownership of and reliance on data and intellectual property rights, and around cybersecurity and other legal issues. A recent English case relating to the construction of a power station in the Falkland Islands is one of the first published legal disputes that substantively refers to the use of BIM and highlights some specific issues for parties to consider in the context of construction data.

We hope to see law and regulations develop in relation to these issues - particularly, on the continuing duty to review design, the duty to warn, and the scope of tortious liability in light of BIM and the use of an integrated single model.

Kingdom of Saudi Arabia: Vision 2030 Developments

In April 2016, the Kingdom of Saudi Arabia launched Vision 2030, a plan to reduce its dependency on oil through diversifying the economy and developing the public service sectors. The Council of Economic and Development Affairs identified a list of 12 realization programs to achieve the vision, including the Public Investment Fund Program. The Program, described as the engine behind economic diversity in Saudi Arabia, is aimed at launching and developing new sectors through the Public Investment Fund, including Entertainment and Tourism.

In line with Vision 2030, and with a view of promoting these industries, Saudi Arabia has embarked upon the development of three mega construction projects:

- Red Sea Project: aims to deliver a world-class international tourist destination, promoting tourist activities in Saudi Arabia. The final development will include a wide variety of assets for commercial and private sale, including hospitality, luxury residences, retail, and entertainment activities. The project is expected to contribute USD4 billion annually once completed.
- Qiddiya Project: aspires to become Saudi Arabia's entertainment and recreation destination, with attractions including six theme parks, motorsport and thrill activities, a sports city, events and

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cultural activities, retail malls and outlets, food and beverage strips and real estate developments. It is expected that up to USD2.7 billion will be invested to develop these entertainment projects.

- Neom Project: defining itself as 'the world's most ambitious project', this new cross border city development spanning Egypt, Jordan and Saudi Arabia, aims to become 'a destination at the top of the world's most liveable city index'. One of the Project objectives is to develop sixteen key economic sectors, including energy, manufacturing, technology and digital, design and construction. Neom will be operating as an independent economic zone, seeking cooperation and investment from international innovators and investors. The first phase is due to be completed by 2025. The project is supported by a Saudi Public Investment Fund of USD 500 billion.

There are several other key construction initiatives being developed by the Fund aimed at implementing the reforms under Vision 2030, including:

- A Community Development Company to provide affordable residential solutions, with a view to building up to 600,000 residential units in various cities across the Kingdom;
- The New Jeddah Downtown Project for the rejuvenation of Jeddah's waterfront corniche, aimed at developing a tourist destination with leisure and recreation areas, and with projected costs of USD4.8 billion;
- The development of King Khalid International Airport City in Riyadh and King Abdulaziz International Airport City in Jeddah;
- The development of hotel and housing capacities in the Holy City of Makkah and Al Madinah; and
- The development of a Tourism and Entertainment Destination in Asir.

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International Arbitration Act

One of the biggest developments in the South African legal landscape in recent times was the introduction of the International Arbitration Act (Act) in December 2017. The Act incorporated into law in South Africa the United Nations Commission on International Trade Law (UNCITRAL) Model Law (Model Law), the 'gold standard' by which international arbitrations regimes are measured.

It was hoped that, by adopting the Act, South Africa would establish itself as a regional hub for international arbitrations in Africa and provide competition for the other African Arbitration Centres.

South Africa is well placed to achieve this, for a number of reasons, including the following:

- the Act has support from the South African government, the South African courts and the legal establishment in South Africa;
- South Africa has a well-established and well developed judicial system, as well as independent courts which provide support to arbitral tribunals;
- South Africa has the infrastructure, resources and logistical support such as arbitration venues, hotels, airports and the Gautrain to support large scale international arbitrations;
- geographically, South Africa is a convenient venue to accommodate parties from different parts of the globe; and
- the costs of an international arbitration in South Africa will likely be less than other arbitration venues such as Mauritius, London, New York or Paris.

The Model Law will now provide investors with comfort that disputes will be adjudicated fairly, in accordance with international best practice and against a framework that they understand and are familiar with.

In the short time that the Act has been in effect, it has already been a great success, with approximately 30 international arbitrations having taken place in South Africa (at the time of writing), which is significantly more than some of the other African Arbitration Centres.

Renewable energy independent power producer programme

During 2018, South Africa took two major steps forward in its Renewable Energy Independent Power Producer Programme (REIPPP).

REIPPP commenced in 2010, and was a world acclaimed program providing for participation by Independent Power Producers in the renewable energy sector in South Africa. To date, approximately R142 billion (approximately USD 11 billion) has been invested.

REIPPP includes the following technologies: Onshore Wind (generation capacity allocated 6 360MW); Photovoltaic (generation capacity allocated 4 725MW); Solar Parks (generation capacity allocated 1 500MW); Concentrated Solar Power (generation capacity allocated 1 200MW); Biomass (generation capacity allocated 210MW); Small Hydro (generation capacity allocated 195MW); Biogas (generation capacity allocated 110MW); Landfill Gas (generation capacity allocated 25MW).

During 2015 to 2018, the South African Government stalled on the continuation of REIPPP and did not sign the Power Purchase Agreements (PPAs) for bid Windows 3.5 and 4 of REIPPP.

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This was primarily due to the financial troubles of ESKOM, the South African Power Utility, and the buyer of the allocated power.

