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Comparative
Legal Guides**



Practical cross-border insights into construction & engineering law

**Construction &
Engineering Law
2023**

10th Edition

Contributing Editors:

Alan Stone & Tom Green
RPC

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Preface

We are privileged to contribute once again to *ICLG – Construction & Engineering Law 2023*. This comprehensive guide delves into the multifaceted world of construction and engineering law, providing an essential reference for understanding and comparing the handling of common legal challenges across various jurisdictions. This year, the *Guide* contains four expert analysis and 20 jurisdiction chapters.

Our expert chapter, “Changes to English Building Regulation since the Grenfell Tower Tragedy”, explores the critical aspects of building safety regulations, shedding light on recent developments and international best practices. This chapter is authored by Alan Stone, Jonathan Carrington and Tom Green who bring their extensive experience and expertise to the subject.

Other notable contributions include a chapter on “Bonds and Guarantees in the Construction Sector” by Herbert Smith Freehills LLP, offering an in-depth look at the legal frameworks and practical considerations surrounding construction guarantees; a thought-provoking piece from Project Controls & Forensics LLC titled “Some Early Thoughts on AI-Assisted Analysis in Expert Opinions in Construction Litigation”, which explores the cutting-edge intersection of artificial intelligence and legal analysis in construction disputes; as well as Trowers & Hamlin LLP’s contribution, “A Legal Overview of the Construction sector in the UAE, Bahrain and Oman”.

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Changes to English Building Regulation Since the Grenfell Tower Tragedy

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Background

On 14 June 2017, a fire at a 24-storey residential tower block in London, Grenfell Tower, resulted in the death of 72 people. The Grenfell Tower tragedy led to the “radical overhaul” of the building regulation system in England, which we summarise below.

On 11 December 2017, the Government issued an advice note for landlords and building owners of tall residential buildings with aluminium composite materials (ACM) cladding – the material used on the Grenfell Tower, identified as the cause of the fire spreading so quickly and still present in one in 10 residential high-rise buildings – to assist building owners in assessing what measures would be required to make those buildings safe. As more cladding materials were tested, and found to pose a similar risk, so the call for safety restrictions widened.

In December 2017, the Government announced an independent review of the building regulations and fire safety. Dame Judith Hackitt led the review, and concluded that the regulatory system for safely designing, constructing, and managing buildings was not fit for purpose.¹ In May 2018, Dame Hackitt issued her final report and recommended a “radical overhaul” of the building regulation system.²

The Banning of Combustible External Cladding Materials

There was, however, concern because Dame Hackitt failed to recommend the banning of combustible cladding materials on the external walls of high-rise buildings. The Government responded on 21 December 2018 by amending regulation 7 of the Building Regulations 2010 restricting the use of combustible materials in the external walls of buildings over 18 metres in height.³ The new regulation, 7(2), requires that all materials which become part of an external wall, or specified attachment, of a relevant building are of European Classification A2-s1, d0 or Class A1. This class of materials is stricter than the definition of “limited combustibility” in the relevant Approved Document B volume 2 and basically means the materials must be non-combustible. The new regulation only applied to building work carried out after 21 December 2018, and does not apply to materials which were already part of an existing external wall.

However, the Government advice about the risk of combustible materials on buildings made it difficult for valuers to value high rise properties and many valuers were providing nil valuations for properties in high rise residential buildings with cladding, on the basis that they could not work out what work might be required.

In December 2019, the Building Societies Association (BSA), the Royal Institution of Chartered Surveyors (RICS) and UK Finance published guidance on how to assess the fire safety risk of external walls on buildings over 18 metres, Form EWS1: External Wall Fire Review.

Government Advice

In January 2020, the Government’s expert panel went further and published advice that ACM cladding (and other metal composite material cladding), with an unmodified polyethylene filler (category 3 in screening tests, which the Government published after the Grenfell Tower fire), presents a significant fire hazard on residential buildings at any height with any form of insulation.⁴ The Government strongly advised building owners to consider the risks of any external wall system and fire doors in their fire risk assessments, irrespective of the height of the building.

However, the Government had to withdraw this advice because flat owners could not sell or re-mortgage their flats as lenders required assurances that the cladding materials on their buildings complied with the Government’s advice.⁵

The Government therefore withdrew this advice on 31 January 2022, and a new standard was introduced by the British Standards Institute, Publicly Available Specification (PAS) 9980, which adopts a “risk-based proportionate approach to the assessment of fire risk” and uses “risk-based benchmark criteria” which are “necessarily subjective, requiring professional judgement by competent persons in their application”. The result is that combustible material can remain on buildings below 18 metres so long as it is deemed by a fire engineer or other competent building professional, after undertaking a fire risk appraisal of external walls (FRAEW), to represent a tolerable fire safety risk.

Building Safety Fund (BSF)

In the March 2020 budget, the Government announced that it would provide £1 billion from 2020 to 2021 to support the remediation of unsafe non-ACM cladding systems on residential buildings 18 metres and over in both the private and social housing sectors.

The Building Safety Fund (BSF) reopened for new applications on 28 July 2022 with a fund of £4.5bn and buildings over 18 metres with cladding issues are now eligible to apply. The aim is to prevent qualifying leaseholders from paying most of the costs to fix fire safety defects in their homes and make those responsible, and those who own the buildings, pay instead. Building owners could also face criminal action if they continuously seek payment from leaseholders to fix historical building safety defects.

Fire Safety Act 2021

In April 2021, the Fire Safety Act (FSA) was introduced to clarify who is responsible for managing and reducing fire risks in different parts of multi-occupied residential buildings. The FSA amends the Regulatory Reform (Fire Safety) Order 2005 (RRO) and the responsibilities of the “responsible person” who has control of premises, which may include building owners, leaseholders, or managers. Under the RRO, there was a requirement for a fire risk assessment to be carried out on the common areas of a multi-occupied residential building. The FSA extends the provisions of the RRO to the building’s structure, external walls, and any common parts, and it introduces what can be termed “risk-based compliance”. This effectively clarifies that where it is alleged a Responsible Person has contravened the RRO, proof of compliance with any applicable risk-based guidance by that Responsible Person may be relied on to establish that there has been no such contravention. The converse also applies insofar as failure to comply with applicable risk-based guidance tends to establish there was such a breach.

Building Safety Act 2022

The Government accepted most of Dame Hackitt’s recommendations, and on 28 April 2022 the Building Safety Act 2022 (BSA) received Royal Assent and introduced new regulations for: (1) “higher risk” buildings, that is, buildings that are 18 or more metres in height or have seven or more storeys and contain at least two residential units; and (2) “relevant buildings”, that is, buildings that have at least two dwellings and are at least 11 metres high or have at least five storeys.

The main changes introduced by the BSA are:

- The establishment of a new Building Safety Regulator (BSR) in England which will regulate, and be the building control authority in relation to, higher-risk buildings.⁶ All higher-risk buildings must be registered with the BSR by 30 September 2023.
- New roles and responsibilities for higher-risk building owners and people responsible for their maintenance. Certain duty holders must “actively consider and manage building safety risks throughout the construction process”, and the “accountable person” and “principal accountable person” are responsible for overseeing the building safety (but not in care homes and hospitals) during occupation.⁷
- Changes to the building control profession.⁸ Approved Inspectors have been replaced with “registered building inspectors” (RBI) and “registered building control approvers” (RBCA), and they are required to register with the BSR between October 2023 and April 2024 (when

the new building control regime comes into effect). The BSR will regulate the new RBIs and RBCAs and set operational standards rules, professional conduct rules, codes of conduct and a competence framework.

- Changes to the Defective Premises Act 1972 (the DPA) which extend the limitation period for claims under section 1 of the DPA⁹ and creates a new statutory duty in the DPA (section 2A)¹⁰ which applies to any person who, in the course of a business, takes on work in relation to any part of a residential building (a “dwelling”). Prior to section 135 of the BSA coming into force on 28 June 2022, the time limit or limitation period for claims under section 1 of the DPA was six years from when the work was completed. The BSA extended this limitation period to 30 years retrospectively and 15 years prospectively, which means work completed prior to 28 June 2022 (the date these changes took effect) will be subject to a 30-year limitation period, and work completed after 28 June 2022 will be subject to a 15-year limitation period. The 30-year period was chosen because the Government says evidence shows that this period (mid-1992 to mid-2022) captures all buildings affected by fire safety defects. Retrospective provisions are rare and onerous so where a claim is made retrospectively, the BSA provides that it may be dismissed if the court is satisfied that it breaches the defendant’s human rights,¹¹ and a claim which has previously been settled or finally determined by a court or arbitration cannot be revived simply because of the extended limitation period.¹² The BSA also creates a new, wider statutory duty in the DPA, section 2A, which, unlike the old section 1 duty, applies to refurbishment work undertaken on existing buildings. The new section 2A duty may also apply to people who were not subject to the old section 1 duty. The old duty applied to “people taking on work for or in connection with the provision of a dwelling”, whereas the new duty applies “where a person, in the course of a business, takes on work in relation to any part of a relevant building”. It does not therefore apply to homeowners doing work on their own home, but it may apply to persons who were not involved in the provision or creation of the dwelling, such as Approved Inspectors. In *The Lessees and Management Company of Herons Court* [2019] EWCA Civ 1423, the Court of Appeal held that approved inspectors did not owe a duty under section 1 of the DPA because, *inter alia*, they are not involved in the provision or creation of a dwelling. At some time in the future, the courts will probably have to consider whether RBIs and RBCAs owe a duty under the new section 2A of the DPA. The High Court has not considered section 135 of the BSA in any detail but in *BDW Trading Limited v URS Corporation Limited* [2022] 12 WLUK 248, Judge Williamson said, “section 135 raises difficult questions of interpretation, which will no doubt be resolved by future litigation”.
- Changes to section 38 of the Building Act 1984 which extend the limitation period for claims for breach of building regulations, although section 38 has not yet come into force.¹³ However, it is assumed that section 38, if and when it comes into effect, will only apply to actual physical damage, and not to pure economic loss.
- The power to apply to the High Court for a “building liability order” to make companies which are associated with and controlled the company which built the building jointly and severally liable under the DPA, section 38 or “as a result of a building safety risk”.¹⁴ The Government says it introduced building liability orders to deal with situations where the building was built by a special purpose vehicle

or subsidiary company which has no assets or is wound up once the development has been completed and cannot pay for any remedial work. The BSA also created a right to apply for an “information order” to obtain information needed to ascertain whether a company was associated with and controlled the company which built the building.¹⁵

- The power to apply to the First-tier Tribunal Property Chamber (Residential Property) for a remediation order,¹⁶ or a remediation contribution order which requires a landlord to remedy specified defects in the building.¹⁷ The first remediation contribution order was granted by the First Tier Tribunal Property Chamber (Residential Property) on 13 January 2023 in the matter between *Arjun Batish and other leaseholders and Inspired Sutton Limited and others* (Case reference LON/00BF/HYI/2022/0002). The applicants had paid the remediation costs via service charge and sought to recoup them from the First-Tier Tribunal. The property in that case was a high-rise block of flats held by residents under long leases. The building was initially used as office accommodation and the defendant had carried out the conversion and development works and were also the freeholder landlords. The defendant was an SPV which had intended to sell the freehold once the conversion had been completed, but, due to several factors, including the BSA, it could not do so. ACM and HPL cladding had been used and the defendant engaged architects and contractors to carry out remedial work including replacement of the cladding and rectifying or replacing the unsafe balconies. The tribunal found that the defendant was responsible for the defects (albeit it was pursuing a claim against a contractor), and that it was just and reasonable to make a remediation order against it. The total costs of the remedial works including professional fees were £3,573,269.91 but the leaseholders pursuing the claim had contributed £194,680.62, which the defendant was ordered to pay.
- New causes of action and liabilities in relation to construction products¹⁸ and past defaults relating to cladding products¹⁹ which enables claims to be brought against (1) construction product manufacturers and sellers for their role in dwellings being unfit for habitation, (2) people who have marketed or supplied a cladding product for making misleading statements in relation to a cladding product or for manufacturing a cladding product that is inherently defective, and (3) people who have failed to comply with a cladding product requirement. The explanatory note to the BSA says there is evidence that the mis-selling of construction products and the supply of defective construction products have contributed to safety defects in buildings, particularly in multi-occupied residential buildings. The new liabilities in the BSA for construction products and past defaults relating to cladding products should make it easier to obtain recourse against manufacturers of defective or inappropriately marketed construction products.²⁰
- The power to establish a building industry scheme.²¹ On 3 July 2023, the Secretary of State made The Building Safety (Responsible Actors Scheme and Prohibitions) Regulations 2023 which require property developers to identify and remediate (or pay for the remediation) of life-critical fire safety defects in residential buildings over 11 metres in height, which they developed or refurbished in England between 1992 and 2022. Developers who do not join and comply with the scheme are prohibited from carrying out major development and gaining building control sign-off in England.

- The removal of payment by certain long (21 years or more) lease holders of service charges that relate to building safety risks in a relevant building.²²

The Government has also introduced a new building control approval process for higher risk buildings which must now pass through three “gateway points”:²³ gateway 1 at the planning stage when a fire statement and consultation with BSR is required (in effect from 1 August 2021);²⁴ gateway 2 approval from BSR before the commencement of construction work on site (in effect from October 2023); and gateway 3 at completion for a certificate from BSR for occupation (in effect from October 2023).

Responsible Actors Scheme

On 21 July 2023, the Government launched the Responsible Actors Scheme which requires developers to identify and remediate residential buildings that are over 11 metres in height in England that they developed or refurbished over the 30 years ending on 4 April 2022, and which have life-critical fire safety defects. Developers are required to sign a “developer remediation contract” with the Government and if they refuse to sign the contract or fail to comply with its terms, the Secretary of State has the power to block them from commencing developments for which they have planning permission, and from receiving building control approval for construction that is underway.

Reported Cases on the New Building Regulations

There have been three recent cases which clearly demonstrate the importance of strict compliance with the Building Regulations.

LDC (Portfolio One) Limited v George Downing Construction Limited [2022] EWHC 3356 (TCC)

The court held that a specialist cladding design and build subcontractor for three high rise residential blocks in Manchester was under a duty to comply with the applicable building regulations, rather than a lesser obligation to simply exercise reasonable care and skill.

Martlet Homes Limited v Mulalley and Co Limited [2022] EWHC 1813 (TCC)

The court found that the claimant could recover not only the cost of repairing and replacing the cladding, the cost of repair and but also that of a “waking watch” costs, on the basis that all such costs all being deemed not too remote to be irrecoverable and were reasonable given the alternative and more costly evacuation process. HHJ Davies found that the argument that “everyone else was doing it” did not, on a proper application of the “Bolam” principle, operate as “a get out of jail free card”. As a result, the builder was found liable for *circa* £8 million in damages for the costs of investigating, removing, and replacing cladding, including an extensive claim for “waking watch” costs.

St James's Oncology SPC Limited v Lendlease [2022] EWHC 2504 (TCC)

This case confirms a very generous approach for recovery by claimants when building regulations have been breached and for the recovery of costs of schemes when remediation has not yet been undertaken. The judge found that the simple argument that “this received building control sign off” is not in itself a defence.

Acknowledgments

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Endnotes

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Bonds and Guarantees in the Construction Sector

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Bonds and Guarantees as Performance Security

Bonds and guarantees are widely employed in the construction sector as a means of performance security. Although successful recovery under these documents is by no means certain (as explored in the latter part of this chapter), they offer comfort to those involved in the development of construction projects that there is some security against the risks covered by the particular bond or guarantee.

This chapter explores the main types of bonds and guarantees used in the construction sector and how they are used in both the UK and international markets. It then considers how these instruments are interpreted in the courts, how the rights available under bonds and guarantees may be enforced, and the potential remedies available.

Performance security may be sought by an employer from the main contractor that it engages to perform construction works. Equally, a main contractor may seek performance security from key sub-contractors. For brevity, this chapter refers only to the employer-contractor relationship, although the same principles can be applied to a contractor and sub-contractor scenario.

Categories of Bonds and Guarantees

A bond or guarantee can fall into one of two categories. It may be an on-demand instrument requiring the surety to pay such amount as demanded by the beneficiary without having to prove that the contractor is at fault (a primary obligation). Alternatively, it may be a guarantee which is conditional upon the default of the contractor and will require proof of the breach (a secondary obligation). It is not always immediately evident which category a bond or guarantee falls into, and the English courts' approach to this issue is explored in the latter part of this article, together with the associated challenges of enforcing performance security.

Parent company guarantees

A parent company guarantee is a type of security given by a company, within the contractor's group, to guarantee the performance of the contractor. As the guarantor's liability is contingent on the contractor's default, it falls into the secondary obligation category. The employer will need to establish that liability has arisen under the contract and the extent of its loss. Where the contractor is in breach, depending on the wording of the parent company guarantee, the employer may be able to require the guarantor to remedy the breach, or to pay damages to the employer.

Subject to the guarantee's terms, the guarantor's liability will be co-extensive with that of the contractor. The duration of liability under the guarantee will normally be commensurate with the contractor's liability under the main contract (though a contractor may seek a release of the guarantor's liability at an earlier date). This contrasts with the position under bonds which will typically only endure until completion of the works and be capped in value, as discussed below.

An employer will typically seek a guarantee from the contractor's ultimate parent company.¹ A contractor may have a policy, however, against providing guarantees from its ultimate parent, and may offer a guarantee from an intermediary that is not the ultimate entity in the corporate structure.² Due diligence on the covenant strength of the guarantor is critical when determining its acceptability. An employer may also consider imposing a requirement for accounts to be provided on a recurring basis throughout the course of the works, with an obligation to provide a satisfactory substitute guarantor, if necessary, to ensure that the guarantee continues to provide adequate security for the contractor's obligations.

Although some published forms of parent company guarantee are available, such as the example form annexed to the International Federation of Consulting Engineers (FIDIC) suite of contracts, there is no generally adopted standard form of parent company guarantee. These instruments are therefore typically provided on bespoke terms. Tier one contractors will often have their own preferred form of guarantee that they will propose to an employer.

Performance bonds

A performance bond provides security against the contractor failing to perform the works in accordance with the contract. For example, if a main contractor becomes insolvent halfway through carrying out the works, it will not be able to perform the contract and the employer will incur additional costs in arranging for another party to complete the works. A performance bond provides security against that risk. The bond is provided by a bank or other independent surety. Unlike a typical parent company guarantee, a performance bond will endure for the duration of the works only (and possibly the defects rectification period) and provide for a maximum sum payable under the bond, usually represented as a proportion of the contract sum (e.g., 10%).

A performance bond can be provided on either an on-demand (primary obligation) or conditional (secondary obligation) basis. How the courts interpret whether a bond is truly 'on-demand' is explored later in this article. Where a bond is on-demand, the issuer of the bond must pay upon presentation of a valid demand

from the beneficiary, without further investigation into the merits of the beneficiary's claim that it has suffered loss. As such, these instruments are sometimes described as being equivalent to cash (and therefore have an impact on the contractor's banking facilities, as its bank will take account of the potential exposure to calls under issued on-demand bonds). An on-demand bond will inevitably command a higher premium than a conditional bond which requires the employer to demonstrate that there has been a breach by the contractor that has caused the employer loss.

Other bonds in the construction sector

Other bonds frequently utilised within the construction sector include retention bonds, off-site materials bonds and advance payment bonds.