In April 2018, however, the Minister of Energy, Jeff Radebe, signed 27 outstanding PPAs from Bid Windows 3.5 and 4. This is expected to generate 2300MW of renewable energy at a total investment to South Africa of about R56 billion (approximately US3.5 billion).

In June 2018, Radebe announced that bidding for Window 5 of REIPPP would commence in November 2018. Bid Window 5 is estimated to generate an additional 1800MW of renewable energy, and it is expected that the investment value will be in the region of R40 billion to R50 billion. At the time of writing, BD Window 5 had not yet been commenced, but it is anticipated to take place in 2019.

These developments demonstrate the South African Government's commitment to REIPPP, which will hopefully bring South Africa's world class program back on track.

Integrated Resource Plan 2018

In August 2018, the Minister of Energy, Jeff Radebe, released the long awaited draft Integrated Resource Plan (IRP), which is an update and revision to South Africa's IRP 2010.

The IRP is South Africa's Energy Roadmap to 2030, and sets out what South Africa's energy demands are, how those energy demands will be supplied and the cost of such energy supply. Highlights of the IRP include:

- An emphasis on "least-cost" options;
- Significant additional Wind, Solar/PV and Gas allocations;
- New installed capacity to 2030 forecast to include 1 000MW coal; 2 500MW Hydro, 5 600MW wind; 8 100MW Solar/PV and 8 100MW gas; and
- The energy mix by 2030 forecast to consist of 34 000MW of coal (46% of total installed capacity); 1 860MW of Nuclear (2.5% of total installed capacity); 4 969MW of Hydro (6% of total installed capacity); 2 912MW of Pump Storage (4% of total installed capacity); 7 958 MW of Solar/PV (10% of total installed capacity); 11 442MW of Wind (15% of total installed capacity); 600MW of Concentrated Sola Power (1% of total installed capacity); and 11 930MW of Gas (16% total installed capacity).

Phase II of the Lesotho Highlands Water Project

The Lesotho Highlands Water Project is a joint project, between the governments of South Africa and Lesotho, to supply water to areas of South Africa. The cost of phase II is estimated at US2 billion and completion is expected by 2026. Phase II will include the construction of roads, bridges, bulk power lines, telecommunications, resettlement, the Polihali Dam and transfer tunnel.

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Tanzania's drive to achieve semi-industralised status

Tanzania aims to achieve semi-industrialised status within the next seven years, in keeping with its National Development Goals-2025. This entails moving from an agriculture-based economy to a manufacturing-centric economy, focusing on division of labour and technological innovation. The National Bureau of Statistics has confirmed that industrial establishments in Tanzania almost doubled between 2008 and 2016.

On top of this, Tanzania boasts a high 7.7% growth rate of value-added activities, leading the race against its East African counterparts, with Kenya, (currently the leading economy in East Africa), trailing with a 3.4% growth rate.

Despite this, Tanzania continues to face obstacles in aspiring to semi-industrial status. An especially 'costly to resolve' challenge has been the lack of capacity and infrastructure. As a result, Tanzania continues towelcome foreign investment, with many investors keen on capitalising on infrastructure and construction projects, including via public-private partnerships. There is also a growing need for logistical services. (Foreign bidders are often advised to form unincorporated joint ventures, in line with local content requirements, spanning several industries.)

The Government is forging ahead with several of its key projects, including upgrading the Dar es Salaam Port, constructing the new Chato Airport, reviving the Air Tanzania Company Limited, and implementing the Standard Gauge Railway project, as well as the construction of the Selander Bridge. The drive to make Tanzania a middle income country means that the Government is prioritising finance and moving towards projects that aim to improve Tanzania's social and economic standing.

Three projects that especially stand out are the Uganda-Tanzania Pipeline, the Bagamoyo Port Project and the Stiegler's Gorge Hydroelectric Power Station. Below, we provide a general overview of these projects, their associated benefits, and their unique challenges.

East African Crude Oil Pipeline (EACOP)

In 2017, Uganda reached an agreement with Tanzania to build an oil pipeline from Hoima to Tanga, effectively withdrawing from negotiations with Kenya for a joint pipeline undertaking. The USD3.5 billion project is expected to be completed by 2020, at which time Uganda's status as an oil producing country will be cemented. Stakeholders in this project include Total E&P Uganda, Tullow Uganda, Cnooc Uganda Ltd as well as the governments of Uganda and Tanzania.

Construction for the pipeline is underway and, while it had been reported that the Environmental Social Impact Assessment report for the project would be completed by December of 2018, at the time of writing, the report has not yet been published.

The Bagamoyo Port Project

The Bagamoyo Port Project is now officially underway with ownership having been transferred to China Merchants Holdings International (CMHI) and Oman's State General Reserve Fund (SGRF), who have suggested that they will run the port as an overseas venture.

The project has the potential of being the most profitable port in Africa, and other economic advantages include:

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- the establishment of the Special Economic Zone supplementing the project, which is to consist of over 700 industries; and
- offsetting losses due to lack of capacity and infrastructure in the Dar es Salaam Port which, according to the World Bank, has peaked at USD1.8 billion in recent years.

Although the timeline for the construction is yet to be confirmed, SGRF has confirmed that the project will be undertaken in phases.

Bagamoyo Port is set to be 'the largest and most modern port in Africa', and promises to continue the drive to industrialisation in Tanzania.