An employer may seek a retention bond in *lieu* of deducting a cash retention from interim payments throughout the works.³ These are invariably on-demand instruments as the employer will want to be able to call upon the bond as if it were cash, akin to the retention that would otherwise have been held by the employer. Retention bonds are an attractive option for contractors where the premium is reasonable, as the absence of cash retention increases the cash flow received in interim payments throughout the works.

Off-site materials bonds provide security for materials that have been paid for by the employer, but not yet brought to site, and which may therefore be problematic to recover in the event the contractor becomes insolvent and retention of title issues arise.⁴ Similarly, advance payment bonds provide security for advance payments made by the employer to the contractor to cover the cost of ordering long-lead items, such as steel, and other costs that are incurred by the contractor during the early stages of the works. If the contractor were to become insolvent before the works are delivered under the contract, such advance payment may not be recoverable by the employer. Bonds from a third-party surety protect the employer from the risk that advance payments or off-site materials cannot be recovered, and these are usually drafted as on-demand instruments.⁵

With all of these types of bonds, there will be a counter indemnity from the contractor as principal to the surety. Where the surety becomes liable under the terms of the bond, the surety will recover that sum from the contractor under the counter indemnity. Therefore, the surety's risk is limited to non-recovery from the contractor in the event of the insolvency of the contractor. A contractor will often have agreements with multiple providers and with each provider will have a defined amount available for bonding. The contractor will therefore seek to ensure that the sum bonded is released as early as possible to free up its bonding facility for other projects.

Trends in Performance Security

UK market

Performance bonds in the UK market are invariably conditional (sometimes known as 'on default') in nature, rather than on-demand instruments (with some exceptions in particular sectors). They typically provide a bonded amount of 10% of the contract sum and will be in place until practical completion, or potentially until the certificate of making good defects is issued. The Association of British Insurers (ABI) form of bond offers an industry standard form of conditional performance bond, and is widely adopted in the UK construction sector. However, it is common for parties to agree bespoke amendments to the ABI terms, such

as those to expressly refer to insolvency (although there is some debate as to whether such amendments are required), in order to allow the employer to assign its rights under the bond and to adjust the provisions around the expiry of the bond, to ensure that the employer has sufficient time to make a claim. It is also relatively common for an employer to confirm within the terms of the bond that a decision of an adjudicator will be sufficient to establish and ascertain the liability of the surety under the bond.⁶ The requirement within the ABI bond to establish and ascertain liability requires the employer to take action against the contractor before being able to recover under the bond (see below regarding the English courts' approach to this); this contrasts with a parent company guarantee that usually will not require the employer to take action against the principal before seeking to recover under the guarantee.

In times of supply chain uncertainty and increasing costs, such as those seen recently, contractors often seek to procure goods and materials at an earlier stage of the works to ensure availability of supply and to fix the price. Off-site materials bonds have therefore become somewhat more common in the UK market as the parties seek to protect their interests where it is too early to bring the materials to site. Some employers have looked to receive bonds directly from the sub-contractor that is supplying the materials (with the main contractor as a party to the bond), rather than entering into a bond solely with the main contractor. This avoids the cost of obtaining two bonds (i.e., one between the sub-contractor supplier and contractor, and a further bond between the main contractor and employer). Advance payment bonds can also be employed where a contractor needs to procure materials in advance of the works. The uptake of retention bonds, however, is still relatively low in the UK market, but it is common for contractors to offer them as an alternative to cash retention.

In some sectors in the UK market, it is typical for contractors to offer either a performance bond or a parent company guarantee, but not both. Employers will invariably ask tendering contractors to cost the price of obtaining a performance bond. The cost of the bond will ultimately be added to the contract sum. In light of the increased costs, employers will often prefer a parent company guarantee, which should not impact the contract price. Bonds are still preferred, however, if there is any perceived instability in the contractor's financial position or that of its overall corporate group.

A parent company guarantee also has its advantages for employers in the event that the underlying terms of the main contract need to be varied. An amendment to the underlying terms of the main contract will ordinarily discharge a guarantor's obligations,⁷ but a parent company can usually readily confirm that the guarantee will remain in place.⁸ This confirmation may be more difficult to obtain from the provider of a performance bond that is not part of the same corporate group as the contractor.

However, parent company guarantees do not always represent an easier option. Enforcing a parent company guarantee against a guarantor company located outside of the jurisdiction (discussed in '*Enforcement of bonds and guarantees*' below) can come with its difficulties; and with many contractors operating globally, the employer should consider this when determining the acceptability of performance security offered by the contractor.

The above considers the security sought by employers from contractors. Conversely, a contractor might also seek security from the employer. This is often a requirement in both UK and international schemes where the employer is a special purpose vehicle (SPV) developer with limited assets. A contractor might ask for a guarantee from a group company of the employer, or a letter of credit (which is similar to an on-demand bond).

International market

On-demand bonds are commonplace on international projects, with the bonded sum sometimes more than 10% of the contract price. Parties contracting across different jurisdictions require the certainty that an on-demand bond represents.

The ICC Uniform Rules for Demand Guarantees (the URDG) are frequently incorporated into international bonds, as these provide a standardised set of rules for international contracts (and may be a factor in interpreting the bond, as discussed further below). The URDG safeguards the contractor against the unfair calling of on-demand bonds, by requiring demands to be in writing and accompanied by supporting documents in relation to the breach. The URDG also requires a copy of the demand and supporting documents to be sent to the contractor, so that it can take steps to seek withdrawal of the demand or seek injunctive relief if necessary.

Where external financing and overseas sureties are involved, an employer will often require the contractor to procure a validly executed instrument, together with an opinion letter. However, this is not always easy to procure in practice.

Contracts which require on-demand security will also often include 'extend or pay' provisions, which require the contractor to extend the duration of a bond or provide a new bond in the event that the project is not completed by a date in advance of bond expiry; otherwise the employer reserves the right to call the remaining balance of the bonded sum in full. This ensures that security is available for the full project duration (though a contractor may resist this where the delay is due to an employer default).⁹ Such contracts may also include express undertakings from the employer to the contractor that the employer will only make a call under the bond in specified circumstances. If the employer were to otherwise make a call, it would be in breach of contract. The contractor therefore has the comfort that it can counterclaim against the employer where such a call is made, rather than having to rely solely on seeking injunctive relief against the call (the challenges of which are discussed below).

There is no single standard form of on-demand bond accepted in the international market, but FIDIC publishes example forms of bond in its suite of contracts.

The Construction of Bonds and Guarantees

Whether a particular instrument is one that imposes primary obligations (e.g., an on-demand bond)¹⁰ or secondary obligations (e.g., a guarantee)¹¹ remains one of the most commonly disputed issues in relation to bonds and guarantees. This question becomes even more contentious in cases involving 'hybrid' instruments which encompass features of both.¹²

Whatever the nature of the instrument, its construction will ultimately turn on the precise language used. In this regard, the English courts will apply the well-established rules of interpretation,¹³ and consider the natural and ordinary meaning of the language used, taking into account the relevant aspects of the contractual context. The instrument will also be considered as a whole and without preconceptions as to what it is.¹⁴ Further, the description of an instrument is considered as a label only, and the court will be concerned more with its effect and substance.

In the case of bonds and guarantees, there are also certain presumptions that the English courts are known to apply when construing such instruments. For example, a court is likely to presume that a document should be construed as an on-demand bond where it:¹⁵

- relates to an underlying transaction between parties in different jurisdictions;
- is issued by a bank or other financial institution;

- contains an undertaking to pay 'on demand' (with or without the words 'first' and/or 'written'); and
- does not contain clauses excluding or limiting the defences available to a surety (i.e., a guarantor).

Where an instrument is not given by a bank or other financial institution, it has been held that there is a strong presumption *against* it being construed as an on-demand bond.¹⁷

Although the above features are not determinative, clear language is usually required in the operative clauses of the instrument to rebut the presumption established by them.

The URDG

Whether an instrument is subject to the terms of the URDG will also be an important consideration, and the incorporation of the URDG in itself has been held to be indicative that the instrument in question is intended to be an on-demand bond.¹⁶

The application of the URDG can be particularly important in an international context as some national courts will only have regard to the URDG when construing an instrument governed by the rules. In the recent case of *Leonardo*, for instance, the Appellate Division of the Qatar International Court confirmed that the URDG '*...is accepted to represent the law and practice applied internationally in respect of demand guarantees*' and that '*[n]ational case law, however, eminent, is no longer relevant on issues where the law and practice are set out in a code*'.¹⁸

Enforcement of Bonds and Guarantees

The legal and commercial considerations, as well as the practicalities involved in the enforcement of an on-demand bond, will differ significantly from those involved in making a claim under a guarantee or conditional/default bond.

Making a 'call' under an on-demand bond

A key feature of an on-demand bond is that payment is against documents, rather than the existence of facts. This means that a beneficiary need only present to the issuing bank or financial institution a demand that complies with the formalities set out in the bond, and the bank will be required to honour that demand. Payment is usually made within a matter of days – five business days in the case of a bond governed by the URDG,¹⁹ but banks are known to agree to even shorter periods.

Importantly, there is no requirement in the case of an on-demand bond to substantiate a breach or default on the contractor's part, loss incurred by the beneficiary or even a causal link between the two. Neither is there a general principle that the beneficiary must pursue the defaulting party first before calling on the bond.²⁰ An employer is therefore generally entitled to call on a bond, notwithstanding any underlying dispute with the contractor as to its entitlement.²¹

Making a claim under a conditional/default bond or guarantee

On the other hand, making a claim under a conditional/default bond or guarantee will usually require additional steps to be taken and any recovery thereunder is likely to lack the immediacy of payment under an on-demand bond. This is primarily because the guarantor's liability for payment or performance is contingent on the contractor's default or breach of contract. This, in turn, means that the employer first needs to establish such breach or default and its losses before being able to make a claim.

This is the position under the ABI model form of guarantee bond (referred to above), under which the guarantor's obligations are contingent on a breach of the underlying construction contract by the contractor. Further, the beneficiary's damages must be '*established and ascertained pursuant to and in accordance with the provisions of or by reference to the Contract taking into account all sums due or to become due to the Contractor*'.²²

The English courts have recently provided some helpful guidance on the interpretation of this provision, holding that where the underlying contract provides for adjudication, the employer must obtain an adjudicator's decision in its favour with respect to the sums claimed under the guarantee. The courts have also clarified that the language '*all sums due or to become due to the Contractor*' do not preclude an employer from making a claim under the guarantee until the contractor's final account claim has been decided.²³

Specific issues concerning projects with an international dimension

As is often the case on construction projects with international features, where the entity providing the bond or guarantee is based overseas (*vis-à-vis* the parties to the underlying contract), further considerations in relation to enforcement may need to be borne in mind. For example, where an employer wishes to bring a claim against a bank/guarantor based overseas, disputes may arise in relation to jurisdiction (i.e., which national court or arbitral tribunal has jurisdiction to dispose of the claim), and the employer may encounter further difficulties when trying to enforce a court judgment or arbitration award against the bank/guarantor.

Another issue that has become more relevant of late is international sanctions. Following the recent expansion of international sanctions regimes due to the conflict in Ukraine, a scenario may arise where a bank refuses to pay out under a bond due to concerns that the transaction will contravene sanctions (e.g., where the payee is sanctioned directly or indirectly through its parent or ultimate holding company).²⁴ Whilst such cases are unlikely to be a frequent occurrence, given that international construction projects often involve contracting parties with complex shareholding structures, it is a possible risk that parties will need to consider and on which appropriate due diligence checks should be conducted.

The extent to which these issues give rise to difficulties in practice will depend on a variety of factors such as the governing law of the instrument, the choice of jurisdiction, and where (in the case of guarantees) the guarantor's assets or (in the case of bonds) the bank/financial institution are located.

Remedies available under bonds and guarantees

Another important distinction between bonds and guarantees is in the remedies available under each type of instrument. The distinction is especially pronounced as between bonds issued by banks or financial institutions (whether on-demand or conditional) and corporate guarantees given by the parent or ultimate holding company of a contractor.

In the case of bank-issued bonds, the remedy available will invariably be monetary, with the bond issuer's liability limited to payment of the bond amount. However, under parent/holding company guarantees, the guarantor's main obligation will typically be to underwrite the contractor's performance or to see to it that the contractor performs its obligations in the underlying contract. It is only when the guarantor fails to procure such performance that its failure will amount to a breach of the guarantee, which in turn gives rise to a liability in damages to the beneficiary.

Challenging a Bond Call

The high threshold involved in obtaining an injunction

A contractor's main legal avenue for challenging a bond call by the employer is to apply to the courts or an arbitrator for an injunction. The injunction could be either to restrain the employer from calling the bond or the bank from making payment. In either case, a party seeking an injunction would typically need to demonstrate the following general requirements:²⁵

- (i) whether or not there is a serious issue to be tried;
- (ii) that damages would not provide an adequate remedy for the applicant in the event of succeeding at the trial; and
- (iii) on the balance of convenience between the parties, whether there is a good reason why the *status quo* should be preserved.

In the case of injunctions to restrain bond calls (or payment under a bond), the threshold in relation to limb (i) is extremely high, and the English courts will only grant injunctions in exceptional circumstances. The main grounds are where the contractor can establish fraud (commonly referred to as the 'fraud exception'), or where the employer is precluded from making the call by the underlying contract:

- **The fraud exception**²⁶ – when pleading fraud, the contractor will need to establish that the fraud was '*obvious or clear*'.²⁷ This means that the contractor must establish clearly that the only realistic inference is (a) that the employer could not honestly have believed in the validity of its demand under the bond, and (b) that the bank was aware of the fraud.²⁸ This involves a high evidential threshold and, as such, parties rarely succeed in arguing fraud.
- **The employer is precluded from making a call by the terms of the contract**²⁹ – under this ground, it is essential for the contractor to show that the employer is clearly precluded by the express or implied terms of the contract. This means that the contractor needs to *positively* establish that the beneficiary is not entitled to call on the bond, and it is not enough just to show a '*seriously arguable case*'.³⁰

Even where either of the above grounds can be established, a court will also be required to consider whether the balance of convenience favours the granting of an injunction. This presents another obstacle for a contractor as the circumstances in which the court would conclude as such are thought to involve '*extraordinary facts*', for example, the '*unavoidable and immediate insolvency*' of the contractor.³¹

Given the significant legal hurdles involved, cases in which a party has successfully obtained an injunction are extremely rare in practice. However, these legal hurdles do not appear to deter parties from making applications and, particularly on international construction projects, it is not uncommon for a contractor to commence emergency arbitration proceedings to restrain a bond call by an employer.

Differences with other legal systems

In the context of international construction projects, it should also be noted that important differences exist in how jurisdictions other than the UK – including those based on a common law system – approach injunctions to restrain bond calls.

A good example is Singapore law, which recognises the principle of 'unconscionability' as a ground on which an otherwise compliant call on an on-demand bond may be restrained as separate and independent from the fraud exception.³² Whilst the relevant test for unconscionability also involves a high threshold, it also involves a consideration of matters such as bad faith, abuse and unfairness,³³ and is arguably wider than the strict fraud exception under English law.

Defences to Claims Under a Guarantee

Formalities, procedural requirements, and pre-conditions to making a claim

Similar to on-demand bonds, the employer's failure to comply with any formalities (e.g., notices) and procedural requirements may invalidate a claim under a guarantee. However, the consequences of non-compliance will depend on the precise language of the guarantee and, compared to on-demand bonds where a non-compliant demand will often be detrimental to a call (particularly in the case of URDG-governed bonds),³⁴ non-compliance in the case of guarantees may not necessarily vitiate the claim.

What is more likely to defeat a claim under a guarantee is an employer's failure to satisfy pre-conditions, such as the requirement under the ABI guarantee bond that the beneficiary's damages are to be 'established and ascertained'. As noted above, where the underlying contract requires the parties to submit first to adjudication, the employer's claim under the guarantee is likely to fail if it is unable to present a valid adjudicator's decision in its favour to support its claim.

Discharge

Since a guarantor's obligations are coextensive with those of the contractor's, the general rule is that a material variation to the original contract (without the guarantor's consent) will release the guarantor from liability under the guarantee.³⁵

Most sophisticated parties anticipate this issue by including an 'indulgence' clause in their guarantees and any agreements to vary the terms of the underlying contract (as well as the scope of works) to the effect that the variation does not operate to discharge the guarantor from its liability. However, in the absence of such provisions, a guarantor could have grounds to argue that its liability has been discharged due to the underlying contract being varied in some way.

Concluding Remarks

As the world continues to grapple with the fallout of the COVID-19 pandemic and the conflict in Ukraine, as well as localised issues such as rising energy costs, one thing that is clear is that uncertain times remain ahead for the construction industry in the UK and globally. In this precarious environment, employers will be more concerned to put in place a robust security package on new projects, and any bonds and guarantees on existing projects will likely be subject to greater scrutiny and potentially more claims. It is therefore important for both employers and contractors to properly understand the nature of these valuable instruments to ensure that they secure proper performance and ultimately provide the remedies that they are expected to.

Endnotes

1. Some standard forms take this approach. The NEC4 Engineering and Construction Contract ("NEC4 ECC") secondary option clause X4.1 provides for such a guarantee.
2. NEC4 ECC secondary option clause X4.2 provides for the contractor to propose such an alternative guarantor.
3. The JCT Standard Building Contract ("SBC") 2016 clause 4.18, and NEC4 ECC secondary option clause X16.3 provide for the contractor to provide a retention bond instead of cash retention being deducted.
4. JCT SBC 2016 clause 4.16.4 provides for such a bond to be provided.

5. JCT SBC 2016 clause 4.7 provides for advance payments and the option of a bond, as does NEC4 ECC secondary option clause X14. The JCT forms of retention, off-site materials and advance payment bonds are considered by some to be conditional instruments, however, rather than on-demand.
6. *Yuanda (UK) Company Ltd v Multiplex Construction Europe Ltd* [2020] EWHC 468 (TCC) confirmed that an adjudicator's decision would represent an amount 'established and ascertained' but employers may still include an express provision.
7. *Holme v Brunskill* [1878] 3 QBD 495 (CA).
8. Notwithstanding any wording in the guarantee regarding non-vitiation in the event the main contract terms are varied (as referred to in "Defences to claims under a guarantee" below), it is best practice to seek the guarantor's consent and confirmation to a variation.
9. *Goldbell Engineering Pte Ltd v Etiqa Insurance Pte Ltd* [2022] SGHC 1.
10. For the purpose of this section, the term 'on-demand bond' is used to mean an instrument giving rise to an autonomous payment obligation that is independent to the construction contract to which it relates.
11. The term 'guarantee' is used to mean an instrument giving rise to a secondary obligation to pay or procure performance that is coextensive with the underlying construction contract.
12. See *Buchan Biogas Limited v BSG Civil Engineering Limited* [2020] CSOH 42 in which the Outer House held that '... the possibilities available to parties creating a contract of this sort are not limited to what could be described as a pure on-demand bond or a pure cautionary or secondary obligation. The instrument can plainly be something of a hybrid, having features of both'.
13. As set out in *Rainy Sky SA v Kookmin Bank Co Ltd* [2011] UKSC 50, *Arnold v Britton* [2015] UKSC 36 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24.
14. *Gold Coast Limited v Caja de Ahorros del Mediterraneo* [2001] EWCA Civ 1806.
15. Sometimes referred to as the 'Paget's presumption' from Paget's Law of Banking which sets out these criteria (see Chapter 35.8 of Paget's Law of Banking, 15th Edition).
16. Sometimes referred to as the 'Marubeni presumption' from the principle established in *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2005] EWCA Civ 395. The Court of Appeal suggested that cases concerning instruments issued by banks or financial institutions 'provide no useful analogy for interpreting a document which was not issued by a bank and which contains no overt indication of an intention to create a performance bond or anything analogous to it'. Further, the absence of appropriate language in a transaction outside the banking context created a strong presumption against the interpretation that the instrument is a demand bond or something having similar legal effect.
17. *Meritz Fire and Marine Insurance Co Ltd v Jan de Nul NV and Codralux SA* [2010] EWHC 3362 (Comm).
18. *Leonardo S.p.A v Doha Bank Assurance Company LLC* [2020] QIC (A) 1. However, the court also added that '[n]ational law (as the proper law) will be important in respect of matters not covered by a code'.
19. Article 20, URDG 758.
20. *OTV Birvelco Limited v Technical & General Guarantee Company Limited* [2002] EWHC 2240 (TCC).
21. *Sirius International Insurance Co v FAI General Insurance Ltd* [2003] EWCA (Civ) 470.
22. See Clause 1 of the ABI model form of guarantee bond.
23. *Yuanda (UK) Company Ltd v Multiplex Construction Europe Ltd* [2020] EWHC 468 (TCC).