Stiegler's Gorge Hydropower project

Stiegler's Gorge Hydroelectric Power Station is a planned 2,100 megawatts hydroelectric dam along the Rufiji River in the Selous Game Reserve.

The Government of Tanzania first considered developing an irrigation dam back in the 1960s (it was later picked up in the 1970's, this time for power generation). The project stalled for many years due to lack of funding, but it is now back on and, once fully developed, will be the largest power station in the country. It is expected to produce at least 5,920GWh of power annually.

Late in 2017, the Tanzanian Government advertised bids for the construction of the dam which is expected to be completed within 36 months. At the time of writing, it had been announced that the Arab Contractors Company had secured the contract, but there have been no further details pertaining to timeline or cost.

The Government has assured observers that the dam will ensure a more frequent supply of water for wildlife than has been the case in the past, and is adamant to see the project to completion, as it promises to guarantee a constant supply of electricity to neighbouring countries, as well as powering industries and homes locally. Hence, the project remains at the centre of Tanzania's industrialisation plans for the near-future.

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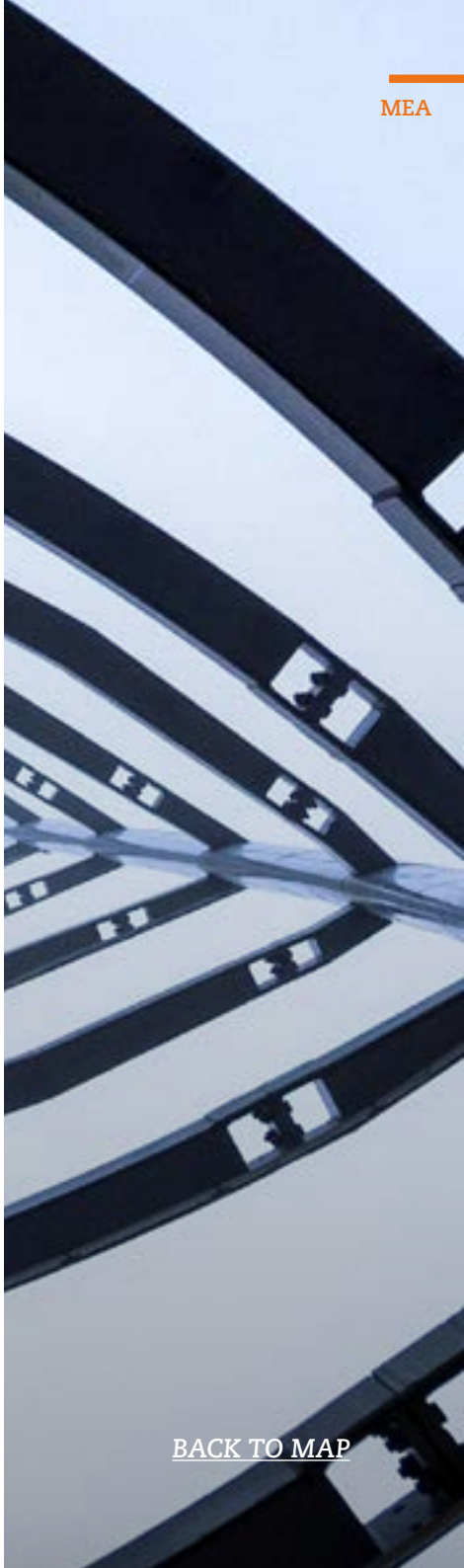

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The importance of formalising contractual amendments: *Built Environs WA Pty Ltd v Perth Airport Pty Ltd [No 2] [2018] WASC 17*

Perth Airport Pty Ltd (PAPL) and construction company Built Environs WA Pty Ltd (Built Environs) entered an airport expansion contract in 2013, which was valued at AUD172.8 million. The contract was complex. It was more than 100 pages in length and had 45 appendices.

In December 2016, PAPL had recourse to performance bonds in an amount of AUD14.5 million in partial satisfaction of liquidated damages that were due to it under the contract. Built Environs claimed that PAPL was not entitled to call on the performance bonds and, by presenting them for payment, PAPL was in breach of the contract.

Built Environs claimed that the contract had been varied by a 2015 email from a PAPL executive to the Built Environs managing director,to the effect that PAPL would (on certain conditions) release one of the bank guarantees and would not attempt to recover the liquidated damages. Built Environs submitted the email constituted a binding agreement and an intention to create legal relations.

The Court found PAPL was entitled to call upon the performance bonds. The email did not constitute an intention to create legal relations and, even if it did, PAPL would not be bound by it. The main takeaway points from this are that:

- informality will not suffice when it comes to the amendment of complex construction contracts, and the validity of ad hoc amendments will be closely scrutinised by the courts; and
- any communication which purports to amend a contract must be in clear and precise language and indicate an intention for the parties to be legally bound.

High Court confirms Security of Payment determinations can only be overturned in limited circumstances: *Probuild Constructions v Shade Systems [2018] HCA 4 and Maxcon Constructions Pty Ltd v Vadasz [2018] HCA 5*

Probuild and *Maxcon* were two cases simultaneously considered by the High Court of Australia. They related to the Court's jurisdiction to "quash" an adjudicator's determination containing an error of law. The Court held in both instances that the Building and Construction Industry Security of Payment Acts in New South Wales and South Australia (Acts) evinced an intention to limit the Court's jurisdiction to review an adjudicator's determination.

The primary purpose of the Acts is to create statutory entitlements to receive progressive payments (which cannot be contracted out of), and to provide for the informal, quick and interim resolution to such entitlements. The High Court held that the interim nature of the determinations, which preserve and leave undiminished the parties' contractual rights (that can be separately pursued by litigation), was a deciding factor indicating that a determination could not be reviewed for error of law.

The decision will be welcome news for claimants as it supports the purpose of the Acts, in providing quick, effective and interim resolution of payment disputes, in order to keep money flowing in the contractual chain.

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West Coast Security of Payment issues

The jurisdiction of adjudicators under the Western Australian and Northern Territory security of payment legislation was scrutinised in several high-profile disputes in 2018. Two cases originated from a subcontract under which Duro Felguera Australia Pty Ltd provided works for head contractor, Samsung C&T Corporation, at the Roy Hill iron ore mine in the Pilbara, Western Australia.

The first decision, *Samsung C&T Corporation v Duro Felguera Australia Pty Ltd* [2018] WASCA 27, determined that an adjudicator only had jurisdiction to determine payment disputes related to "construction work" under the Construction Contracts Act 2004 (WA) (CCA).

The WA Court of Appeal found that an adjudicator would commit a jurisdictional error, if they attempted to settle a payment dispute relating to *"non-construction work"*. The CCA expressly excludes *"fabricating or assembling items of plant used for extracting or processing … any mineral bearing or other substance"* in the definition of *"construction work"*. Therefore, the adjudicator committed an error in determining Duro's claim, which included assembling an iron ore processing plant. The WA Court of Appeal found, however, that an adjudicator was not required to dismiss an application without making a determination on its merits, if the underlying claim concerned payment for both *"construction work"* and *"non-construction work"*.

In the second decision, *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation* [2018] WASCA 28, the WA Court of Appeal held that the portion of an adjudicator's determination which was affected by jurisdictional error was severable, and that the uncompromised portion of a payment determination — that which related to the statutory definition of "construction work" — could still be enforced.

Jurisdictional error was also highlighted in *Total Eden Pty Ltd v Charteris* [2018] WASC 60, in which an adjudicator was found to have gone beyond the limit of their powers by implying terms into a contract which were not expressed, and which departed from each party's submissions. In particular, the adjudicator implied terms about the timing of payments, despite the contract having express terms relating to payments.

In *Clough Projects Australia Pty Ltd v Floreani* [2018] WASC 101, the Court determined that an adjudicator could adjudicate more than one payment dispute between parties, without the consent of the parties, if the adjudicator was satisfied that it would not adversely affect their ability to settle the dispute fairly and quickly. However, an adjudicator will deny parties procedural fairness if they make a decision on a point not advanced by either of the parties without inviting further submissions on that point.

Similar issues were considered in *JKC Australia Pty Ltd v INPEX Operations Australia Pty Ltd* [2018] NTCA 6. The Northern Territory Court of Appeal considered an adjudicator's determination of a payment dispute under the Construction Contracts (Security of Payments) Act 2004 (NT).

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At first instance, the Court determined that INPEX had not been afforded natural justice, as it was denied proper opportunity to address matters outside those defined by the parties. The Court of Appeal set aside this decision, determining that INPEX had constructive notice, in the form of emails from the adjudicator, that the adjudicator would rely on matters outside of those initially considered by the parties.

In their judgment, Grant CJ, Southwood J and Mildren AJ held at [56]:

"Although the Determination turned on a point of law not contended for by either of the parties, the issue was squarely identified by the Adjudicator and the parties were given opportunity to address it. That being so, in our opinion the Adjudicator did not fail to provide procedural fairness to INPEX on these grounds."

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The main takeaway points from this judgment are that:

- Claimants seeking adjudication of a dispute under the CCA will need to identify and separate claims for payment for "construction work" (as defined in the statute) from any claims for payment which aren't.
- With a significant number of high value determinations being subject to judicial review (and further appeal) each year, adjudicators will need to be careful to ensure that their determinations are within the limits of their power under the relevant Act.
- Adjudicators must ensure that, if they wish to give consideration to matters outside those defined by the parties, the parties are given notice and time to respond. If the parties do not avail themselves of the opportunity to do so, they risk having the matter determined on issues not dealt with in their submissions.

Australia introduces "ipso facto" reform

The Federal Government has recently enacted reforms to Australian insolvency legislation that restrict the enforcement of contractual rights triggered by voluntary administration, receivership or other insolvency events (commonly referred to as "ipso facto" rights). These reforms are intended to encourage businesses to work through difficult times by allowing important contracts to be maintained during financial hardship.

Construction contracts commonly allow a principal to exercise certain contractual rights where a contractor becomes insolvent or experiences some other "insolvency event". Once triggered, these "ipso facto" rights allow a principal to:

- Terminate the contract;
- Suspend or omit the works; or
- Call upon a security.

The reforms, which took effect from 1 July 2018, stay or limit the enforcement of certain ipso facto rights. The stay on enforcement is triggered if a right arises under a contract because:

- An administrator is appointed;
- A managing controller is appointed over the company's assets; or
- Certain steps are taken to propose a scheme of arrangement to avoid winding up.

Although parties cannot contract out of the new ipso facto legislation, there are certain types of contracts (for example, for the supply of essential services to a government body); and rights (for example, certain "step in", set off and assignment rights), that are excepted from the stay.