24. See, for example, the recent case of *LLC Eurochem North-West-2 v Tecnimont S.P.A, LLC MT Russia* [2023] EWCA Civ 688.
25. *American Cyanamid Co v Ethicon Ltd* [1975] 1 All E.R. 504.
26. A lesser known or discussed ground on which the English courts have granted an injunction in the past is where the continuing validity of the bond was the result of the beneficiary's breach of contract (*Doosan Babcock Limited (formerly Doosan Babcock Energy Limited) v Comercializadora de Equipos y Materiales Mabe Limitada (previously known as Mabe Chile Limitada)* [2013] EWHC 3201 (TCC)). This could, however, be considered as a variation on the fraud exception.
27. *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1977] 3 WLR 764.
28. *National Infrastructure Development Co Ltd v Banco Santander SA* [2017] EWCA Civ 27.
29. *MW High Tech Projects UK Limited & Another v Biffa Waste Services Limited* [2015] EWHC 949 (TCC).
30. *Sirius International Insurance Co v FAI General Insurance Ltd* [2003] EWCA (Civ) 470 and *Simon Carves Ltd v Ensus UK Ltd* [2011] EWHC 657 (TCC).
31. This was suggested in *Tetronics (International) Ltd v HSBC Bank Plc and Blueoak Arkansas LLC (Intervener)* [2018] EWHC 201 (TCC). However, following the late introduction of further evidence, the court ultimately concluded that the claim would not immediately render the contractor insolvent, and therefore refused the continuation of the injunction.
32. *JBE Properties Pte Ltd v Gammon Pte Ltd* [2010] SGCA 46.
33. By way of example, the Singapore Appellate Court recently concluded that it was unconscionable for a party to call on a performance bond in circumstances where the effect of doing so would be to negate an adjudicator's decision prior to any final determination of the dispute between the parties (see *Samsung C&T Corporation v Soon Li Heng Civil Engineering Pte Ltd* [2020] SGCA 79).
34. Article 24, URDG 758.
35. *Holme v Brunskill* [1878] 3 QBD 495 (CA).



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Some Early Thoughts on AI-Assisted Analysis in Expert Opinions in Construction Litigation

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Kenji P. Hoshino

Introduction

Expert analysis in construction claims has relied on calculations and analysis using scheduling and related software for several decades now. This is true in other fields as well, e.g., accounting spreadsheets, digital documents mining, engineering calculations, simulation models, etc. The ever-ballooning volume of digital data requires that forensic analysts must use machine-augmented methods to timely complete their analyses. As projects get larger and more complicated, and the volume of data increases, analysts are having to become more dependent on computer technology to analyse that information and data.

Experts, as well as attorneys and clients, are beginning to ask how Artificial Intelligence, or AI, might best be used to produce analyses in construction disputes. At the same time, commercial software developers are building complex analytics tools to create and manage increasing volumes of construction project data. Sophisticated machine learning and related techniques – popularly, “AI” – are already being incorporated into a large and growing number of professional products. It is likely that these techniques will eventually be incorporated into the software that experts use for forensic cost and schedule analysis. Caution and preparation are in order.

There are no recommended practices, yet, for AI-assisted analysis and expert opinions. Experts and attorneys considering possible new generations of tools to produce engineering, for scheduling, and to cost expert opinions face a number of issues and questions:

- What is the current state of law and practice? What is different about AI-assisted analysis?
- What are the prospects for admissibility of AI-assisted analysis? Can AI be relied on?
- What might be included in new disclosure requirements?
- What should experts consider in evaluating AI tools?
- What's next? Will AI replace expert analysis?

Exploring these questions provides a foundation for assessing developments toward AI-assisted analysis, but the field is moving too fast to recommend fixed rules at this time.

Current Law and Practice

Experts rely on technology like calculators and scheduling software to investigate claims, develop their opinions, and assemble their analyses. Again, this has long been true. Courts commonly find these machine-augmented opinions meet the criteria for reliability and admissibility. Recent advancements in machine learning and the like present potential benefits in resolving construction conflicts through novel kinds of AI-assisted analysis, but there is little precedent for issues raised by expert opinions formed

through such analysis. Nevertheless, established legal principles regarding admissibility and disclosure of expert opinions using existing technologies provide insight into how courts might assess future AI-assisted opinions.

In brief, there are three conditions that must be fulfilled for admissibility of expert opinion: (1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case.

When determining admissibility of expert testimony, trial courts may be guided by different considerations, depending on jurisdiction. In the United States, for example, the Daubert Standard identifies five non-exclusive factors: (1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community.

As a specific example, thanks to its complexity, and often scale, critical path methodology (CPM) makes heavy use of calculations performed by software. CPM analysis is a staple of construction litigation, and courts have found CPM analysis, and its reliance on a computer, generally accepted, as well as reliable. However this is not always the case. In some cases, whether through preliminary challenge or through trial, courts have rejected particular experts' use of, e.g., scheduling software to establish project delay. These cases are instructive. They show how more “advanced” AI-assisted expert opinions might face challenges. Today, forensic experts using machine-augmented analysis must understand and be able to explain what the software in question is doing. An expert's methodology must be explainable, even when the results are a software output.

The same set of principles for considering admissibility of expert opinions that employ common tools, e.g., scheduling software, will be brought to bear on opinions that make use of newer AI-assisted analysis. Experts will still need to understand how the tool works and be able to explain its function. They will need to understand the underlying method and confirm that it is reliable. They will also need to be able to defend the input, the data, and the tool's implicit or programmed assumptions and parameters. As discussed below, these requirements may introduce costs and complications for experts considering the use of AI.

Nevertheless, AI-assisted analyses are already being used for expert opinions in other fields. Notably, AI-driven probabilistic genotyping is in wide use in cases where DNA analysis is impeded because of, e.g., a sample containing DNA from multiple people. Despite objections, opinions using probabilistic genotyping have typically been admitted by courts.

AI: Distinctions

The increasing volume of data generated in construction projects has created the need for machine augmentation for forensic experts, and the tools are becoming more sophisticated. At this stage, however, an autonomous, artificially intelligent computer system capable of creating, communicating, and answering for a relevant expert opinion is a very distant prospect. Such a system would be generating opinions based on independent “decisions” with respect to data. Though not autonomous in this sense, emerging AI-driven tools do differ in key ways from today’s more common tools for machine-augmented forensic analysis.

Today’s “conventional” tools assist experts in reaching *deterministic* conclusions. The calculations in a machine-augmented analysis can be verified by hand (however laboriously); the relation of output to input can be shown to be deterministic; and the analysis can be documented. Many such common tools, e.g., scheduling software, are already quite complex and sophisticated, but they do not currently use AI. Their calculations and methodologies are not only deterministic, they are also built on and align with industry experience and the best practices published by organisations such as the Association for the Advancement of Cost Engineering and the Society of Construction Law. Principally, then, machine-augmented analysis enables significant efficiencies.

The software tools that experts commonly use today are not always intended for forensics. For example, Primavera is used mainly for project management and project controls; forensic schedule analysis is a fringe or niche market for the tool. This means that, alongside the introduction of AI-driven tools into construction and construction disputes broadly, there is a possibility for new tools designed specifically for narrower use cases such as forensic schedule analysis. Will producers of commercial software be sensitive to the special needs of experts in the dispute resolution community by offering features that promote transparency and disclosure of AI-assisted processes (about which more below)?

For example, as AI adoption in the industry increases, it is important to be aware that future versions of tried-and-true software programs and apps may incorporate an AI-processor into a feature update or an upgrade without an explicit ‘warning’. This is reasonable because if the majority of users are not using it for forensic purposes, such warning is unnecessary. On the other hand, the forensic practitioner must stay vigilant.

Regardless of use case or purpose, new AI-driven tools are distinct from conventional tools because of their dependence on machine learning and related techniques that incorporate randomness. Machine learning is a probabilistic process in which computers “learn” from training data without being explicitly programmed, identifying patterns in the data that can be used to make inferences. For the same inputs, a machine-learning model does not necessarily generate the same outputs, distinguishing it from the kinds of calculations experts typically rely on. Importantly, because machine-learning requires training data, applying a machine-learning model to the facts or data of a dispute introduces a second set of facts, the training data itself, which can be scrutinised for sufficiency and relevance to the data being analysed. For example, a machine learning model being used to analyse schedule logic in a construction project may have been trained on past data from projects that were significantly larger and more complex. Would this AI-assisted analysis be admissible? An expert using an AI-assisted analysis may need to establish that not only was the expert opinion based on sufficient facts, but the training data comprises sufficient facts as well. This would be a departure from the machine-augmented analyses common today.

Another way of looking at what’s at stake in AI-assisted analysis is to think about synthetic outputs. If need be, most forensic

experts can explain in intricate detail the analytical thought process in breaking down a complex set of intertwined data, i.e., the project. But experts can find it more difficult to explain the synthesis of those analysed data into a coherent narrative. Were an AI-driven tool with its fuzzy logic deployed here, in generating a synthesis, experts can expect courts to balk. The possibility for AI’s iterative, differing stories about the analysis undermines the expert opinion’s authority.

This also reinforces that construction dispute resolution processes are not structured in a way that an AI-driven tool could be engaged to avoid having an expert. Even if a system existed – autonomous, capable of forming an opinion, communicating it, and defending it – industry stakeholders would not be ready to trust such an opinion, at least for the foreseeable future. Like the distinction between machine-augmented (deterministic) and AI-assisted (probabilistic) analyses, there is a line between existing and emerging tools and speculative systems in which an AI takes over an expert’s decisions, e.g., choosing an appropriate method of analysis, choosing which assumptions to build in, etc.

Reliability and Credibility

Compared to expert opinions using machine-augmented analyses that are deterministic and comparatively explainable, expert opinions formed with the assistance of AI may not be effective within an adversarial system such as the American judicial system, past findings about probabilistic genotyping notwithstanding. The relative opacity of the inner workings of AI-driven tools and their probabilistic techniques makes the discovery of “truth” in an adversarial system difficult. In theory, inquisitorial systems may be more congenial to AI-assisted analysis, but many of the same challenges remain.

AI-driven tools may produce superior analyses because of their capacity and sophistication, but they may also demand more and new know-how from testifying experts. The issues raised by machine learning’s dependence on training data, as well as the complexities of how AI-driven tools operate, present real challenges to expert testimony that makes use of AI-assisted analysis. Experts will need to understand their tools’ ins, outs, parameters, and results – and be able to explain them.

Indeed, experts’ use of AI-driven tools is not inconsistent *per se* with the adversarial system. A forensic expert’s credibility can be challenged in cross-examination and assessed by a finder-of-fact regardless of whether the expert’s opinion utilised AI-assisted analysis. Expert testimony uses specialised knowledge to help the finder-of-fact to comprehend the evidence. Using AI-driven tools may multiply the specialised knowledge that experts must possess in order to serve that role, for an expert can be questioned on the underlying facts and data that were relied on and along any other avenue that speaks to credibility. In an adversary setting, expert opinions are not dispositive on their own, which makes credibility an especially important consideration for the finder-of-fact. An expert’s demeanour, speech, non-verbal communication, confidence, competency, and facility with the opinions expressed, again regardless of whether they utilised AI, can all be taken into consideration by the finder-of-fact in determining how to weigh the expert’s testimony, including ignoring it completely.

On a speculative note, direct testimony from an autonomous AI system would present a unique problem under existing adversarial systems. The penalty of perjury would be an ineffective constraint on the AI. The AI would also be vulnerable to an attacker seeking to alter its opinions, perhaps in undetectable ways, e.g., through adversarial machine learning, and the human feedback that contributes to a finder-of-fact’s evaluation of credibility would be absent. The AI would lack behavioural clues

suggestive of nervousness or strained interpretation. It could process more data more quickly than a human expert, but cross-examination would be less effective in eliciting information probative of credibility because the system would lack human experience – emotions, biases, interests, motives, etc. Law evolves, but allowing testimony from an AI would require massive change.

The widely accepted practice of using CPM software to determine the critical path of a large network of activities provides an instructive example that brings together the issues around machine-augmented and AI-assisted analyses discussed so far. A large CPM network consisting of around 10,000 activities is a perfect candidate for preferring the use of computers over hand calculation. No practical-minded expert will attempt such hand calculation, and experts routinely testify to an expert opinion based on the computer's identification of the critical path. This might be conceived as a classic black box problem, yet deposition questions concerning the reliability of the computer calculation are rare.

If questioned about it, a seasoned and credible expert will have a robust approach for defending its reliability. The expert would testify that he is knowledgeable about the general principle of the critical path method used as the basis of the computer algorithm. Perhaps they studied it in college and performed CPM calculations by hand during the early years of their career as a project controls and forensic scheduling practitioner. Further, they would testify that they have consistently used the same brand of CPM software and are familiar with its operation, performance characteristics, and reliability. They would also testify that they have personal knowledge that the brand and model of CPM software that was used has a very large installed base in the industry, and is used not only for forensic analysis but also for day-to-day business operations. As such, the expert is confident that the software will produce reliable calculation results. Over the years, the expert has tested computer output against hand calculations to ensure that the software is generating expected and correct results. The expert has no reason to believe that the specific instance of calculation generated anything other than reliable results. This expert has testified under oath in many cases using the same software for this same purpose. None of these opinions have been excluded.

This approach works because of the general acceptance of the software, despite the fact that the brand of software does not disclose its specific calculation algorithm, let alone its source code. It works despite the fact that the software does not offer any method to audit or check the string of calculations that result in a specific output (more on disclosure below). Finally, it works despite the fact that general acceptance is not necessarily equivalent to reliability; but it is good enough.

The biggest reason it works is because the CPM calculation is a deterministic calculation that results in the same answer given the same set of inputs. The answer can be checked, if necessary, against a correct answer. The expert must establish the software as a tool, with herself as the master operator who exercises human judgment over the use of the calculation result.

This approach may not be enough when looking ahead to new AI-driven tools. If the software or type of calculation is used primarily for forensic purposes, it may not fly, unlike today's niche use of, for example, Primavera. Or perhaps the software brand or model is not widely accepted or known, or the program is an in-house or custom package, untested in the open market outside of the expert user's office.

Most importantly, if the AI-assisted analysis is not deterministic, in that it involves assumptions, probability, judgment calls, and evaluative criteria so that there may not be just one correct answer, the expert may not be able to defend its reliability, not to mention an interpretation based on it. For contrast, consider

schedule risk analysis software that uses probabilistic schedule calculations. The typical use of random number generators to perform these calculations makes exact replication of results iffy at best. Engineers (less so than other stakeholders like attorneys who aren't as close to the calculations) claim that the results are replicated when different instances of the calculations land with a similar range of numbers; that's the very nature of what is being measured, i.e., probability!

These exceptions are the very characteristics of emerging AI-driven tools. What are the necessary elements to establish their reliability?

Disclosure and Discovery

In the construction dispute context, AI-assisted analysis, i.e., using machine learning and related techniques, will likely obligate disclosure of new, additional information than experts currently provide for conventional tools. The disclosures needed to evaluate the reliability of AI-driven tools may vary by specific tool or category of tool, but some of the basic types of information can be described now.

First, disclosure of source code may be something sought by parties opposing expert opinions that use AI-assisted analysis. However, outside of patent infringement and copyright cases, courts have generally not compelled source code disclosure for software because of trade secrecy. Courts likely also believe that the methods and calculations implemented by software can be understood, articulated, challenged, and defended without source code disclosure (whether a piece of software properly implements a methodology is a more vexing question). In addition to questions about source code, evaluating the reliability of AI-assisted analysis will potentially entail disclosure of: training data (relevance, provenance, features, how prepared, whether modified, etc.); algorithms (assumptions, how selected and evaluated, etc.) and resulting models; tuning information (thresholds, weightings, feature extraction, hard-coded expert judgments, etc.); and error rates (false positive/negative rate, etc.).

If the AI processor is in a dynamic mode of continuous learning as opposed to a static mode that freezes the level of learning, the disclosure, let alone the ability to obtain a stable output become very difficult, not only for the opposing expert but also for the expert who used the AI in the first place. With the typically prolonged process of civil litigation, it is not unusual for months or years to elapse between the formulation of an opinion in a report and the eventual testimony. What if the AI processor learned new things and "changed its mind" in the meantime?

Experts' motivation for using tools like scheduling software include augmenting and speeding up analysis. If employing AI-assisted analysis comes with strings attached that complicate the process, such as extensive disclosure requirements, the benefits become diluted.

On a related note, one of the most important practical considerations around disclosure is whether an expert's report is in an accessible format that can be examined and evaluated within the timeframe allowed in the procedural calendar. For example, disclosure of training data, algorithm, model, and full source code may not be desirable in a construction dispute because the evaluation of such a disclosure may require the potentially time-consuming step of having a computer expert familiar with the specific programming language, algorithm, etc. examine and render opinions in conjunction with the construction expert.

The complications might be alleviated by first establishing a standardised requirement on the type and volume of data and system disclosure, thereby providing predictability of effort. Such a standard would also help legal teams, who often lack the

detailed knowledge of the expert subject matter, not to mention software engineering, so may not understand what to ask for. The content of such disclosure should be based on what is necessary for a successful replication of the AI-assisted analysis by another expert and also by what is necessary for a meaningful cross-examination.

In other words, disclosure would be guided by the answer to the question, “What information is required in order to replicate the AI-assisted analysis and arrive at the same answer given the same input data?” The intent would not necessarily be to actually perform the replication, but to get a full understanding of the AI-driven tool’s “thinking process” in order to probe its reasonableness and reliability. One possible way to achieve replication like this would be to allow the opposing expert access to the software to test it out with input data that would generate results within an expected range. This may be the most expedient short-term solution as AI-assisted analyses become more common, though it is far from perfect because commercial interests and arrangements present serious impediments.

Longer-term, another way to alleviate the potential burden of disclosure on experts using AI-assisted analyses is by building reporting functions that comply with relevant standards of transparency into AI-driven tools. Tools could be designed to generate reports that provide meticulous, step-by-step disclosure of their processes.

Ultimately, as a goal, disclosure requirements for AI-assisted analysis should not add up to significantly more effort than disclosures in a case that involves only human experts.

Considering New Tools

Short of speculative “fully autonomous” systems, the emerging technology discussed above might prove to be an evolutionary generation: AI-assisted analysis will be integrated as another tool, and in construction disputes, the underlying capability of the expert user will continue to be decisive. What has stood the test of time with previous technologies will generally still be applicable to the next generation. Computer-based spreadsheets are an evolutionary leap from slide rules, but in either case, someone testifying about an analysis has to be truthful, understand the facts, understand and be able to explain the analysis methodology being used, and wield common sense.

Beyond the concerns around disclosure discussed above, my preliminary advice is for experts and other stakeholders to stay up to date on developing technologies and the subsequent availability of commercial applications within their expert subject matter.

Experts’ reliance on a given tool should be on the strength and speed to process known data with known algorithms, not with undisclosable or unknown algorithms or algorithms incomprehensible by the expert. Put differently, it is important to be an expert on the tool being employed and not only on the subject matter. Experts need to take time to understand what is “under the hood.”

Experts should be able to explain persuasively to the audience the pros and cons of their chosen tool and demonstrate that it has been used credibly. Presenting findings with step-by-step reasoning that can be followed by the audience prevents their perceiving the tool as a questionable black box. Experts should be bringing finders-of-fact along by breaking down the reasoning process, especially for emerging kinds of AI-assisted analysis.

By establishing a clear distinction between the expert user and the tool and maintaining mastery over the tool the expert will be able to avoid issues in fair use of the technology.

Conclusion

In the near future, we will likely not see “fully autonomous,” AI-driven systems that formulate expert opinions that are relevant and predictably admissible in court, let alone systems capable of “testifying” in place of a human expert witness. However, products built on machine-learning and related techniques are coming to market, and “AI” is being made available within existing software. These powerful new tools are altering the kind of assistance that expert witnesses can command for their analyses, from machine-augmented methods toward new, AI-assisted ones. Courts are beginning to contend with applications of AI, and as the law wrestles with the prospects for AI in adjudicating disputes, forensic experts in the construction industry should begin preparing.

For AI to have any effective impact on the industry, key stakeholders must become educated on various pathways that developments in AI might take and what the corresponding issues will be for disputes in and out of the courts. It is an evolving landscape that requires players to stay informed and be nimble on their feet. Industry study would be an excellent way to move towards well-reasoned recommended practices.



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His presentations of complex concepts and facts feature simplicity and clarity that cuts through smokescreens to illuminate the core issues. By narrowing his expertise on CPM analysis and labour productivity issues, he provides true depth to his expert reports. The combination of his in-depth expertise, decades of hands-on experience in project scheduling, CPM software design, and his law degree, has earned him a word-of-mouth following among clients, many of whom consider him among their first choice.

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A Legal Overview of the Construction Sector in the UAE, Bahrain and Oman

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Standard Types of Construction Contract in the Middle East

Generally, fixed price lump-sum contracts are the most common type of construction contracts. While the traditional procurement route of separating design from construction remains popular particularly in the real estate sector, design-build contracts are also a regular feature in the market for plant and infrastructure, with EPC contracts being prevalent in sectors such as water, power and oil & gas.

As a natural consequence of the preference for the traditional procurement route in the real estate sector, design-only (consultancy) contracts are regularly used in the market.

Management contracting is relatively rare as there is a preference for a single point liability in construction projects throughout the UAE, Bahrain and Oman; however, EPCM contracts are occasionally used in the petrochemical sector and for certain fast-track projects.

How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction, and what forms of collaborative contracts are commonly used?

Collaborative contracting forms are very rare in the UAE, Bahrain and Oman, although there is an increasing adoption of collaborative principles and mechanisms within traditional contracts (such as dispute avoidance mechanisms, early contractor involvement and cost-reimbursable pricing for certain elements of work).

Industry standard forms of construction contract most commonly used in the Middle East

Most construction contracts in the UAE, Bahrain and Oman are based on the forms published by the International Federation of Consulting Engineers (**FIDIC**), albeit with (often extensive) modifications through Particular Conditions of Contract to accommodate local laws and market practices, and to allocate additional contractual risk and responsibility to the contractor. The 1999 FIDIC “Rainbow Suite” (known as the Red, Yellow and Silver books) are the most commonly used standard forms

of contract for construction, design-build and EPC works, as there has not yet been a widescale adoption of the 2017 forms of FIDIC contracts (and it is not uncommon to still see the 1987 FIDIC forms in use for certain projects).

The 1999 FIDIC forms, particularly the Red Book and Yellow Book, have also been used as a base for standard-form conditions of contract in the UAE published by governmental entities.

The FIDIC Client/Consultant Model Services Agreement (FIDIC White Book) is occasionally used for construction consultancy services for project management and for procuring design-only services, although most employers choose to engage consultants on bespoke terms.

In the UAE, the Abu Dhabi Government have introduced a build-only contract and a design-build contract for use by governmental entities on all projects which are based on the FIDIC Red Book and Yellow Book (with employer-friendly amendments). The other emirates within the UAE have not published standard forms of construction to be used on projects involving public works but certain governmental entities (particularly governmental entities of Dubai) have bespoke in-house construction contracts which are generally based on FIDIC forms.

In Bahrain, the Ministry of Works publishes a suite of Standard Contract Agreement and Conditions of Contract to be used for contracts to be entered by governmental entities of Bahrain. The Standard Contract Agreement and Conditions of Contract are categorised into four books (based on the FIDIC 1999 forms) which are:

- building And Engineering Works;
- engineering Consultancy Services;
- quantity Surveying Consultancy Services; and
- minor Works, Supply of Materials, Supply of Equipment, Supply of Human Resources and Maintenance & Repair Works.

In Oman, construction contracts awarded by governmental entities typically use the Oman Standard Forms including the Oman Standard Documents for Building and Civil Engineering Works and the Oman Standard Documents for Electrical and Mechanical Works. In 2019, the Ministry of Finance and Ministry of Legal Affairs of the Sultanate of Oman published a new edition of the Oman Standard Documents for Building and Civil Engineering Works which is based on the 1999 Red Book.

What (if any) legal requirements are there to create a legally binding contract? Are there any mandatory law requirements which need to be reflected in a construction contract?

Generally, all legally binding contracts in the UAE, Bahrain and Oman must have:

- mutual and valid (i.e., has legal capacity) consent to the essential elements with a meeting of an offer and acceptance;
- object that is not impossible (i.e., capable of being governed by a contract and permissible to be dealt with); and
- an intended purpose that brings lawful benefit to the contracting parties and is not inconsistent with public policy or morals.

The UAE's Federal Law No. 5/1985 on Civil Transactions (**UAE Civil Code**), Bahraini Decree-Law No. 19/2001 (**Bahraini Civil Code**) and Oman Sultani Decree No. 29/2013 (**Omani Civil Code**), each have dedicated sections with provisions for *muqawala* contracts (contracts to perform works) and construction contracts must comply with such provisions.

A construction contract is not expressly required to be written or signed between the contracting parties.

However, in the case of the UAE and Oman, the above-mentioned legislations expressly require that the site, the description of the construction works including the quantity and method/manner of execution, the time for completion and the consideration for the performance of such construction works must be described or specified as appropriate.

Letters of intent

Letters of intent are commonplace in the UAE, Bahrain and Oman. A properly drafted letter of intent with clear intention for such letter of intent to create legal relations may be recognised under the UAE Civil Code as a legally binding contract pursuant to Article 141.

Whilst the Bahraini Civil Code and Omani Civil Code do not expressly provide for letters of intent, letters of intent are frequently used in practice. In the absence of specific statutory provisions, the general principles applicable to the creation of contracts will apply. As such, a properly drafted letter of intent with clear intention for such letter of intent to create legal relations may be a legally binding contract.

Common statutory or standard types of insurance when carrying out construction work

Apart from the mandatory workmen compensation insurance, insurances are typically negotiated and determined based on the unique requirements or circumstances of a construction project.

Nevertheless, contractors will typically be required to take out and maintain have the following insurances in order to carry out construction work:

- contractors' all-risks insurance that covers property, personal injury, and plant and equipment cover as appropriate, unless the contractor is covered by project insurances taken out by the employer;
- third-party liability insurance;
- automobile insurance; and
- professional liability insurance (and/or occasionally decennial liability insurance) where there is a design element to the scope of works.

Statutory requirements in relation to constructing contracts, in terms of labour, tax, and health and safety

In terms of labour, all construction workers onshore are entitled to statutory rights under the labour law in the UAE, Bahrain and Oman, including regulated working hours (and providing specific day-time rest periods for workers working outdoors or in places under the sun during the height of summer), over-time pay, safe and decent accommodation, transportation to and from construction site, and end of service gratuity. The benefits under labour laws are the minimum statutory entitlement of the construction worker. Emiratization, Bahrainisation and Omanisation policies, encouraging the employment of the nationals of the UAE, Bahrain and Oman respectively, are also applicable to construction projects.

There is no income tax payable by employees in the UAE, Bahrain and Oman.

There is specific health and safety legislation applicable in the UAE (at the federal level and individual emirates level), Bahrain and Oman. Generally, there is an obligation on employers to ensure the construction workers' safety, including providing the employees with medical insurance, providing employees with suitable protection from injury and fire hazards, providing first aid kits as well as fire extinguishers, ensuring that the working environment is clean and hygienic, and displaying basic health and safety instructions in a language understood by employees.

Building and fire safety codes, regulations and/or other statutory requirements which apply to construction contracts

As stated above, generally there is an obligation on employers to ensure the construction workers' safety including providing employees with suitable protection from injury and fire hazards.

In the UAE, the Dubai Civil Defence, i.e., a governmental authority in the field of industrial and commercial safety and security, issued a Fire and Life Safety Code of Practice which contains specific fire and safety requirements that need to be met prior to the construction of any buildings in Dubai taking place. The Dubai Development Authority (governmental authority issuing permit for construction activities, conducting inspections and issuing completion certificates) has endorsed the Fire and Life Safety Code of Practice. The Abu Dhabi Department of Municipal Affairs recently published the Abu Dhabi Building Codes which set out the construction standards designed to address building safety, fire protection and energy conservation, these codes are applicable to all projects and buildings in Abu Dhabi.

In Bahrain, a general guideline for prevention of fire, which sets out fire safety requirements for construction activities, is published on Bahrain's National Portal.

In Oman, the ministerial decision on occupational health and safety requires amongst others, that an employer has in place an occupational health and safety programme includes precautionary measure for fire prevention, and such ministerial decisions regulates fire safety measures at a workplace which would apply to a construction site.

Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

There are no statutory restrictions to the practice of retaining part of the purchase price for the works. Therefore, if it is contractually provided in a construction contract, employers are

allowed to retain a certain percentage of each progress payment as retention monies.

In general, retention monies will be released in two tranches, the first half is released on completion (taking-over) of the construction works and the second half on the employer being satisfied that the contractor has rectified all defects identified and notified during the defects liability period.

Performance bonds

Performance bonds provided in the form of bank guarantees are very common in construction projects throughout the UAE, Bahrain and Oman.

The laws of the UAE, Bahrain and Oman recognise conditional and unconditional bank guarantees. Generally, performance bonds will be on-demand and unconditional so that the beneficiary will not need to prove or demonstrate any breach by the contractor under the construction contract to call upon or cash in on the performance bond, but certain banks have been known to resist calls or encashment of performance bonds due to non-compliance with formalities. The required form of performance bond is typically agreed in advance and included as an annexure to the construction contract.

A contractor that believes an employer will be calling upon or encashing a performance bond unlawfully or unjustifiably may seek for an attachment order on the amount guaranteed in the performance bond, provided that such contractor has “serious and certain reasons”.

Company guarantees, for the performance of subsidiary companies

Company guarantees are not the preferred form of performance security but are a regular feature in larger projects in the UAE, Bahrain and Oman.

It should be noted that a company guarantee is generally required in addition to a performance bond and not *in lieu* of one. In contrast with performance bonds, the guarantor’s liability under a company guarantee mirrors the liability of the contractor under the construction contract, and the guarantee is a secondary or conditional instrument (i.e., there will not be any liability upon the guarantor company unless and until the contractor fails to perform its obligations).

Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

The UAE Civil Code, in Article 879, entitles the contractor to a lien over its works until the contractor is paid for such work, if the works have a beneficial effect which is a remedy that resembles the common law concept of lien; however, neither the Omani Civil Code nor the Bahraini Civil Code have a similar provision, and as such the concept of contractor’s lien is not expressly recognised under the laws of Bahrain or Oman (however, in practice, many construction contracts in these jurisdictions include retention of title provisions).

Generally, it is common for employers in the UAE, Bahrain and Oman to require that the transfer of ownership of goods and materials forming part of the works takes place on the earlier of: (i) the employer’s payment for such goods and materials; or (ii) delivery to the site.

Supervising Construction Contracts

Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)?

Yes, it is common for Owners/Employers in the UAE, Bahrain and Oman to appoint a third party to provide the services of an “Engineer” or “Contract administrator” to manage and supervise the works effectively. This Engineer may, in certain instances, perform decision-making functions.

However, the laws do not specifically regulate the impartiality of the Engineer. The impartiality of an Engineer is generally regulated contractually between the parties, for example as the FIDIC contracts are the predominant standard form contracts used in the Gulf we know that under the Red Book the Engineer has a greater duty to act impartially than the Employer’s Representative under the FIDIC Silver Book. Importantly, one should note that Article 246 of the UAE Civil Code requires parties under a contract to act in good faith.

In the event of a breach by the Engineer of their contractual duty of care, the Owner/Employer will be able to claim for damages based on a breach of contract. Absent a contractual relationship between the contractor and the Engineer, it will be difficult for the contractor to have any recourse against the Engineer.

“Pay when paid” clauses

United Arab Emirates and Bahrain

“Pay when paid” clauses are not expressly prohibited by law in the UAE and Bahrain and are generally enforceable. Article 885 of the UAE Civil Code and Article 599 of the Bahrain Civil Code provide that payments are due on delivery of the works unless agreed otherwise. It is not uncommon for parties to incorporate such clauses in construction agreements. Most “pay when paid” clauses are found in subcontract agreements.

Considering the enforceability of “pay when paid” clauses, subcontractors should take note that Article 891 of the UAE Civil Code prohibits subcontractors from making claims against the Owner/Employer directly unless the main contractor has assigned its rights against the Owner/Employer to the subcontractor. The enforceability of such clauses is subject to the principle of good faith enshrined in Article 246 of the UAE Civil Code.

The position of subcontractors in Bahrain differs from other GCC countries as Article 605 of the Bahrain Civil Code permits a subcontractor to make a payment claim against the Owner/Employer directly provided the sums claimed are due by the Owners/Employers to the main contractor on the date that the claim is made.

Oman

Omani law imposes no restrictions on payment terms to be mutually agreed between the parties and adopted in a construction contract. “Pay when paid” clauses are generally enforceable in Oman, and it is not uncommon for parties to incorporate such clauses, particularly within subcontract agreements.

Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g., liquidated damages for late completion?

By virtue of Article 390(1) of the UAE Civil Code parties may fix, in advance, the amount of the damages, either in the contract

or in a subsequent agreement. There is no express reference to this being a genuine pre-estimate of loss. However, parties' contractually agreed compensation arrangements can be overridden by reference to Article 390(2) of the UAE Civil Code. Compensation can be adjusted to make it equal to actual loss suffered which is relevant to liquidated damages provisions in construction contracts where "The judge may, in all cases, at the request of one of the parties, amend such an agreement, in order to make the amount assessed equal to the prejudice. Any agreement to the contrary is void". Consequently, it is recommended that any pre-agreed damages should have a referable basis and be a genuine pre-estimate aligned to actual loss.

Common Issues on Construction Contracts

Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

Varying the original scope of works of a construction contract is any permanent and conclusive change or alteration, whether by increase or decrease of the original scope, is otherwise referred to as a variation. Generally, construction contracts will contain variation clauses that give contracting parties flexibility and rules to govern the contractual entitlements and obligations when it comes to variations. In particular, a variation clause will often entitle the employer to unilaterally instruct a variation.

Where the construction contract is absent a variation clause, the Employer's legal entitlement to variations is limited to a mutual agreement between the contracting parties, i.e., the Employer must provide its consent and the contractor or engineer must agree in connection with the variation (references: Article 887(1) of the UAE Civil Code, Article 641 of the Oman Civil Code and Article 70 of the Bahrain Civil Code). In other words, the contractor cannot be compelled to the Employer's variation instruction without also agreeing to it.

Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

Variations through omission of works is permissible in limited circumstances. However, if there is no variation provision in the underlying contract and absent agreement, then the employer cannot omit any original scope of works of the construction contract without risk of being in breach of the construction contract.

The standard terms of the FIDIC contracts, which are typically used in the Region, do not permit the Employer to omit the original scope of works of the construction contract if those omitted works are assigned to a third party.

Potential terms implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)

Contracting parties are bound by the express terms in the construction contract. Whilst there is no express statutory reference to "fitness for purpose", there are mandatory obligations in the UAE and Bahrain Civil Codes imposed on contracting parties; including the duty to perform in accordance with its contents and in a manner consistent with the requirements of good faith (references: Article 246 of the UAE Civil Code and Article 129 of the Bahrain Civil Code). A statutory obligation to perform the contract in good faith does not exist in Oman.

If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

The issue of concurrency is not legislated for within the Civil Codes of the UAE, Bahrain or Oman. Where there is concurrent delay events the primary recourse would be to the contract provisions, which generally are based upon FIDIC principles. Where concurrency is not contemplated by the Parties, general principles within the UAE Civil Code could be relied upon including Article 106 which prevents a party from benefiting from its own breach and Article 318 which prohibits unjust enrichment.

Correspondingly, Article 87 of Bahrain's Civil Code bars a party that has committed a mistake from capitalising on that mistake in a manner contradictory to the principles of good faith. Moreover, Article 28(b) of Bahrain's Civil Code asserts that the exercise of a right with the aim of achieving an unlawful interest is, itself, unlawful. This provision gives the contractor a potential basis to reduce or avoid exposure to liquidated damages imposed by the employer in instances of concurrent delay.

Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other?

Generally, a long-stop limitation period of 10 years applies to construction contract disputes under the respective Commercial Codes (references: Article 95 in UAE, Article 92 in Oman and Article 87 in Bahrain), save for:

- specific legislative provisions for specific types of disputes that prescribe differing limitation periods;
- exceptions to the default position; and
- financial free zones with their own body of laws, including statutory limitation periods (e.g., DIFC and ADGM in the UAE).

Contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices

United Arab Emirates

As a general principle, parties have freedom of contract in the UAE, including the freedom to agree contractual time limits. Article 243 read together with 257 of the UAE Civil Code provides that all conditions and obligations mutually agreed to by the parties under the contract will be binding on the parties, provided that such provisions are not contrary to public policy. However, there are various provisions under the UAE Civil Code that may be utilised by a party to circumvent a contractual time limit. Therefore, the UAE Civil Code neither expressly prohibits contractual time limits nor enforces them.

Nevertheless, there is a strong potential that courts will enforce a contractual time limit as demonstrated by case law. Equally, however, courts are also empowered to scrutinise the contractual time limit to determine whether it is equitable and reasonable to prohibit a contractor from submitting a claim.

The form and substance of notices are not specifically regulated by law in the UAE. These are generally regulated by contract. Again, there is a strong potential that courts are likely to uphold such provisions.

Bahrain

As a general principle, parties have freedom of contract in Bahrain, including the freedom to agree contractual time limits, provided

that those provisions do not contravene public order or public moral as enshrined in Article 128 of the Bahrain Civil Code.