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To avoid contravening the new legislation (and to avoid claims for wrongful termination), principals and head-contractors should be careful when seeking to enforce an ipso facto right.

Market trends

The construction market in Australia will continue the current trend of operating at two speeds in 2019. On the East Coast, large infrastructure projects will continue to drive the market, particularly with growth in road and rail projects, and a second airport in Sydney. Disputes on the East Coast are also steadily increasing and it is likely that 2019 will start to see many large infrastructure projects heading for high value litigation.

On the other hand, the states of Western Australia and Queensland are likely to continue to experience a decline in mining related construction. In particular, the LNG sector will be affected as most major LNG projects draw to a close. With that, we will see the spike in oil and gas construction disputes continue to rise over the upcoming year and beyond as these projects are completed and parties seek to close out claims.

It is likely that Australian contractors will continue to benefit from the globalisation of the construction market and an increase in infrastructure investment by its closest neighbours, including Indonesia. Likewise, international contractors will continue to play a major role in the Australian construction industry, and reap the benefits of the high infrastructure spend on the East Coast.

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Getting on Board: The Singapore Infrastructure Dispute-Management Protocol

The Singapore Infrastructure Dispute-Management Protocol (SIDP) was launched on 23 October 2018. It is part of the Singapore government's effort to develop Singapore's reputation as an infrastructure and dispute resolution hub and to capitalise on an expected increase in infrastructure investments in Asia.

The SIDP dispute board, targeted for use in construction infrastructure projects in Asia, is unique – even though it is based on well-established dispute board protocols and incorporates elements of a traditional board, such as issuing opinions or making determinations. In addition, the SIDP dispute board can assist the parties in avoiding or resolving differences through informal discussions and negotiations. Where these fail, it has a variety of tools at its disposal, including acting as a mediator.

SIDP has the potential to gain popularity in Asia as its available options for conflict resolution and dispute avoidance align with the general temperament of parties in an Asian context, where a less confrontational approach is typically preferred. However, it remains to be seen if it will eventually displace the incumbent forms of dispute boards that are currently used in the region.

Building on the 'Build, Build, Build' Infrastructure Plan in the Philippines

A session of the 2017 forum on DuerteNomics, in the Philippines, was opened with the assertion that the country will embark upon the most ambitious infrastructure development programme in its history, which will usher in a *"Golden Age of Infrastructure"*. The country seems destined for an exciting era of development, as the government promises to grow the economy, reduce poverty and create jobs with an ambitious USD180 billion infrastructure program encompassing almost 5,000 projects.

The surge in infrastructure spending has even seen new "hybrid" models of public-private partnerships (PPPs) where infrastructure projects are fast-tracked by using government funds, or cheaper financing at the construction phase, with the operation and maintenance aspects to be auctioned off to the private sector thereafter.

There are considerable factors that are involved in structuring a PPP project. The PPP Centre of the Philippines (PPP Centre) is the main driver of the PPP program in the Philippines and in the coordination and implementation of PPP projects.

As part of a multi-national consortium, we are working closely with the PPP Centre to assist in developing a feasibility study for the financing, design, construction, operation and maintenance of a world class seaport on a PPP basis, and to provide support from bidding to financial close of the project (which is intended to boost the economy of the region and to realise its full potential as an international port destination).

The Hong Kong position on single joint experts - not so single after all

In Hong Kong, if a party wishes to adduce expert evidence in Court, it must apply for the Court's leave to do so. Recent cases suggest that it is more likely that the Court will insist upon the appointment of a single joint expert (SJE) as opposed to the parties' own experts. This is because the Court believes that the instruction of a SJE can improve the quality of expert evidence, reduce costs and improve the speed at which actions can be resolved.

It is, however, possible that at least one of the parties may be unhappy with the SJE's report. What then can the dissatisfied party(ies) do in such a situation?

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In the recent case of *Nga Investment Limited v Lau Jennifer P.T. [2018] HKDC 1094*, the Court turned down an application challenging a SJE's opinion but did confirm that parties may make such a challenge, by calling the SJE to be cross-examined at trial (if the Court considers that such a challenge may further assist the Court and it is just to do so).

In order to arrive at such a conclusion, the Court will take into account considerations such as the nature of the dispute and the number of issues on which the expert evidence is relevant, and balance the reason(s) for the challenge against other practical considerations, such as the associated time and costs and the size of the claim(s).

Amendments to Singapore Security of Payment legislation

The Building and Construction Industry Security of Payment (Amendment) Act was passed by Parliament on 2 October 2018. While the commencement date of the new Act has yet to be announced, it is expected to come into effect in 2019. As a result, we expect to see fewer technical objections to payment claims and adjudication applications, as the amendments to previous legislation shift the focus of adjudication to the substantive merits of claims for work done. In addition, we expect to see more adjudication review cases, as now both the claimants and respondents are entitled to apply for adjudication review.

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Bond by Duty to Inform:
Valard Construction Ltd. v. Bird Construction Co. [2018] SCC 8

In *Valard Construction Ltd. v. Bird Construction Co. [2018] SCC 8*, the Supreme Court of Canada held that obligees are required to inform potential beneficiaries of the existence of a bond where the beneficiary would objectively suffer an unreasonable disadvantage by not being informed of the same.

Bird, a general contractor for a construction project subcontracted certain electrical work to Langford. The subcontract required Langford to obtain a labour and material payment bond naming Bird as trustee. The bond allowed for a provider of work, who had not received payment from Langford, to sue the surety for the unpaid sum, subject to a condition that the provider of work give notice of its claim within 120 days of its last provision of work.

Valard contracted with Langford to provide the required electrical work, but its invoices were never paid by the latter. After the 120 day notice period had expired, Valard asked Bird whether a bond had been obtained to which Bird replied affirmatively. Valard filed a claim that was denied by the surety as being out of time.

Valard sued Bird for breach of trust but its claim and subsequent appeal were dismissed. However, the Supreme Court of Canada allowed Valard's appeal, imposing a duty on project owners and general contractors, who are designated as trustees, to provide reasonable notice of the existence of bonds to subcontractors for whose benefit such bonds are secured.

Stronger Liens in Ontario

On 1 July 2018, 2018, Ontario's amendments to the Construction Act (previously the Construction Lien Act) came into force. Changes include extending the period to preserve a lien by registration or to deliver a lien claim from 45 days to 60 days from the earlier of the last day of work, termination or completion of the contract, or publication of a certificate of substantial performance.

Lien claimants will also have a further 90 days to perfect their liens. Holdback can now be released on an annual or phased basis on projects where the original contract price exceeds a certain amount, so long as this was provided for in the contract.

Contractors who enter into a contract with the Crown, a municipality, or a broader public sector organisation, will be required to obtain a labour and material payment bond and a performance bond where the contract price is CAD500,000 or greater.

Finally, every contractor or subcontractor who receives trust funds in relation to a project must deposit those funds into a bank account in the trustee's name and maintain written records detailing the amounts received and paid out of those funds.

Managing Construction Disputes in Manitoba

On 19 November 2018, the Manitoba Law Reform Commission released its final report following a review of the Builders' Liens Act, which had not been reviewed since 1981. The final report, entitled "The Builders' Liens Act of Manitoba: A Modernized Approach" contains 87 recommendations, some of which are based on Ontario's own amendments to its Construction Act that came into force earlier in 2018.

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Recommendations include implementing a comprehensive claim protocol for bonding and providing for uniform bonding forms (Recommendation #85), developing a private adjudication system (Recommendation #46), defining the term "public-private partnership" (Recommendation #5), establishing a two-year limitation period for the commencement of civil actions for breach of trust (Recommendation #36), and allowing for a trustee to expressly discharge the trust for all trust funds duly paid (Recommendation #25).

Clearing the Air in Quebec

Bill 162 came into force in Quebec on 4 September 2018, following a public enquiry which exposed systemized corruption in the construction industry.

It provides for various new legal requirements, addressing the most common issues revealed during the enquiry:

- A conviction for certain offences, which already warrant restricted access to public contracts, will lead to refusal by the Board of Construction to issue a licence, and may lead to the cancellation or suspension of an existing licence.
- The Board will also cancel a licence if the licence holder or one of its officers has been convicted of an offence or indictable offence referred to in the Building Act, where it has already been convicted of such an offence or indictable offence in the five years preceding the new conviction.
- The Board's powers of inquiry, verification and inspection are broadened.
- Immunity against civil proceedings and protection against reprisals are granted to any person who, in good faith, communicates information to the Board concerning an act or omission that the person believes constitutes a violation or offence with respect to the Building Act.

  A new penal offence concerning the use of prête-noms is introduced. Although a French concept, a prête-nom is literally translated as "the act of simulating a contract". In Canadian law, a contract can be simulated where the parties agree to express their true intent, not in an apparent contract, but in a "secret contract", also called a counter letter. This counter letter will prevail over an apparent contract but third parties in good faith may, according to their interest, avail themselves of the apparent contract or the counter letter.
- In addition, the prescription period applicable in penal matters is extended from one to three years from the date on which the prosecutor becomes aware of the commission of the offence but may not exceed seven years after the offence was committed.

The general consensus is that the new regulations are likely to improve public perceptions about the construction sector.

Integrated Project Delivery

In the past months, we have been seeing a push toward Integrated Project Delivery (IPD). This new method of delivering projects is intended to integrate all project parties in a process that collaboratively harnesses

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the talents and insights of all participants, to optimize project results, increase value to the owner, reduce waste, and maximize efficiency through all phases of design, fabrication, and construction. By putting the focus on shared responsibility, the contractual arrangements between the parties align the business interests of all participants, hence bringing added motivation for collaboration throughout all phases of the project. We believe that 2019 will be the year that this procurement method really picks up in Canada.

Artificial Intelligence

Artificial Intelligence (AI) is starting to impact engineering in many ways. From the automation of many low-lever tasks to machine learning, engineers in Canada are making use of these technologies to facilitate and speed up their work and eventually bring down costs. With Canada's prominent place in AI development around the globe, it is no surprise that Canadian engineers, as well as other professions, are increasingly looking into the use of such technologies, and we believe that this trend will only accelerate over 2019 and beyond.