The Bahraini courts will generally take consideration of the application of a contractual time limit with discretion on a case-by-case basis. Where it is evident that a strict application of a contractual time limit will unreasonably prejudice the contractor's right to pursue legitimate claims, the courts are unlikely to uphold such provisions.

The form and substance of notices are not specifically regulated by law in Bahrain. These are generally regulated by contract. Again, the courts' approach to such provisions will be judged on a case-by-case basis.

Oman

As a general principle, parties have freedom of contract in Oman. Further, Article 155 of the Oman Civil Transaction Law requires parties to fulfil their contractual obligations as specified in the contract. However, there are various provisions under the Omani Civil Transaction Law which may be utilised by a party to circumvent a contractual time limit, for example, the unlawful exercise of rights under Article 59 of the Omani Civil Transaction Law.

The Omani courts will normally consider the application of a contractual time limit on a case-by-case basis, taking into account all the relevant facts such as the exact wording of the clause and the impact of the limitation. Omani courts are unlikely to uphold a contractual time limit where it will lead to a miscarriage of justice. This includes any requirements as to substance and form of notices required.

Finally, there remains a tension between Sharia law, which generally does not recognise that rights may be extinguished due to the passage of time, and permitting a party to benefit from a contractual time limit.

Which party usually bears the risk of unforeseen ground conditions under construction contracts?

United Arab Emirates

The laws in the UAE do not specifically contain provisions which expressly govern the risk allocation of unforeseen ground conditions, and this largely remains a matter of contractual arrangement between the parties. However, where the contract is silent as to the allocation of this risk, courts are likely to find that the contractor is liable for the costs of unforeseen ground conditions based on Article 53 of the UAE Civil Code which requires the contractor to provide that which is "ancillary" to the contract. Overcoming unforeseen ground conditions may be considered ancillary to the contract.

Where unforeseen or adverse ground conditions cause a building or structure to collapse (totally or partially) or even have any defects that threaten the stability or safety of the structure, both the designer and contractor will be held jointly liable under the mandatory decennial liability provision at Article 880 of the UAE Civil Code. However, Article 881 of the UAE Civil Code provides that where a designer was responsible for the design then its liability will be limited to only defects caused because of its design. Conversely, Article 878 of the UAE Civil Code provides that a contractor will only be responsible for defects arising from the execution of its works unless they prepared the design.

Bahrain

The laws in Bahrain do specifically contain provisions which expressly govern the risk allocation of unforeseen ground

conditions, and this largely remains matter of contractual arrangement between the parties. Commonly, contracts are drafted such that the contractor bears this risk.

Where unforeseen or adverse ground conditions cause a building or structure to collapse (totally or partially) or even have any defects that threaten the stability or safety of the structure, both the designer and contractor will be held jointly liable under the mandatory provision at Article 615 of the Bahraini Civil Code. Further Article 620 of the Bahraini Civil Code provided that this liability cannot be excluded or limited by way of mutual agreement between the parties.

Oman

Article 16 of the Engineering Consultancy Law (Royal Decree 27/2016) (the **Engineering Law**) strictly provides that the contractor and engineer will be liable for unforeseen ground conditions, where the engineer was responsible for the design and supervision of the works.

Where unforeseen or adverse ground conditions cause a building or structure to collapse (totally or partially) or even have any defects that threaten the stability or safety of the structure, both the designer and contractor will be held jointly liable under the mandatory decennial liability provision at Article 634 of the Oman Civil Transaction Law and Article 21 and 23 of the Engineering Law. It is however to be noted that the interplay between the Engineering Law and the Oman Civil Transaction Law still remains to be tested by the courts in Oman.

Changes in law

The issue of a change in law affecting the completion of the works under construction contracts is not specifically addressed by law in the UAE, Bahrain and Oman, and remains a matter of contractual arrangement. Generally, parties will allocate this risk to the Owner/Employer, which is a similar risk allocation as that adopted by the FIDIC contracts.

Intellectual property in relation to the design and operation of the property

Intellectual property rights in the UAE, Bahrain and Oman are being developed rapidly, however ownership of intellectual property on construction projects in the UAE remains a matter of contractual arrangement between the parties. Typically, ownership of the design and operation will vest with the designer with the Owner/Employer being granted the rights of use of the design and operations by way of a royalty-free, non-exclusive licence.

Is the contractor ever entitled to suspend works?

United Arab Emirates

The UAE Civil Code does not expressly recognise the concept of suspension and this right is generally the subject of contractual arrangement.

However, Article 247 of the UAE Civil Code provides that a party can refuse to perform its obligations if the counterparty is not performing its reciprocal obligations under the contract.

Furthermore, Article 414 of the UAE Civil Code deals with the concept of "withholding performance", and is drafted in broad and general terms as to allow a party to withhold performance until the counterparty perform their obligations. Therefore, it is important to note that the parties' obligations must be connected if one seeks to rely on Article 414 of the UAE Civil Code.

Bahrain

The Bahrain Civil Code does not expressly recognise the concept of suspension and this right is generally the subject of contractual arrangement.

However, Article 150 of the Bahrain Civil Code provides that where correlative obligations are owed between the parties, either of the contracting parties may refrain from performance of their obligation if the counterparty does not perform its obligations, unless agreed otherwise.

Oman

The Oman Civil Transaction Law does not expressly recognise the concept of suspension and this right is generally the subject of contractual arrangement.

However, Article 157 of the Oman Civil Transaction Law provides that if mutual obligations binding upon both parties become due, then any of the contracting parties may abstain from performing their obligations if the counterparty fails to perform its obligations.

Terminating the contract

A party is usually entitled to terminate a contract if the other party has committed a substantial breach of their contractual obligations. However, the specifics are often dictated by the termination provisions within the contract itself.

A termination of a contract can occur under three broad scenarios:

- Pursuant to Article 268 of the Federal Law No. 5 of 1985 on the Civil Transactions Law of the United Arab Emirates (the **Civil Code**), parties can mutually agree to terminate the contract.
- A court of competent jurisdiction orders termination.
- When parties have completed their contractual responsibilities and obligations.

It is common for contracts, especially in the construction sector, to have express provisions that detail the circumstances under which termination is permitted. These can include failure to commence works on time, non-compliance with contractual notices or instructions, breach of subcontracting rules, non-compliance with payment obligations, or extended suspension of works. Additionally, termination for convenience clauses, which allows a party to terminate the contract without any default or non-performance by the other party, is becoming common.

When a party decides to terminate a contract based on the contractual provisions, there are often procedural requirements that need to be met. Typically, the party seeking to terminate must issue a preliminary warning or default notice, and a certain time period must elapse before termination. Failure to meet these procedural requirements could lead to claims for damages for wrongful termination.

Additionally, a party has a statutory right under Article 247 of the Civil Code law to terminate for a repudiatory breach, where the other party fails to fulfil their obligations. This often applies in cases such as unlawful refusal to carry out works, abandonment of site, or failure to provide site access.

The party intending to terminate the contract would have to set out the grounds for termination, and the procedural requirements would typically need to be set out clearly in the termination notice, unless the contract provides otherwise.

It is common for construction contracts to include provisions that allow employers to terminate the agreement under certain circumstances, which can occur through mutual agreement, court order, or by operation of law and in certain instances, these contracts may contain a “termination for convenience”

clause which permits the employer to terminate the contract at any time and for any reason. The employer’s right to terminate may also arise from substantial breaches, such as persistent delays, insolvency, or contractor abandonment.

In situations where termination is due to:

- The contractor’s breach, the employer would usually not be required to make further payment until the cost of completing the works, which may include engaging a replacement contractor has been determined. This is to ensure the employer doesn’t incur additional costs due to the contractor’s default.
- The employer’s breach or at the employer’s convenience, the employer would typically not be entitled to withhold any due payments to the contractor and must fulfil all payment obligations as per the terms of the contract.

Under Article 877 of the Civil Code, if the contractor is carrying out the work in a defective manner or contrary to the contract conditions, the employer may demand immediate termination if it is impossible to rectify the work. However, if the work can be made good, the employer can require the contractor to rectify the work within a reasonable period, and if this is not done, the employer can make an application to the courts to terminate the contract.

Force majeure

Force Majeure is a recognised statutory concept according to the UAE, Oman and Bahrain Civil Codes (Article 273 UAE Civil Code, Article 171 of the Oman Civil Code and Article 145 of the Bahrain Civil Code). The affected party may seek to terminate the contract (if not terminated automatically due to impossibility of full performance), as well as seek payment of compensation for any loss or damages suffered as a result.

It is unlikely that a contract becoming uneconomical will be successfully argued under the *force majeure* provisions. This is particularly because the *force majeure* provisions require that the performance of the contract has become impossible. Furthermore, there are specific provisions within the UAE, Oman and Bahrain Civil Code that address this matter (Article 159 of the Oman Civil Code, Article and 130 of the Bahrain Civil Code). These provisions provide a means to obtain relief from grave loss arising in exceptional circumstances of a public nature. It imposes a statutory term that cannot be contracted out of. It allows a party in “exceptional circumstances” to seek relief from the court from its obligation under a contract where harsh consequences would arise and lead to grave loss. This is dissimilar to the principle of *force majeure* in that it does not result in the termination of the contract pursuant to the determination of a force majeure event. Rather, it provides the judiciary with the discretion to adjust the effect of the contract so as to balance the respective interests of both parties, where an unforeseen event occurs disrupting this balance.

The COVID-19 pandemic

With respect to the implications of the COVID-19 pandemic on construction contracts in the Middle East, there are several legislative provisions that may provide some form of relief to parties who have experienced delays, disruptions, or financial loss.

The FIDIC forms of contract commonly used across the region contain provisions which could be relied upon where COVID-19 has impacted projects. Clause 8.4(iv) of the 1999 Red Book allows a contractor to claim for an extension of time in situations of “unforeseeable shortages in the availability

of personnel or Goods caused by epidemic or government actions". In addition, as per Clause 13.7 of the 1999 Red Book, a contractor can potentially claim additional costs and vary the contract price as a consequence of changes in the laws. Invoking this clause will largely be dependent on whether the actions from the government (for example the introduction of new legislation or decrees) amounts to a legal change affecting the party's performance of the contract.

Parties may place reliance on the relevant *force majeure* provisions in the Civil Code (Article 273 UAE Civil Code, Article 171 of the Oman Civil Code and Article 145 of the Bahrain Civil Code) as well as the exceptional circumstances provisions matter (Article 159 of the Oman Civil Code, Article and 130 of the Bahrain Civil Code) to seek relief from the effects of the COVID-19 pandemic.

Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

Parties who are not parties to the contract are entitled to claim the benefit of a contractual right, but only where the right is created for them in the contract (Articles 252 UAE Civil Code, Article 162 Oman Civil Code and Article 136 Bahrain Civil code). The third-party beneficiary may be a person who is likely to exist in the future and may be a person that is not specified at the time of the contract, if identifying the person was possible at the time that the contract provides effect according to the agreement.

If the second or subsequent owner of a building attempted to claim against the contractor, pursuant to the original construction contracts, in relation to defects in the building, then unless the original construction contracts provided for this, the subsequent owner may not be able to successfully bring a claim under contract.

Direct agreements and collateral warranties

In a typical construction project, the primary contractual relationship is between the employer and the main contractor. The principle of privity in UAE law, which is similar to other jurisdictions, typically limits the ability to enforce contract terms to the parties to the contract. In other words, a subcontractor, not being a party to the contract between the employer and the main contractor, would usually have no legal obligations towards the employer or other parties involved in the project.

As per the Civil Code, the main contractor has the discretion to subcontract either the entirety or a section of the works, provided this is not expressly prohibited by the contract terms, or if the nature of the works necessitates the main contractor's personal performance (Article 890 of the Civil Code). Article 891 of the Civil Code further provides that all rights and liabilities in relation to the subcontracted portion of the works are a matter strictly between the main contractor and its subcontractor.

However, there are times when it is a practical necessity to allow parties that are not privy to the contract to still take on enforceable obligations. The mechanism for this, known as collateral warranties which is recognised under UAE law as unilateral acts as outlined in Articles 276 to 278 of the Civil Code. The employer, in such cases, may ask for collateral warranties from the subcontractor, thereby enabling parties such as the subcontractor who is otherwise not privy to the contract to acquire enforceable obligations.

Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

Set off of monetary claims under a construction contract is possible, and can occur either by operation of law, by agreement between the parties, or by order of the court (Article 369 UAE Civil Code, Article 247 Oman Civil Code). In Bahrain, P1 would be able to set off against sums due without the need to agree with the other party or obtain a court order (Article 353 Bahrain Civil Code). P1 in Bahrain would be able to set-off, even when the causes giving rise to the two debts are different, provided that they are both for a sum of money or fungibles of a like nature and quality, that they are not in dispute, and that they are due and may be sued for.

The Bahrain Civil Code does place restrictions/exceptions on the ability of parties to set off debts (Article 355 Bahrain Civil Code). It provides that set off cannot take place:

1. where one of the two obligations consists of a thing of which the owner has been unjustly deprived, and is the object of a claim for restitution;
2. where one of the two debts consists of a thing that has been deposited or lent for use or is the object of a claim for restitution; and
3. where one of the two debts is a right which cannot be subject to attachment.

Duty of care

Liability for breach of a duty of care is first and foremost a matter of contract. The UAE, Oman and Bahrain Civil Codes provide that where the exercise of care in the performance of obligations is required under contract, a party shall be deemed to have discharged that obligation if, in the performance thereof, "he exercises all such care as the reasonable man would exercise" (Article 383 UAE Civil Code, Article 261 Oman Civil Code and Article 214 Bahrain Civil Code). There is no separate extra-contractual duty of good care that exists in the UAE, Oman or in Bahrain.

In the absence of a contractual obligation, the courts will consider whether the breaching party has performed an obligation with the duty of care that would be expected from a reasonable person in similar circumstances or a professional acting within the scope of his duties. However, this remains subjective in the absence of clear definitions within the law, and the courts have the discretion to decide. Very often, the court will decide to appoint technical experts to determine whether a contractor has executed their obligations with the reasonable skill and care that is expected from a reasonable person in similar circumstances or a professional acting within the scope of his duties.

Ambiguity in construction contracts

There is a statutory requirement in the UAE, Oman and Bahrain Civil Codes that all ambiguous terms should be interpreted in favour of the obligor (Article 266(1) UAE Civil Code, Article 166 Oman Civil Code and Article 126 Bahrain Civil Code). This provision requires that any doubt about the meaning of a contractual terms be resolved in favour of the compliant party, or the party on whom an obligation would fall. Furthermore, these provisions impose an implied protection of a party with less bargaining and/or less negotiation powers at the outset of the contract. Meaning that where the terms of contract were imposed on (the weaker) one party, any ambiguous term should be interpreted to the benefit of that party.

Unenforceable terms in construction contracts

There are a number of mandatory statutory provisions which parties cannot contract out of, and any term which purports to do so or conflicts with these mandatory provisions will likely be unenforceable. These include, for instance, any exemptions from the decennial liability provisions, the hardship provisions (see section above regarding potential terms implied into a construction contract), and duty of good faith.

Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

A design consultant that did not administer and/or supervise the contract shall only be liable for the design defects (Article 880 UAE Civil Code, Article 634 Oman Civil Code and Article 616 Bahrain Civil Code). Overseeing the construction phase of a project causes a consultant to be jointly and severally liable with a contractor for both design and workmanship related defects.

Decennial liability, and the scope of its application

In the UAE and in Oman, the contractor and the design consultant are jointly and severally liable for the cost of rectification of a structural defect in a building or installation within 10 years from the date of handover (Article 880 UAE Civil Code, Article 634 Oman Civil Code). The scope of the liability is limited to structural defects that threaten the solidity and the safety of the building, resulting in the potential for partial or total structural collapse.

In Bahrain, the defects liability period is for five years (Article 615 Bahrain Civil Code), however there is a separate general fitness for purpose obligation (Article 596 Bahrain Civil Code). The contractor shall only be responsible for the defects in execution, but not for the defects in design unless such defects are obvious. However, the contractor shall be liable for the defects due to the design if the consultant who prepared the design is an employee of the contractor.

Dispute Resolution

How are construction disputes generally resolved?

In the UAE, Bahrain and Oman it is common for the underlying contract to specify how the dispute will be resolved. This could be on a tiered and escalating basis to the ultimate forum of resolution.

Only judgments of the Courts or Arbitration awards are recognised and enforceable. If a contract is silent as to how disputes are to be resolved, the default position will be through the Courts. The majority of construction contracts will provide for an agreement to arbitrate and each of the UAE, Bahrain and Oman has its own Arbitration Law and is a signatory to the New York Convention.

Adjudication processes and interim dispute resolution

There is no statutory framework regarding adjudication in the UAE, Bahrain or Oman, nor is an adjudication decision directly enforceable.

Adjudication is most commonly found by reference to the FIDIC standard-form contracts used in the region, which

provide for Dispute Adjudication Board and Dispute Review Board known as 'DAB' and 'DRB' respectively. However, these provisions are commonly deleted and rarely used by contracting parties, as decisions are not directly enforceable, and a judgment of the local courts or an arbitral award is needed to finally determine the dispute.

The UAE, Oman and Bahrain have made strides to enhance the availability of alternative dispute resolution forums by establishing centres offering mediation services, such as the Centre for Amicable Settlement of Disputes for onshore Dubai, Oman Commercial Arbitration Centre for Oman, and Bahrain Chamber for Dispute Resolution.

Arbitration clauses in construction contracts

United Arab Emirates

It is common for construction agreements in the UAE to provide for arbitration as a dispute resolution mechanism.

If an arbitration is seated in any emirate in the UAE (other than in a financial free zone), the Federal Law No. 6 of 2018 (the **Arbitration Law**) will apply. The Arbitration Law is largely based on the UNCITRAL Model Arbitration Law on International Commercial Arbitration (the **Model Law**) with a few exceptions for example, the date of the commencement of arbitration in the Arbitration Law differs from the Model Law.

There are currently two financial free zones established in the UAE that have separate arbitration legislation: Dubai International Financial Centre (**DIFC**) the Abu Dhabi Global Market (**ADGM**).

Parties are also free to elect the rules of various arbitral institutions that will govern the arbitration proceedings, including the Dubai International Arbitration Centre (**DIAC**), the Abu Dhabi Commercial Conciliation and Arbitration Centre (**ADCCAC**) and the International Chamber of Commerce (**ICC**).

Bahrain

It is common for construction agreements in Bahrain to provide for arbitration as a dispute resolution mechanism.

If an arbitration is seated in Bahrain, then Legislative Decree No. 9 of 2015 (the **Bahrain Arbitration Law**) will apply. The Bahrain Arbitration Law adopts the UNCITRAL Model Arbitration Law on International Commercial Arbitration in its entirety.

Generally, parties are also free to elect the rules of various arbitral institutions that will govern the arbitration proceedings including the Bahrain Chamber for Dispute Resolution (**BCDR**) and International Chamber of Commerce (**ICC**).

Oman

It is common for construction agreements in Oman to provide for arbitration as a dispute resolution mechanism.

Royal Decree 47/97 (the **Omani Arbitration Law**) governs all arbitration proceedings in Oman. The Omani Arbitration Law is applicable to all arbitrations seated in Oman, or arbitrations seated outside of Oman provided parties have agreed to apply the Omani Arbitration Law. The Omani Arbitration Law largely adopts the UNCITRAL Model Arbitration Law on International Commercial Arbitration. The parties are also free to elect the rules of various arbitral institutions that will govern the arbitration proceedings.

Enforcing international arbitration

United Arab Emirates

The UAE is a signatory to the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards (the **New York Convention**).

The substantive law and procedure for the recognition and enforcement of foreign arbitral awards in onshore UAE is set out in Articles 85 and 86 of the Cabinet Regulations Number 57 of 2018 Concerning the UAE Civil Procedure Law as amended by Article 1 of Cabinet Decision No. 75/2021.

Since signing the New York Convention, the UAE courts have, in broad terms, relaxed their adherence to the strict provisions of domestic legislation for ratification of foreign awards generally (although the shift in approach has been gradual).

Bahrain

Bahrain is a signatory to the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards (the **New York Convention**).

The Bahrain court generally apply a non-interventionist approach to foreign arbitral awards, treating them as final and binding except in exceptional circumstances. However, the courts are at liberty to set aside award if the award: (i) contradicts public policy; (ii) is contrary to good morals; (iii) has been obtained despite procedural irregularities and (iv) there is no binding arbitration agreement between the parties.

Oman

Oman is a signatory to the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards (the **New York Convention**). However, we are aware of only one foreign arbitral award that has been enforced by the Omani Courts based on Oman being a contracting state.

Article 352 of the Civil and Commercial Procedure Law promulgated by Royal Decree 29/2002 (**CCPL**) sets out the mandatory conditions for a foreign arbitral award to be enforced in Oman. In addition, Article 353 of the CCPL provides additional conditions for the enforcement of foreign arbitral awards.

Court proceedings provided for in the contract, rights of appeal, and a how long proceedings are likely to take

If the contract expressly provides for court proceedings or it is silent as to how any disputes will be resolved, the Courts will have jurisdiction. It is not possible to predict how long any court proceedings will take as this will be dependent upon the complexity of the matter. In the UAE (excluding DIFC and ADGM) and Bahrain the court process will flow through the Court of First Instance, the Court of Appeal and the Court of Cassation. Similarly, in Oman, the court process is the Court of First Instance, the Court of Appeal and the Supreme Court.

Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced?

Reciprocity of court judgments is subject to there being a specific bilateral enforcement treaty in place. Within the Gulf there is the Riyadh Arab Agreement for Judicial Cooperation 1983 (of which the UAE, Bahrain and Oman are signatories to), as well as the Gulf Cooperation Council (**GCC**) Convention for the Execution of Judgments, Delegations and Judicial Notifications of 1996, of which all GCC states (Saudi Arabia, Kuwait, and Qatar, in addition to the UAE, Oman, and Bahrain) are

signatories, recognising and enforcing each other's court judgments. Furthermore, each state also has distinct treaties and understandings with foreign countries.

As a general rule, local courts in the UAE (on-shore courts), Oman and Bahrain will enforce foreign judgments without requiring the parties to re-litigate, as long as the judgment originates from a country where reciprocal treatment is established via treaty. Where a treaty does not exist, parties will generally be required to apply to the local courts for enforcement, and the courts may choose to re-examine the issues.

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Angola

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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (*NB* For ease of reference throughout the chapter, we refer to “construction contracts” as an abbreviation for construction and engineering contracts.)

Although not legally regulated in Angolan public procurement laws, standard contract forms are adopted in public projects led by international companies and/or financed by international banks, Export Credit Agencies or multilateral Development Banks. Important infrastructures were built under design and build contracts. EPCs (engineering, construction and procurement), also known as turnkey contracts, are commonly used following the FIDIC’s Silver Book with *ad hoc* adjustments. Design-only contracts and management contracting are not common, particularly in public works where the employer transfers as much responsibility as possible to the contractor. Standard contracts are not so common in private contracts.

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

Collaborative contracts where employer and contractor are allies are not the trend in Angola. It is, however, common to see construction companies entering into Joint Venture Agreements or Consortiums to bid jointly for a project.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

Construction contracts generally follow the Angolan Civil Code and Public Contracts Law and forms. However, internationally sponsored projects typically follow FIDIC forms.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

Yes. There are models provided together with the Public Contracts Law for public works. However, a standard EPC contract is commonly adopted in public works. With the development of public partnerships, we expect to see more build, own, operate and transfer (BOOT) contracts, although these are already used in energy-related projects.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

Angola is a civil law country, which means that obligations on the parties may not result exclusively from the contract. The Angolan Civil Code does not require works contracts to be in writing. Regarding public works contracts, depending on the amount, the Public Contracts Law may impose not only a written agreement but the prior approval of the Audit Court.

1.6 In your jurisdiction please identify whether there is a concept of what is known as a “letter of intent”, in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

Yes, there is, although their legal effect in binding the parties to a future agreement is debatable. Intents are commonly expressed as a Memorandum of Understanding, and may be used to claim pre-contractual liability under the Civil Code.

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out

construction work? For example, is there employer's liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors' all-risk insurance?

Insurance covering employees against works accidents and occupational diseases is mandatory. Contractors are commonly requested to take out all-risk insurance covering the risks connected with the works, equipment and damage caused to third parties. Other insurance may be requested depending on the project.

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

Workers are traditionally bound by an employment contract, which regulates the relationship between them and the contractor, and can be for a fixed or indetermined term. It is also possible to hire complementary services through Service Agreements, with self-employed individuals.

Taxes are always due, whether staff is hired through employment contracts or service agreements. Subject to a case-by-case analysis, income tax is withheld by the employer and paid over to the tax authorities. Social security contributions must also be considered for employees.

The employer is responsible for the implementation of health and safety measures. This is regulated by the General Labour Law and ancillary regulations.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

Yes, Presidential Decree no. 195/11 of 8 July regulates safety measures against fires in buildings. Supervision is done by the Home Office for Civil Protection and the Fire Service.

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

The employer is permitted to retain part of the purchase price. The Angolan Civil Code does not stipulate any limitation on retentions. Usually, construction contracts contain provisions allowing the retention of 5% to 10% of the price, either *in lieu* of the issuance of a bank guarantee by the contractor, or in parallel to this obligation.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor's performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

It is common to have bonds provided by the contractor in both public and private construction contracts. The most common

are performance and warranty bonds. Performance bonds are usually provided by the contractor in an amount between 5% and 15% of the contract price. Performance bonds included in construction contracts in Angola very frequently correspond to "on first demand" bonds, so far issued by banks, allowing an immediate request for payment with which financing entities must comply.

The execution of performance bonds may certainly be subject to interim injunctions, which will be granted if the following legal requirements are met:

- (i) serious probability of the existence of the right claimed;
- (ii) well-founded fear that someone else, before the suit is filed or while it is pending, will cause serious injury to that right, that is difficult to repair;
- (iii) the damage resulting from the injunction does not exceed the damage it is intended to avoid; and
- (iv) the non-existence of a specific injunction to protect the same right.

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

The request for issuance of parent company guarantees by the contractor is common. This allows for the creation of a joint-liability system between the contractor and its parent company, and therefore it provides a further layer of security to the employer.

These guarantees may also take the form of a "comfort letter" issued by the parent company.

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

The Angolan Civil Code regulates retention rights. If the employer does not comply with its payment obligations under the construction contract, the contractor is entitled to exercise a right of retention of the works. The right of retention consists of an *in rem* guarantee which prevails over mortgages, even if registered in advance.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

Yes, it is common for construction contracts to provide for the hiring of a supervision company to monitor compliance with the project and its amendments. Normally, this company acts as third party to the works contract. Under the Public Contracts Law, the execution of the works is supervised by the owner's representative designated for this purpose together with the supervisor. The project supervisor cannot, under any circumstances, be the designer.

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a “pay when paid” clause?

In private contracts, the parties are free to agree on such a condition for payment. The “pay when paid” clause is mostly used in subcontracts, meaning that subcontractors will only be paid if the employer pays the contractor.

The “pay when paid” clause is not contrary to the provisions of Articles 280 and 281 of the Civil Code, provided it does not offend the law, is not legally impossible or indeterminable, and does not offend public order or good customs.

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

The parties are free to agree on the amount of compensation in the event of default by one of them (“penalty clauses”). These may take the form of a liquidated damages clause or a compulsory clause (not necessarily related to the occurrence of actual damages).

Both types of clauses may be inserted in construction contracts and their amounts may be subject to judicial control, under article 812 of the Angolan Civil Code. This prevents the execution of excessively burdensome clauses, especially those which may offend public order or morality.

In the case of liquidated damages clauses, the pre-estimate of the loss should be as close as possible to the actual loss incurred. In fact, article 811(2) of the Angolan Civil Code provides that a court may reduce the amount of the compensation when the amount agreed is excessive in relation to the damage.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

Yes, the employer is entitled to require modifications to the construction works, provided that the associated value does not exceed one-fifth of the agreed price, and there is no modification of the nature of the work (regulated by article 1216 of the Civil Code). An increase in works implies an increase in price.

The Angolan Public Contracts Law provides that variations of the works by the employer imply a financial rebalancing of the contract and are limited to the following cases: (i) abnormal change of circumstances, and (ii) public interest.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

Only works included in the contract binds the contractor. It is not common to see clauses on the omission of work by the

employer for the purpose of concluding it or awarding it to a third party, however the employer is allowed to reduce works.

Under the Public Contracts Law, if during the contract’s execution the employer decides to reduce the scope of works by more than one fifth of the award, the contractor is entitled to terminate the contract and to a compensation.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

In addition to the contractual provisions, the parties are expected to act in good faith, a basic principle in civil law systems. Common practices in the sector may also be considered.

Fitness for purpose obligations may be agreed. In Angola, this is becoming popular in contracts where the contractor takes on the operation of the facility built, particularly in energy projects.

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

There are no specific rules regulating concurrent delays. We would have recourse to the Civil Code using a case-by-case approach, taking into account any causal link between the employer’s fault and the contractor’s fault and the specific loss and damage to be compensated, considering the principle of “adequate cause”. Pursuant to article 563 of the Angolan Civil Code “*the obligation to compensate only exists in relation to damage that the injured party would probably not have suffered had it not been for the injury*”.

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

With regard to buildings intended for long-term use, there is a statutory time limit of five years during which the contractor is liable for any damage caused to the employer or future buyers in case of collapse or discovery of defects. This time limit starts to run from the date the building is handed over to the employer.

The Public Contracts Law provides that the warranty period should be stated in the tender documents. If no time limit is defined, a period of three years should be considered.

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

Regarding the form and substance of the notices, courts normally look to what was defined by the parties in the contract. Also, in relation to time limits, in principle contractual clauses will prevail.

If not stipulated in the contract, the time limits to bring a claim under a construction contract, will be as soon as the breach is known; the obligation was due; or the defect became known. Common practice is that notices of breach/claims must be served in writing and properly grounded.

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

This may be defined in the contract. The Public Contracts Law provides that the employer will hire a supervisor, who is expected to confirm, among other things, the suitability of the project to the grounds. In principle, the contractor cannot be held responsible for, or burdened by, such an unforeseen event.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

This may be defined in the contract. It is debatable whether a change in law could be foreseen by any of the parties. One could also discuss whether a change in the law could be considered an abnormal change in circumstances (regulated by the Civil Code), according to which the injured party is entitled to terminate or request a modification to the contract.

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

Intellectual property belongs to the designer prior to, and during, the contract's execution. Ownership of engineering designs, technical specifications, construction projects and drawings may be transferred to the employer when works are handed over, in the terms agreed by the parties.

3.10 Is the contractor ever entitled to suspend works?

Yes. In public contracts, the contractor may suspend the works due to delays in payment, instruction from the employer or its representatives, delays in the supply when these are hired by the employer, *force majeure* or legal imposition. Outside these causes, the employer is entitled to terminate the contract when the suspension exceeds 10 days.

The contractor's right to suspend works is commonly provided for in private construction contracts, and associated with breaches by employer under the Civil Code regulations.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party's grounds for termination must be set out (e.g. in a termination notice)?

Yes. The Civil Code and the Public Contracts Law provide a few causes for termination both for the employer and the contractor. The Public Contracts Law has different rules for employer and contractor. When termination is at the initiative of the contractor, the contractor must give notice to the employer of thirty days from the event that grounds termination. When the employer aims to terminate the contract, it gives written notice to the contractor granting an eight-day period to challenge the grounds of termination.

The contractor of a public construction contract may terminate due to: (i) an abnormal and unpredictable change of circumstances; (ii) breach of contract by the public entity; or (iii) delays in payment superior to six months and delays in amounts superior to 25% of the contract price, among others.

In private construction contracts, it is common for the parties to agree provisions conferring the right to immediate termination in certain events, such as: (i) abandonment; (ii) reaching of liquidated damages limits; (iii) reaching of limitation of liability caps; or (iv) failure to achieve provisional acceptance by a given date.

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor's profit on the part of the works that remains unperformed as at termination?

This is not commonly expressed in contracts. However, in general terms, the employer may terminate a contract at any time, even after the works have started, as long as it indemnifies the contractor for the costs and loss of profit (article 1229 of the Civil Code).

The Public Contracts Law provides for the right of termination for public interest reasons.

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

Yes, it is a well-known concept in our jurisdiction, and typically works contracts include a *force majeure* clause. After a reasonable period, if the situation is not resolved, the parties may decide to terminate the contract, without resulting in a right to compensation for either party. The Public Contract Law regulates the effects of a *force majeure* event for each party depending on when it occurs, specifically concerning the suspension or termination of the contract.

3.14 Is there any legislation or court ruling that has been specifically enacted or handed down to provide relief to parties to a construction contract for delay, disruption and/or financial loss caused by the COVID-19 pandemic? If so, what remedies are available under such legislation/court ruling and are they subject to any conditions? Are there any other remedies (statutory or otherwise) that may be available to parties whose construction contracts have been affected by the COVID-19 pandemic?

We are not aware of any court ruling that has been specifically handed down to provide relief to parties to a construction contract for delay, disruption or financial loss caused by the COVID-19 pandemic. The COVID-19 situation was not considered *force majeure* in construction contracts, as it was not expressly provided for in contracts. Typically, *force majeure* clauses included, prior to the pandemic, natural disasters (earthquakes, floods, tornados, hurricanes), war, or labour strikes.

3.15 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

Second or subsequent owners can claim within the defects notice period in accordance with the Consumer Protection Act, Law no. 15/03 of 22 July 2003 and the Angolan Civil Code. The warranty period for "long duration" buildings is of five years.

3.16 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

In Angola, the use of direct agreements and collateral warranties is becoming more popular in project finance structures, particularly in the energy sector.

3.17 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

Article 847 of the Angolan Civil Code allows for a set-off between sums owed and sums due between private entities. This mechanism is called “compensation” and may be effected simply through mere notice to the other party, provided that the credit to be set off is judicially enforceable and both obligations have as their object fungible things of the same kind and quality, such as money.

3.18 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

In Angola there is no duty of care similar to the one that exists in common law systems. The parties to a construction contract are, however, bound to act in good faith towards all contracting parties and regarding the terms of the contract.

3.19 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

The Angolan Civil Code stipulates the rules for the interpretation of declarations. Under article 236, a declaration has the meaning that an ordinary addressee, placed in the position of the actual addressee, may deduce from the declarant’s behaviour.

It is common to include a list of definitions and interpretation clauses in construction contracts. It is also common to define in the contract the prevalence between contractual documents as to facilitate interpretation in case of dispute.

3.20 Are there any terms which, if included in a construction contract, would be unenforceable?

Under the Angolan Civil Code regulations, clauses contrary to the public order or clauses that offend good morals are null. Clauses excluding liability or warranty periods could also be held to be null and thus unenforceable.

3.21 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer’s obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

Design services are provided under a services agreement, to which the civil liability principles fully apply. Under the Angolan

Civil Code, the breach of a contract by one of the parties generates the obligation to indemnify the other party.

Accordingly, design professionals are liable for errors and omissions contained in the projects/plans prepared by them, so it is usual for employers to contractually stipulate compensation obligations, which in any case are due by law.

The Public Contracts Law separates situations when the designer is hired by the contractor or by the employer, attributing the liability for the increase in costs or project defects to the entity that hired the designer.

3.22 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

The concept of decennial liability does not exist in Angola.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

Construction disputes are typically resolved through negotiation between the parties and, in the alternative, by the judicial courts. Particularly in private contracts, it is common to include arbitration clauses seeking a more specialised review of case, speed, and cost effectiveness. In Angola, there are no courts specialising in construction matters.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

Adjudication processes are not the rule in Angola. However, as standard contracts become more popular, it is expected that the development of said proceedings and the acceptance of dispute boards will assist during the execution of the contracts.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

Parties commonly refer to arbitration in construction contracts (governed by Law no. 16/03 of 25 July 2003, the Voluntary Arbitration Law). Arbitration clauses are less common in public contracts. However, the Public Contracts Law regulates recourse to arbitration, including limitations when using an *ad hoc* arbitral tribunal.

Arbitration agreements are typically included in the construction contract. Alternatively, the parties may agree on a separate arbitration convention. In any case, arbitration clauses typically define the number of arbitrators, the seat of arbitration, the governing law and enforceability.

The Voluntary Arbitration Law provides that arbitration awards must be issued within six months of the date of acceptance of the last appointed arbitrator. The parties may, however, agree to extend the deadline for the decision.

In private contracts involving international parties or financed by international banks or multilaterals, it is common to use arbitration clauses following International Chamber of Commerce or UNCITRAL models and procedures.

4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been in force in Angola since 2017. Thus, Angolan courts recognise and enforce international arbitral awards in the terms of the Convention.

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

The Angolan court system is organised in a first level of jurisdiction, distributed by local courts with jurisdiction up to a certain amount; intermediate and appeal courts; and a final appeal court – the Supreme Court of Justice.

Judicial cases are filed with the competent court, and in civil and commercial matters the parties must be represented by a lawyer. Proceedings start with a pleading phase, followed by an adversarial phase, where the pleading are discussed. Parties may be invited to present further evidence at a preliminary

hearing, typically used to seek a settlement. If the parties aim to proceed, the judge organises the trial sessions where evidence and substance are discussed.

Decisions by civil courts of first instance are usually subject to appeal to the courts of appeal, while a subsequent right of appeal to the Supreme Court of Justice may exist in certain restricted cases.

In practice, proceedings at the first level jurisdiction take between three and six years. Appeal decisions may take between three and five years.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

Subject to a proceeding to recognise the foreign judgments, foreign judicial decisions are enforceable in Angola. There are countries with which Angola has judicial cooperation agreements, namely Portugal and countries which are members of the Community of Portuguese Language Countries (CPLP). In practical terms, it is necessary to file a proceeding with the Angolan court, which, except under extraordinary conditions, will not review the merits.



Renata Valenti has dual qualification, in Portugal and Angola. She has dedicated over than 15 years exclusively to the Angolan market, with extensive experience in supporting companies in setting up or operating businesses in Angola. Her experience includes working with regional governments and public institutions and foreign financing entities. She specialises in corporate, employment, real estate and construction. She was a university lecturer for around five years and has a degree in negotiation and mediation of disputes from the Faculty of Law of Portuguese Catholic University with ICFML and is an active member of ICFML (Institute of training and certification of lusophone mediators). She is also a member of the Angolan Corporate Governance Association.

Partner to the firm based in Angola since 2021, she now works as international partner to PLMJ, one of the largest firms in Portugal and ranked in Tier 1 by *Chambers Europe* and *IFLR 1000*.