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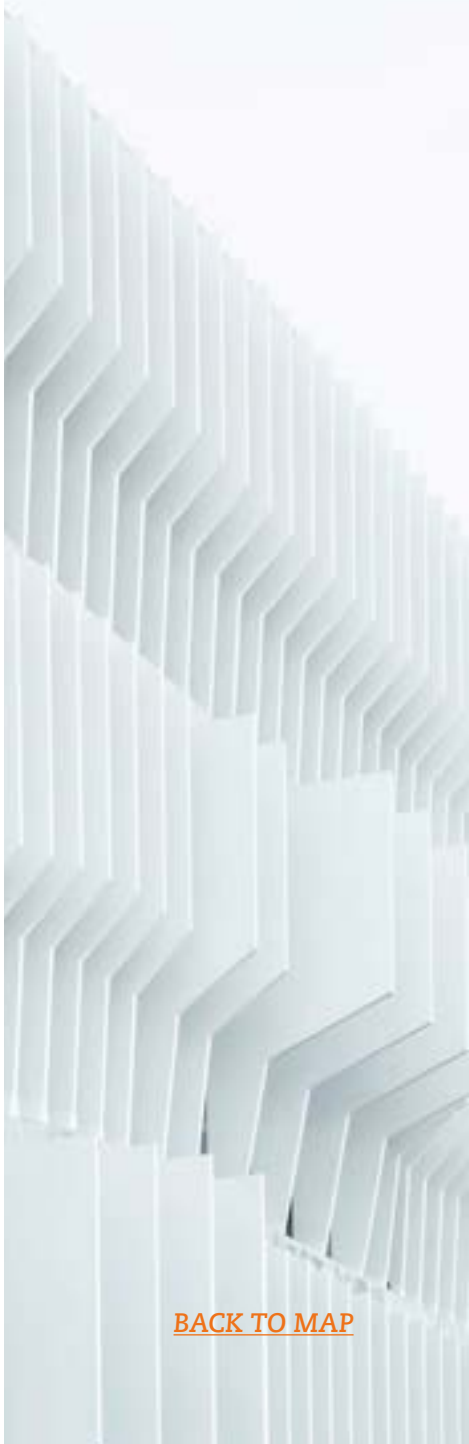

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Bonds required on federal construction projects even if contract is silent: *K-Con, Inc. v. Secretary of the Army*

In *K-Con, Inc. v. Secretary of the Army*, a contractor was awarded two contracts for pre-engineered metal buildings for an Army base in Massachusetts. After the contracts were awarded, the Army told the contractor that it was holding the notices to proceed until bonds were provided. It took two years for the contractor to give the bonds. Shortly thereafter, the contractor submitted claims for the two years of delay.

Faced with a complicated assortment of facts and conflicting contractual provisions, the Court held that the contract was "patently ambiguous." The contractor, therefore, was required to make a pre-bid inquiry. The Court then went on to consider whether the Christian Doctrine applied, which states that a court may insert a clause into a government contract by operation of law if:

- That clause is mandatory, and
- It "expresses a significant or deeply ingrained strand of public procurement policy."

After finding that these two aspects existed, the Court relied on the Christian Doctrine to incorporate into the contract, as a matter of law, bond requirements from the Federal Miller Act that were not physically written in.

It is expected that this judgment will be considered by the courts, in cases involving public contracts at all levels, as most states have laws modeled on the federal law (referred to as "Little Miller Acts").

Department of Transportation revises its rules affecting environmental review of transportation projects

On 29 October 2018, the U.S. Department of Transportation published a final rule in the Federal Register which amends and revises the National Environmental Policy Act procedure rules employed by the Federal Highway Administration (FHWA), the Federal Railroad Administration (FRA), and the Federal Transit Administration (FTA).

The amendments and revisions are intended to accelerate required environmental reviews. The overall policy is to have, insofar as it is possible to do so, all environmental investigations, reviews and consultations coordinated as a single process, with compliance with all applicable environmental requirements reflected in the environmental review document.

The rule lists categorical exclusions for FRA, FHWA, and FTA-regulated projects, including some described as "cross-agency" exclusions, to promote flexibility in the review process.

Alternative fee structure goes live for American Arbitration Association

Although arbitral institutions like the London Court of International Arbitration and International Chamber of Commerce have historically based arbitration costs on models other than a pure hourly-basis, the American Arbitration Association / International Centre of Dispute Resolution (AAA-ICDR) recently became the first national institution to make a true alternative fee arrangement available for parties arbitrating under their rules.

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The scope of the AAA-ICDR's alternative fee arrangement (AFA) will likely expand over time. Currently, two types of AFAs are available for two-party commercial and construction cases over which a single arbitrator presides:

- The parties and tribunal can agree on a fixed-fee, itemized by the three phases typical of arbitration: pre-hearing, hearing, and post-hearing.
- A maximum fee — or, in the construction industry, a "not to exceed" amount — is set and billed by the tribunal at an hourly rate until the agreed cap is reached.

The decision to proceed under an AFA is made at the outset of the dispute and is based on the parties' approval of the prospective-tribunal's proposed compensation expectations or budget.

New Jersey P3 legislation expands opportunities for major infrastructure projects, including roads

On 14 August 2018, in order to address growing infrastructure needs, New Jersey enacted legislation that greatly expands the pool of public agencies authorized to enter into public-private partnerships (P3s) for capital projects in the state. Prior to the signing of Senate Bill No. 865 (SB 865), only public colleges and universities were authorized to use P3s in New Jersey.

SB 865 authorizes local governments, school districts, public authorities and state and county colleges to enter into P3s for capital projects. The new law also allows for statewide road or highway P3 projects, as long as the project includes an expenditure of at least USD10 million in public funds or any expenditure of solely private funds.

SB 865 establishes specific requirements for P3 agreements, including provisions that construction projects contain a project labour agreement and affirm that the agreement and any work performed under it is subject to the provisions of the Construction Industry Independent Contractor Act which governs and regulates the classification of workers on the project.