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Orlando Buta is an associate whose work has focused mainly on corporate law, finance, foreign investment, commercial and international contracts, real estate and public procurement. He regularly assists companies in Angola in a variety of business sectors and has participated in due diligence processes in his different practice areas. In recent years he has accumulated relevant experience in the areas of labour and civil litigation and, more recently, in projects in the mining sector, with an emphasis on regulatory and contractual issues and negotiation with supervisory bodies. He has a post-graduate degree in employment law from the University of Coimbra and is currently working on her Master's dissertation in the area of civil law at the University of Lisbon Law School.

Before joining PLMJ Colab Angola – RVA Advogados, he was an associate at AVM – Sociedade de Advogados, a firm where, in addition to providing legal services, he also supervised traineeships.

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Diogo Duarte de Campos is the partner who heads the Public Law practice. He has almost 20 years' experience in the areas of administrative law, public contracts, public procurement and construction. His experience also includes litigation in the state courts and arbitration, both as a lawyer and as an arbitrator. In recent years, he has also worked with clients in other countries, particularly Angola and Mozambique. Here, Diogo has advised on several infrastructure projects, and has experience in the construction, transport, real estate and energy sectors. He was a university lecturer for around 10 years and has a master's in legal-economic sciences. Diogo still works regularly with higher education institutions and is also the author of works on the areas to which he is dedicated.

Diogo is on the list of arbitrators of several arbitration centres, a member of the Management Committee of the Concordia – Centre for Dispute Conciliation and Mediation, and president of the Supervisory Board of the Public Markets Association (APMEP).

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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (NB For ease of reference throughout the chapter, we refer to “construction contracts” as an abbreviation for construction and engineering contracts.)

Traditionally the construction-contracting mode is widely applied in China, through which the employer establishes contracts separately with the engineer by a design-only contract, and with the general contractor by a construction contract. In this mode, the employer has the ultimate obligation to manage and coordinate the engineer and the contractor, especially in case of variation or defect of design. Although the employer may seek damages under the design contract against the engineer, it has its own responsibility towards the general contractor under the construction contract, and must bear the risks for the design quality.

Under this traditional mode, the general contractor undertakes the overall project and is solely responsible to the employer, although it usually sub-contracts parts of the project to other contractors and it must manage and coordinate them.

After consultation on public opinion in May 2019, the Ministry of Housing and Urban-Rural Development (MOHURD) and the National Development and Reform Commission (NDRC) jointly issued the “Management Measures for General Project Contracting of Housing Construction and Municipal Infrastructure Projects” (Management Measures) on 23 December 2019. The Management Measures became effective on 1 March 2020.

The term “general project contracting” mentioned in the Management Measures covers the contractor’s works for design, procurement, construction, etc. It would seem that the Management Measures are for Engineering, Procurement and Construction (EPC), and Design and Build (DB) practices other than traditional “construction-contracting” practice, in which the contractor is only responsible for construction works. The issuance of the Management Measures indicates the Chinese government’s intention of encouraging the application of “general project contracting” in practice.

The various new points in the Management Measures that may have great impact on EPC practice in the construction area are set out as follows:

- (1) The general contractor should have both engineering design and construction qualifications commensurate with

the scale of the project, or the general contractor can be part of a joint venture formed by an engineer designer and a construction contractor with corresponding qualifications.

- (2) The general contractor is fully responsible for the quality, safety, progress and costs of the project; subcontracting does not relieve the contractor from his responsibility for the quality and safety of the project. In particular, the general contractor and its project manager assume a life-long responsibility for the quality of the project.
- (3) For governmental investment projects, project funds must be considered and estimated in advance, in accordance with relevant financial regulations and within financial budgets. In principle, project funds for governmental investment projects should not exceed the approved budget by authorities, and the general contractor is not allowed to contract works with funds.

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

It is very common for contractors to form a consortium to attempt to undertake the project. This is usually because of the size of the project or the technical qualifications required. In this case, the members of the consortium must establish an alliance contract in which their obligations and duties are stipulated, and such alliance contract must be submitted to the employer. The consortium, although not a legal person like a company, is recognised as a temporary legal entity, and is the party to the construction contract who bears joint liability towards the employer.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

There are certain model contracts available for parties to use on domestic projects in the construction market. Although such use is not mandatory, the terms of these contracts reflect a reasonable allocation of risks and capture good practice, so parties usually adopt these model contracts with amendments on specific projects. Alternatively, parties may design bespoke contracts from scratch, or may use the International Federation of Consulting Engineers (FIDIC) forms with amendments on some projects involving unique or foreign elements.

These model contracts are jointly issued by MOHURD and the State Administration for Market Regulation or the State Administration for Industry and Commerce, and may be revised or amended as necessary. The latest versions of some of the major model contracts are as follows:

- Model Subcontract Contracts (GF-2003-0213/0214) between a contractor and a subcontractor;
- Model Engineering Contract for Construction Projects (GF-2015-0209/0210) between an employer and an engineer designer;
- Model Cost Consultation Contract for Construction Projects (GF-2015-0212) between an employer and a consultant;
- Model Survey Contract for Construction Projects (GF-2016-0203) between an employer and a surveyor;
- Model Contract for Construction Works (GF-2017-0201) between an employer and a construction contractor; and
- Model Contract for General Contracting Projects (GF-2020-0216) between an employer and a general contractor.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

It is not mandatory for the government or other employer in a public interest-related project to apply any particular form of construction contract. However, the model contracts mentioned above are more commonly used in the public sector than in the private sector. The employer in a public interest-related project will often draft its contracts or bidding documents on the basis of such model, and insert a few changes or variations to reflect specific points of interest.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

China's construction contract follows the basic mode in contract law where a contract is formed by offer and acceptance, and consideration and intention are included to bring legal effect to the contract. It is very common in China for a contract to be established under the regime of a bidding and tendering procedure, and for a bidding document to be recognised as an offer and the bidding award as an acceptance, based on which both contracts are finally concluded.

It is worth noting that China's Construction Law requires the contractors, the engineer and the supervisors (and their professional employees) to hold certain qualifications, otherwise the contracts do not bear legal effect. Such qualifications are categorised into different classes and sections, and must be applied by contractors according to their size, financial situation and other elements.

1.6 In your jurisdiction please identify whether there is a concept of what is known as a "letter of intent", in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

There is no clear concept equivalent to the "letter of intent" as may exist in other jurisdictions. However, for projects procured through a bidding process, both the employer and contractor may determine and settle the scope of the works in a letter of award and a letter of tender and its schedules. Specifically:

- the employer may include drawings in the bidding documents, in which the scope of the works is determined;
- the contractor will carefully study these drawings and put issues to the employer for clarification; and
- upon the employer's clarification, the contractor may prepare responses to the bidding documents, including parts related to the scope of the works.

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer's liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors' all-risk insurance?

For construction projects, the most common types of insurance are construction/erection all-risk insurance and third-party liability insurance, which can be taken out by the contractor or the employer, or both, depending on the parties' agreement. Construction/erection all-risk insurance provides coverage for property damage; and third-party liability insurance provides coverage for injury, illness or loss to property of third parties or damage claims, and is not mandatory.

Both the employer and the contractor have a mandatory legal obligation, however, to take out work injury insurance for their respective employees. The contractor is further mandatorily required to procure accident liability insurance for employees who engage in dangerous operations.

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

It is not mandatory to include clauses regarding labour management in a contract. Nevertheless, there are plenty of laws and regulations stipulating obligations upon both parties of a construction contract, such as that the contractor is responsible for establishing legal labour relations with any workers on site, and for making social security entries for every employee. It is similar for health and safety issues – many contracts remain silent while the statutory regulations apply automatically where there are relevant incidents.

The payment of the construction price is based on invoicing, which is highly regulated in various areas in China and the construction sector is no exception. Invoices are issued on standard forms and printed out through a special tax-control printing machine which connects to the supervision system of local tax bureaus. By such means, the tax authority supervises the authenticity of the invoice and inspects the tax payment status of each individual invoice.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

The contractor undertakes overall responsibility for the status of the construction site and such responsibility is mandatory under the law. Relevant articles in China's Construction Law deal with the contractor's responsibility in this respect. Article 39 provides that the contractor must take measures to maintain security, and prevent danger and fires, and may adopt closed management if conditions permit. The contractor must also take protection measures to prevent the construction site from

causing damage to adjoining buildings, structures or the operational environment for special works.

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

While “retention rights” refers to the employer’s right to withhold a certain amount of money as retention money against the contractor’s obligation to remedy defects within the defects notification period, this is a very common right for the employer. As the employer has greater negotiation power than the contractor, it is almost impossible in practice to contractually exclude the employer’s retention rights.

Parties are free to agree on a certain time period for the contractor to remedy defects on notice upon completion of the works. There is no mandatory requirement regarding the length of such period by law, but an administrative rule suggests that such period is generally one year, and no longer than two years. In practice, the defects liability period is often agreed as two years from the date of completion acceptance. Upon expiration of such defect liability period, the employer must return the retention money or release the retention guarantee.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor’s performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

Bonds – usually on-demand bonds (creating a primary obligation on the bondsman to pay) – issued by banks or financial institutions are commonly used in practice. It is stipulated by law that a call on such bonds may be restrained by an interim injunction, and several cases ruled by higher-level (provincial) courts create precedents. However, such interim injunctions are now widely applied because they require the party to provide evidence of urgent necessity, such as the existence of fraud.

Various bond guarantees are involved in the process of project construction, such as the advance payment guarantee bond, performance bond, retention money guarantee, payment bond, etc.

- An advance payment guarantee is provided by the contractor in an amount equal to the advance payment.
- A performance bond is provided by the contractor to secure its due performance under the construction contract. A performance bond is not mandatory; the employer and the contractor must agree on the method, amount and submission time in the contract. The performance bond can be in the form of a bank guarantee or may be guaranteed by a bonding company.
- A retention money guarantee is an alternative to the employer’s retention money. The Ministry of Finance and MOHURD jointly issued an administrative measure on managing the practice of retention money. This administrative measure provides that a retention money guarantee shall not exceed 3% of the final settlement of the project’s total price, though the provisions of this administrative measure are not mandatory.
- A payment bond is provided by the employer to secure its payment obligation to the contractor but is rarely used in practice.

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

Occasionally, parent companies may provide guarantees for the performance of subsidiary companies. Parties of the contracts may explicitly stipulate such clauses to allow or refuse this arrangement, and there is no statutory barrier to doing so, as long as the bank or financial institution cooperate in issuing such guarantee.

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

Parties to a construction contract may arrange the title rights in relation to goods and supplies on the site, such as through a clause that any goods delivered onto the site, whether put into construction work or not, belong to the employer. However, often such arrangement is not specifically set out by the parties, and in this case the judicial practice tends to find that all the supplies belong to the contractor until they are put into use for construction purposes.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

Generally, the employer has the right to appoint its own representatives or entrust an engineer/supervisor to supervise site works and inspect the contractor’s completed works, on the condition that there is no disruption to the contractor’s work. The employer may entrust a supervisor (very often a supervising institution or company other than a natural person) to check and examine the works, review project documents and issue notices on the employer’s behalf, within the scope of authorisation. The supervisor may send a supervising director and a supervising engineer to the site to act accordingly.

Such supervisor or engineer is entrusted and paid by the employer and represents its interests. Although such supervisor or engineer cannot be impartial or neutral, they must act in accordance with national technical standards to ensure a reasonable result, failure of which will invoke a breach of contractual duty.

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a “pay when paid” clause?

A “pay if paid” or “pay when paid” clause is often seen in a subcontractor’s contract, meaning that the subcontractor’s right to payment under its contract may be subject to the contractor’s entitlement to payment under the main construction contract.

The legal effects of such clause are in dispute in court practice. In this case, subcontractors have no right to file a lawsuit against the employer directly, unless the contractor is negligent in exercising the creditor's right that is due or the collateral right related to the creditor's right, thus affecting the realisation of the creditor's right that is due.

However, such clauses are not commonly seen in the general construction contract, i.e., the contract between the employer and the general contractor, because it is a general principle that the employer shall bear the overall payment responsibility and be financially well prepared for the construction projects.

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

Parties are allowed to limit liabilities for their breach by including terms of liquidated damages. However, the court may adjust the liquidated damages on a party's application if:

- the liquidated damages are significantly higher than the actual losses suffered by the complying party, i.e., the liquidated damages are more than 30% higher than the actual losses suffered; or
- the liquidated damages are lower than the actual losses suffered.

In fact, besides the gap in the amount between liquidated damages and actual losses, the court will also look into other factors, such as the parties' performance under the contract concerned, the extent of culpability of the relevant party in causing the losses suffered, etc.

Articles 496, 497 and 506 of the Civil Code and their restrictions on exclusions of certain types of liability only apply to absolute exclusions. Generally, limitations of liability are permissible; however, all such limitations are subject to the principles of fairness and good faith, which are also codified in Articles 6 and 7 of the Civil Code. The courts could potentially use these principles to hold that limitations of liability are unfair or in breach of the principle of good faith, and they have the power to step in and adjust such limits. This is well reflected in the application of liquidated damages.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

The employer generally has the right to vary the works to be performed under the contract, and often exercises such right via its entrusted supervisor or engineer. With the employer's approval, the supervisor or engineer may issue a notice of variation to the contractor, which may list items to be varied and may (rarely) include a price for such variation. The contractor may then submit a proposal of costs on the variation to the supervisor

or engineer within an agreed period upon receiving such notice.

Next, the employer will review the contractor's price proposal, and may negotiate with the contractor to determine the price for the instructed variation. The usual practice is that parties may refer to the unit price of similar work items as prescribed in the construction contract when determining the price of the variation. If unit prices of similar work items are not stipulated in the contract and the two parties cannot reach an agreement on the price of the variation, the parties may refer to the pricing method or standard issued by the local construction administrative department when the contract is signed.

If the employer requests a design variation, the employer must also ask the engineer designer to provide detailed drawings and explanations of such variation.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

Work can be omitted from the contract, especially when approaching the completion of the project. The employer may instruct the contractor, or accept the proposal of the contractor, to omit a certain part of the scope of work for the purpose of meeting the schedule of progress. Such omitted work can be then undertaken by another entrusted contractor, or the employer may complete it himself if capable.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

It is widely accepted that it is not necessary for some terms to be explicitly included in the contract, such as the quality standard clause that national technical standards apply, and the defect guarantee period clause. The fitness for purpose obligation and good faith are also deemed to be implied terms. However, the delicate implied meaning of the terms may depend on the nature of project (public, private, commercial, etc.).

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

Normally when a delay occurs, the first thing the parties must do is identify the cause of the delay. If it is on the employer's part, the contractor may claim extension of time and reasonable costs as provided in the contract. If it is on the contractor's part, the contractor will not have the right to claim extension of time or any costs. On the contrary, the contractor may need to pay liquidated damages and compensation for losses on delay to the employer, and take further measures to accelerate the works to meet the completion date at its own cost. In the situation where the delay is due to concurrent events, the aforementioned principle also applies, so that the responsibility can be discovered in parallel to find reciprocal damages.

If the delay is caused by *force majeure*, the contractor must notify the employer immediately of the occurrence of the *force majeure*, with proof, and take measures to mitigate the effects. The completion time will be extended accordingly.

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

According to the Civil Procedure Law of China, the time limitation of action is generally three years, starting from the occurrence of the cause of action or the (reasonably delayed) knowledge of such occurrence. Beyond this limitation of action, such claim cannot be upheld by the judicial department.

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

In the model contracts promoted by the government, there are time and form limits to bringing claims, in that a claim must be carried out in the form of pre-notice during the incident, and a final notice must be submitted to the other party within 28 days in the wake of the incident. Failure to comply with this may result in a procedural deprivation of claim rights. Such mechanism is regarded by the courts as common market practice, since it is stipulated in the model contract by the government and therefore is usually upheld.

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

Under the Measures for the Administration of General Contracting of House Building and Municipal Infrastructure Projects, major risks allocated to the employer include:

- unforeseen ground conditions;
- fluctuation exceeding the range agreed by the parties in the price of materials, equipment and labour compared with the price at base date; and
- fluctuation in the price due to a change in the law.

This does not provide a mandatory mechanism for allocating risks but a reasonable mechanism for parties' reference. Parties may allocate risks considering their specific projects and circumstances, but are generally expected to allocate risk in a reasonable manner.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

Risks such as a change in the law may trigger the application of the principle of "change of circumstances" under law.

The principle of "change of circumstances" was first introduced in the Interpretation on Certain Issues Concerning the Application of the Contract Law (II) and is now codified in the Civil Code.

Article 533 of the Civil Code provides that:

"[W]here the basic conditions of a contract undergo a material change unforeseeable by the parties at the time of contracting which is not a commercial risk after the formation of the contract, rendering the continuation of the performance of the contract unconscionable for either party, the adversely affected party may renegotiate with the other party; and if the renegotiation fails within a reasonable time limit, the party may request the people's court or an arbitration institution to modify or rescind the contract."

As a result, in the event of an unforeseen change of law which may substantially change basic conditions at the stage of contract conclusion, one party may propose to renegotiate the contract terms with the counterparty. Should the renegotiation fail, either party may apply for the court or the arbitral tribunal to step in to revise the relevant terms or to terminate the contract on the basis of the principle of fairness.

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

In general, the intellectual property right belongs to the author of the work. Such work in a typical construction process may be in the form of drawings, working records, technical documents, technique development, communications in texts, etc. The construction work itself does not constitute a work within the concept of intellectual property, nor does the operation of the property.

Parties to the construction contract may include relevant provisions dealing with intellectual property rights. These provisions, in general, would be:

- for drawings and technical documents provided by the employer, all the intellectual property rights belong to the employer and the contractor may only copy and use these documents for the purpose of carrying out the works;
- for documents that the contractor makes for the purpose of carrying out the works, the contractor only has the right of authorship and all other intellectual rights belong to the employer, and likewise the contractor may not use these documents for purposes unrelated to the construction works; and
- each party is responsible for its own wrongful use of a third party's intellectual property rights.

3.10 Is the contractor ever entitled to suspend works?

In terms of suspension rights, suspension is a common remedy, or at least a protective threat, invoked by the contractor in the event of late or non-payment by the employer, or other breach of contract that makes the contractor unable to continue performing the contract. In a construction contract where suspension rights are excluded, this often means that the contractor has no right to suspend works, but has a right to claim compensation as an alternative. There have been quite a few successful claims by contractors relying on such clause, which indicates that this contractual arrangement is held as valid by the courts and tribunals.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party's grounds for termination must be set out (e.g. in a termination notice)?

Termination of a contract is usually triggered by a serious breach of contract, and sometimes only those breaches which lead to frustration of contract may entitle a party to terminate. For example, if the critical path of the progress is seriously delayed on the contractor's part, the employer may exercise its right to terminate the contract.

It is stipulated by Article 565 of the Civil Code that a notice must be issued to terminate the contract. However, the party may seek such termination right directly at a court by filing a case.

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor's profit on the part of the works that remains unperformed as at termination?

It is not common practice in China for the employer to be able, in accordance with the contract, to arbitrarily terminate the contract. Normally the employer can only terminate the contract when there is a substantial breach of contract, or even a frustration of contract. If the employer intends to terminate the contract without sufficient legal grounds, it will be deemed a breach of contract and may result in liquidated damages.

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

The term “*force majeure*” is defined in Article 180 of the Civil Code. It is “an objective event which is unforeseeable, unavoidable and insurmountable by the parties”. In a traditional construction contract, parties may repeat the legal definition of “*force majeure*” and provide specific circumstances as instances, e.g., earthquake, tsunami, plague, rebellion, war, insurrection, riot, etc.