A contractor is precluded from engaging in a P3 project with an expenditure of less than USD50 million, if the contractor has contributed to the private entity's financing of the project in an amount of more than 10 percent of the project's financing costs.

If the agreement includes the lease of a new project in exchange for upfront or structured financing by the private entity, the term of the lease may not be for a period greater than 30 years.

FERC initiates review of its long-standing pipeline certificate policy statement

On 19 April 2018, the Federal Energy Regulatory Commission (FERC) issued a Notice of Inquiry (NOI) seeking comment on possible changes needed to its 1999 Policy Statement on certification of new interstate pipelines.

The NOI identified four general areas of examination:

- Potential adjustments to the FERC's determination of need;
- The potential exercise of eminent domain (i.e the compulsory acquisition of private land for public use) and landowner interests;
- The FERC's evaluation of alternatives and environmental effects under the National Environmental Policy Act and the Natural Gas Act; and

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– The efficiency and effectiveness of the FERC's certificate processes.

These four areas will frame a debate over whether and how the FERC should take into account new environmental and social considerations – such as evaluating greenhouse gas impacts of new pipelines or requiring that applicants work with landowners and communities affected by proposed projects – while at the same time, expediting pipeline approvals in response to President Trump's Executive Order #13807.

To address increasing concerns expressed by landowners and affected communities in recent cases, the NOI seeks comments about ways to improve the current certificate process to adequately take into account landowner interests and encourage landowner participation in the process. Among other things, the FERC inquires as to whether:

– The use of eminent domain should be considered in reviewing each application against the need for the project;
– The FERC should take additional measures to minimize the use of eminent domain; and
– There is a need to evaluate alternatives beyond those currently evaluated.

Two trends related to public-private partnerships in the US will continue

Public-private partnerships (P3s) will continue to gain in popularity and use. In fact, the use of P3s has spread to lower dollar-value projects, some only valued at USD200 million. In light of this, two trends flowing from P3 activity are likely to continue.

The first is involvement at state level. Over recent years, state governments and agencies have taken matters into their own hands and promulgated laws that support the P3 project delivery model. Additionally, state-run infrastructure banks have been created in an effort to fund projects.

Second, private investment into infrastructure by infrastructure funds is likely to continue, as projects seek to fill funding gaps.

Construction industry may see changes to unionizing standards

Most unionized employers operate under a 9(a) relationship, named for the section of the National Labor Relations Act that establishes it. This means that they are indefinitely obligated to recognize and bargain with the relevant union. Construction employers can also enter into another type of relationship with unions, known as an 8(f) agreement. These agreements obligate them to recognize a particular union for the duration of a contract, but no longer.

However, in some cases construction employers have inadvertently found themselves indefinitely unionized through contracts that create 9(a) agreements based, not on formal action taken by employees, but rather on the premise that the union offered to show the employer evidence that most of the employees want to unionize.

The National Labor Relations Board (NRLB) currently allows this, but it's not clear for how long. At the time of writing, it was considering a case involving a small family insulation business that signed a contract of this nature and, in September 2018, it asked the public for amicus briefs (i.e. submissions by non-litigants) about how it should analyze if a 9(a) relationship exists between that company and the union.

In light of these developments, construction industry employers should watch to see if the NLRB decides to reopen amicus briefing for this case and, ultimately changes the standards for 9(a) unionization. It will also be interesting to see if unions begin to make special efforts in mitigation, such as attempting to get employers to sign 9(a) agreements, before any potential changes take effect.

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Arbitration continues to be favored

Recent court decisions have signaled the courts' proclivity to prefer arbitration over fully-fledged litigation, when provisions in construction contracts are called into question. While the courts recognize a party's constitutional right to a jury trial, the courts also lean strongly towards resolving disputes via arbitration as a matter of public policy, especially if a construction contract carves out arbitration as an alternative to litigation.

What these cases highlight is the courts' appetite to have parties arbitrate a claim when a construction contract's language is ambiguous, in doubt, or open to multiple interpretations. Parties always need to be aware of a construction contract's language and how that language will impact how claims advance and what remedies are available. Litigation may not always be the first and best option.

The emergence of utility-owned renewable energy under build-transfer agreements

Electric utilities in the US historically have been buyers and sellers, but not producers, of renewable energy. Largely due to tax and accounting constraints, vertically integrated, regulated utilities have traditionally entered into power purchase agreements (PPAs) to procure solar, wind and other renewable energy from independent power producers, rather than building such projects and including them in their rate base.

Increasingly, however, dramatic reductions in the installed cost of solar panels and wind turbines, and the looming expiration of federal tax benefits for renewable energy, have led to a new openness to utility-owned generation. A spate of build-transfer transactions — where the utility hires a third-party project developer to develop and construct a project, transferring ownership to the utility at completion — is creating new opportunities and challenges for developers, utilities and equipment suppliers alike.

Increased utility ownership of renewable energy projects may have broad implications for the renewable energy market in those parts of the country where vertically integrated utilities continue to own generating fleets to serve their customers. Renewable energy developers may face the paradox of more direct competition from regulated utilities and fewer opportunities for PPAs, but a larger pool of potential credit-worthy buyers of their projects. The end result may be more renewable energy deployed — but under different ownership structures, and with different challenges, risks and rewards for the players.

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