The parties are generally free to agree a broader scope of application and relief for similar events in the contract, which will generally be given effect. However, in that case, the contractual provisions will apply, as supplemented by the *force majeure* provisions under the law, to the extent relevant to those events which meet the legal definition of “*force majeure*”. In contrast, in China's current jurisdiction, courts and arbitration institutions tend to believe that *force majeure* is a natural phenomenon that cannot be avoided by human forces, meaning it is a legal exemption and cannot be exempted due to the exceptions of the parties. Those events being limited or excluded which do not meet the requirement of *force majeure* under the law will be afforded relief and/or entitlement only as agreed between the parties, to share the loss of the consequences after the occurrence of the *force majeure* event.

3.14 Is there any legislation or court ruling that has been specifically enacted or handed down to provide relief to parties to a construction contract for delay, disruption and/or financial loss caused by the COVID-19 pandemic? If so, what remedies are available under such legislation/court ruling and are they subject to any conditions? Are there any other remedies (statutory or otherwise) that may be available to parties whose construction contracts have been affected by the COVID-19 pandemic?

The Supreme People's Court of the People's Republic of China published its first guiding principles on several issues concerning the proper trial of civil cases in April 2020 relating to the COVID-19 pandemic. It stresses that when applying *force majeure* to relieve contracting parties from contract performance, the affected party must demonstrate causation between the pandemic and the party's failure to perform contractual obligations and provide timely notice to other parties. MOHURD also issued guidance notes on the administration of claims arising from COVID-19. Two of the guiding principles are as follows:

- extension of time should be allowed when the project is delayed or suspended due to COVID-19; and
- if acceleration is approved by the experts to mitigate delays arising from COVID-19, the employer is responsible for

the cost of acceleration if the number of accelerated days exceeds 10% of the remaining/unfulfilled contract period.

3.15 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

A third party may not directly claim contractual rights against a party to said contract because of the contract relativity principle. However, a third party may bring a subrogation suit against a party when this party breaches the contract and the other party waives its contractual right, and such waiver derogates the interest of the third party.

3.16 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

It is very rare for the contractor to have such direct agreements with parties other than the employer. The contractor is normally responsible only to the employer and serves its interest.

3.17 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

According to Article 568 of the Civil Code of China, it is a general principle that a mutual obligation/debt can be set off between reciprocal creditors, as long as such obligation is of the same nature and is notified to the other party.

3.18 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

Concepts such as “duty of care” or “gross negligence” are not expressly defined in law, nor does a common contract stipulate a duty of care to the other party.

However, in practice, the courts have discretion to apply these concepts to cases by considering specific circumstances and the failing party's expertise. Generally, “willful misconduct” illustrates a person's intention in cases where they can reasonably foresee another's losses owing to their action/breach, but they still wish or allow it to happen. “Gross negligence” refers to a person's intention when they are in serious breach of the duty of care and should have foreseen, but fail to foresee; or have foreseen but measures have not been taken due to credulity; the losses caused to another by their action/breach.

3.19 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

In China's judicial practice, where a term of a construction contract is ambiguous, the parties must refer to relevant

contractual documents for further interpretation. Such documents are usually recognised by parties upon the execution of the contract and normally include the bidding and tendering document, the negotiation record and the clarification made by the employer during the bidding process.

3.20 Are there any terms which, if included in a construction contract, would be unenforceable?

It is prescribed by the Civil Procedure Law of China that: (1) money payment; (2) judgments ordering or prohibiting the doing of acts/injunctions; and (3) certain judgments made without notice, for example, a pre-litigation emergency ruling for asset preservation, can be enforced. However, it will be difficult for the judicial entity to enforce a judgment related to active behaviour, such as to continue the construction work.

3.21 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

Which parties are responsible for the design process largely depends on which contracting model the parties select. Also, the engineer's liability can be exempted to a great extent if his work is in compliance with the technical standard.

In a general construction contracting model, the contractor's scope of work only covers construction works that are implemented on the basis of detailed drawings and design documents provided by the employer. The employer will separately engage an engineer-designer for design works. As such, the employer bears responsibility regarding the design under the construction contract, while the engineer-designer is responsible for their design works under the engineering design contract with the employer. Article 805 of the Civil Code provides that the employer will compensate the engineer-designer for actual costs on design work resulting from the employer's change of plan, failure to provide accurate materials, or failure to provide the necessary conditions for the design.

In a general project-contracting model (EPC or DB), the contractor is responsible to the employer for design work under the contract.

3.22 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

In China, there is the similar concept of construction defect liability; such liability is statutory and therefore cannot be excluded by contractual arrangement. The period's duration depends on the specific part of the building. For example: regarding the main structure, it is 40 to 50 years depending on the level and nature of the building; and regarding the pipes and electrics, it is five years.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

In practice, as construction cases involve technical elements, the parties are usually willing to enter into a written arbitration agreement to resolve disputes before an arbitration institution,

such as the Beijing Arbitration Committee, the Shanghai International Arbitration Centre and the China International Economic and Trade Arbitration Commission.

Mediation also plays an important role in resolving construction disputes, sometimes as an independent process and sometimes as part of the arbitration/litigation process. For the widely known "arbitration-mediation" mechanism, the arbitrator may play two roles in the process.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

Several arbitration institutions in China provide a construction project dispute review service and have a panel of experts with legal and technical expertise. This review procedure borrows wisdom from the Dispute Adjudication Board (DAB) and the Dispute Review Board (DRB) in the FIDIC forms. Whether the experts' review decision has a binding effect or not is subject to the parties' agreement in the construction contract. Should the construction contract be silent on this, the review decision will be binding on the parties, according to the review procedure rules.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

A high percentage of the construction contracts in China opt for arbitration as their dispute resolution method. China's arbitration is very similar to that in western countries in many respects; for example, the arbitration is based upon explicit mutual agreement (arbitration clause), and arbitration excludes litigation. Different arbitration institutions have their own rules on procedure, with only a few nuances.

4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

The following types of international/foreign awards are generally enforceable in China: (1) monetary awards; (2) awards containing injunctions ordering or prohibiting the carrying out of acts; and (3) partial awards. Decisions in preliminary/provisional proceedings (such as decisions by emergency arbitrators) are not enforceable because they are not considered to be awards, which must be final and conclusive.

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

It is statutory that the first instance must be finished within six months. Nevertheless, the period of (attempted) mediation and the expertise testification are not included; therefore, the whole procedure can be as lengthy as one year. After the judgment by the court of first instance, an appeal can be filed regardless of the result of the judgment. The appeal must finish within six months, during which the trial focuses on the application of laws rather than the facts.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

Foreign judgment enforcement proceedings are similar to those for the enforcement of domestic judgments in most respects.

However, the schedule for recognition and enforcement of foreign judgments varies from case to case. There is generally no statutory time limit within which the court must make its decision. The enforcing court's ruling on the recognition and enforcement application is not appealable, unless otherwise provided by the applicable treaty, convention, or the Supreme People's Court's interpretation.



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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (NB For ease of reference throughout the chapter, we refer to “construction contracts” as an abbreviation for construction and engineering contracts.)

A committee appointed by the Danish Minister for Climate, Energy and Building has prepared several documents that have the status of “agreed documents”, which consist of:

- General conditions for building and construction works and supplies (AB 18), where the contractor carries out the building and construction works, and where the design, drawings, descriptions, etc. are mainly supplied by the employer.
- General conditions for design and build contracts (ABT 18), where the contractor both supplies the design and carries out the works.
- General conditions for consultancy services for building and construction works (ABR 18), which are commonly agreed between the employer and the employer’s consultant and/or the contractor and the contractor’s consultant.

When the terms and conditions in AB 18, ABT 18 or ABR 18 (the “AB Standards”) are agreed between the parties, they apply alongside the specific contract. Deviation from the AB Standards is then only valid if the points to be deviated from are clearly and explicitly stipulated in the specific construction contract.

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

Partnering is not commonly used in Denmark; however, it is not an unfamiliar concept. Four Danish industrial organisations in the construction industry have produced a guide to partnering in practice (*Partnering i praksis – vejledning i partnering*, 2nd ed. 2005), which also contains three paradigms for partnering contracts.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

The AB Standards described in question 1.1 are the most commonly used standard forms.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

The AB Standards described in question 1.1 are the most commonly used standard forms on projects involving public works. In recent years, we have seen International Federation of Consulting Engineers (FIDIC) or FIDIC-bespoke contracts being used more often on major cross-border public infrastructure projects.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

According to the Danish Contracts Act, an agreement is legally binding once an offer has been made and that offer has been accepted. There are, in general, no formal requirements mandating, for example, that the agreement be in writing, registered, signed or approved.

The AB Standards prescribe that the construction contract is to be concluded in writing. However, this is not a requirement for the contract to be valid, although a party arguing that an oral agreement has been concluded bears the burden of proof in documenting that this is the case.

1.6 In your jurisdiction please identify whether there is a concept of what is known as a “letter of intent”, in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

Pursuant to Danish case law, the general rule is that a letter of intent is not legally binding for the parties. However, dependent

on its content – including a specification that certain provisions are to be considered legally binding and/or subsequent behaviour by the parties – the letter of intent can entail legal consequences (cf. Gam, ‘Letters of Intent’, *Erhvervsjuridisk Tidsskrift* 2009/3, pp 247–260).

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer's liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors' all-risk insurance?

In accordance with AB 18 and ABT 18, the employer is obliged to take out and pay for fire and storm damage insurance.

The parties can agree to a more extensive insurance obligation for the employer or the contractor, such as all-risk insurance. Such agreement is common in large building or civil engineering work contracts.

The contractor(s) must take out professional and product liability insurance. This insurance will include cover for damages to the employer's or a third party's person or property, but there are notable exceptions to the cover that are of particular relevance to construction works; for example, such insurance does not cover damage to objects that the insured has accepted to install, repair, mount or in other ways rework or treat, where the damage is caused during performance of these works.

If the building is to be mainly used for residency, the employer must take out building damage insurance (cf. the Danish Building Act), unless the building is intended to be rented out.

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

In relation to labour, all employees who are not citizens of the European Union (EU), the Nordic countries, the European Economic Area or Switzerland must obtain a residence and work permit in Denmark.

When determining whether a worker is an employee or a self-employed subcontractor, it is essential to establish whether the works are performed on the worker's own account and risk.

Whether an employee is liable to pay tax in Denmark will depend on sections 1 and 2 of the Danish Withholding Tax Act. For instance, the employee will be liable to pay tax in Denmark if the employee has taken residence in Denmark or if the work is performed in Denmark. If the employee is liable to pay tax in Denmark, the contractor will be obliged to withhold tax when paying wages.

If the employee is employed by a foreign firm and is then hired out by a Danish contractor to perform work in Denmark, the employee will be liable to pay 8% labour market contributions and 30% hiring-out of labour tax on gross earnings. The contractor will pay this tax on behalf of the employee.

Denmark's taxation rights can be limited by double taxation treaties. The employer and contractors working on the construction site must comply with the provisions of the Danish Working Environment Act and the statutory orders issued under the provisions of this Act.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

In accordance with the Danish building regulations, buildings must be constructed so as to achieve satisfactory protection against fire, and the fire safety of a building must be maintained throughout the entire lifetime of the building. In addition, inspection and documentation of compliance with the fire safety requirements must be carried out.

For some construction projects, it may be a requirement to make use of a certified statics engineer or a fire management consultant during the construction work. However, this will depend on which “fire class” the construction project belongs to.

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

According to AB 18 and ABT 18, the employer may retain a reasonable amount of the purchase price as security for the rectification of defects detected at the time of handover. The retained amount must be reasonable in relation to the extent of the detected defects and the expected costs of rectification.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor's performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

Under AB 18 and ABT 18, both the employer and the contractor are obliged to provide a performance bond as security for the due performance of their obligations towards one another. This does not apply to the employer if the employer is a public employer or social housing organisation.

The contractor's performance bond must correspond to 15% of the contract sum excluding VAT. After handover, the performance bond is reduced to 10% and then again to 2% one year after handover. Five years after handover, the performance bond ceases. These reductions take place unless the employer has, prior thereto, submitted a written complaint of the defects, in which case the reductions are made once the defects are remedied.

The employer's performance bond must correspond to three months' average payments, but no less than 10% of the contract sum excluding VAT. It will cease once the contractor has submitted the final account and has no outstanding claims.

For both the employer's and the contractor's performance bonds, the parties can request payment in writing by simultaneously notifying the other party and the guarantor. A call on the performance bond must be paid within 10 working days, unless the other party files a request with the Danish Building and Construction Arbitration Board, asking the Board to issue a decision on the security provided. It is not uncommon for full or partial relief to be granted on a call on a bond.

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

According to AB 18 and ABT 18, performance bonds must be in the form of a bank guarantee, fidelity insurance or other adequate type of security.

A guarantee from a parent company will not be sufficient as “other adequate type of security”, and therefore neither the contractor nor the employer will be obliged to accept such a guarantee.

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

If AB 18 or ABT 18 has been agreed and not deviated from, materials and other supplies intended for incorporation in the works must be supplied by the contractor without any retention of title. Once such materials and supplies have been delivered to the construction site, they belong to the employer.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

According to AB 18, the employer must appoint a supervisor to represent the employer in relation to the contractor with regard to the organisation and execution of the work. The supervisor will often be the employer’s technical advisor. Such an agreement will most often be based on ABR 18.

There is no duty to act impartially between the employer and the contractor, but the supervisor should be independent of the employer. There is a general contractual duty to act in good faith (please see question 3.3).

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a “pay when paid” clause?

The parties may include a “pay when paid” clause in their contract. Such a clause is rarely seen in the contracts with the employer, but is sometimes found in the contractor’s subcontracts. It cannot be ruled out that such clause would be considered unreasonably burdensome, and the parties must therefore be aware of the risk that a Danish court will modify or set aside the clause.

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

The parties are free to agree on liquidated damages in the event of breach of contract. Most contracts contain an agreement on liquidated damages. The parties often agree on a daily penalty fixed as a percentage of the contract sum.

There are no specific requirements or restrictions on such an agreement. However, the Danish courts can revise an agreed rate of liquidated damages if the agreement is deemed unreasonable. The amount that can be claimed as liquidated damages may, by agreement, be capped.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

According to AB 18 and ABT 18, the employer can order variations to the works. Such variations can consist of the employer ordering the contractor to supply a service in addition to or instead of a service originally agreed, or that the nature, quality, type or execution of a service be changed.

The employer’s right to order variations is not unlimited, as it is a requirement that any variations are naturally linked to the services agreed in the construction contract. The employer’s right to order variations is also balanced by the contractor’s right (to the exclusion of others) to perform the variation, unless the employer can show particular reasons why others should perform the variation.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

The employer is entitled to order that services that were previously agreed upon be omitted. The AB Standards do not specifically regulate the employer’s right to transfer the omitted works to another contractor but, based on the AB-committee’s report no. 1570 (2018), the employer will most likely not be entitled to perform the work himself or to instruct a third party to perform it.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

In Danish contract law, the parties to a contract have a general duty to act in good faith towards one another. This has been codified in the AB Standards and applies to all parties involved in the construction project.

According to AB 18 and ABT 18, works are to be performed in accordance with the contract, good professional practices and the employer's instructions. A general "fitness for purpose" obligation, to the extent that this reflects an objective, no-fault warranty as known under English law, is not implied into construction contracts based on AB 18 and ABT 18.

However, construction materials must be fit for their intended use and construction methods must likewise be suitable and fit. The contractor's liability – or other party selecting a building material – is strict but not absolute. One rare exemption from liability is the concept of development damage (*udviklingskade*), which has evolved through the practice of courts and arbitration courts since the 1980s, and today has been codified in the AB Standards. A development damage is a damage that occurs despite using a material or method which, at the time of selecting said material or method, was recognised as part of the accepted professional knowledge. Such problem is often discovered years later when the material or method proves to be unfit. The damage itself does not necessarily "develop", as the damage is inherent due to the choice made, and the term "development" refers to the accepted knowledge in the industry. The employer bears the risk of development damage that is not considered a defect.

This issue has been tried before the Danish Building and Construction Arbitration Board in a series of high-profile cases regarding the use of magnesium oxide (MgO) boards as wind-breaker boards. There is no question that MgO boards are unfit to use as windbreakers in Denmark, as the Danish climate causes the boards to break down. The question in these cases was who was liable for the use of unfit MgO boards.

In the cases where the MgO boards were used either prior to becoming generally accepted or after the issues with the boards became known, the Arbitration Board decided against development damage. In cases where the Board decided against development damage, the liability was placed on either the contractors or the employer's advisors, depending on the structure of the contracts, which party had the design obligation and which party made the decision to use the MgO boards.

These cases serve to highlight that the parties to a construction project should exercise caution if using new and untested materials.

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

The principle of "time, no money" (the *Malmaison* doctrine) has been recognised in Danish case law.

This only applies if the two concurrent events are in fact independent and of equal importance. For instance, if the delaying event that is the fault or risk of the employer is insignificant compared to the event that is the fault of the contractor, the contractor will not be entitled to an extension of time.

The contractor will also be entitled to an extension of time due to other reasons such as *force majeure* or public enforcement notices and prohibitions, which are not the fault of either the employer or the contractor.

In addition to an extension of time, the contractor may be entitled to compensation. If the delay is caused by the employer's error or neglect, the contractor will be entitled to compensation for loss sustained. If the employer has not shown error or neglect, but the event still relates to the employer's circumstances, the contractor will only be entitled to partial compensation. The same applies if the delay is caused by public enforcement notices and prohibitions. In case of *force majeure*, the contractor will not be entitled to compensation.

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

Pursuant to the Danish Statute of Limitations Act, the standard limitation period is three years from the time when the claimant could have demanded that the claim be fulfilled. If the claimant is not and should not have been aware of the claim's existence, the limitation period can be suspended up to a maximum of 10 years.

AB 18 and ABT 18 prescribe both a relative and an absolute deadline to present claims regarding defects detected after handover. The employer can only present such claims if the contractor has been notified in writing within a reasonable period of time after the defects were or should have been discovered. Such claims must be submitted no later than five years after handover, after which the contractor's liability for defects ceases.

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

According to Danish construction case law, requirements as to the time, form and substance of notices of claim will most likely not be given preclusive effect, regardless of the wording of the clause(s) in the construction contract. Thus, a contractor who neglects to fulfil specific time, form and substance requirements will most likely not lose his claim only on this basis, but it may affect the contractor's burden of proof and/or whether the employer is considered to have been afforded an opportunity to take necessary measures.

However, various circumstances may be relevant for the court's assessment, for example: whether the requirements have any meaningful significance; whether the contractor can prove the claim by other means than those stated within the contract; whether the employer has suffered any disadvantage as a result of the contractor's neglect of the form requirements; and whether the parties in their prior dealings have deviated from the requirements.

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

According to AB 18 and ABT 18, the employer will, as a general rule, bear the risk of unforeseen ground conditions, as the employer must provide adequate information on hindrances with respect to ground conditions.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

The risk of changes in law being implemented after the contractor's offer is usually borne by the employer.

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

If ABR 18 has been agreed, the consultant owns all rights to ideas developed and material prepared by the consultant. The employer will be entitled to use the material prepared for the

project, which entails a right to execute the project and subsequently operate, maintain, alter and extend the property.

3.10 Is the contractor ever entitled to suspend works?

In accordance with AB 18 and ABT 18, the contractor is entitled to suspend works if the employer fails to pay an amount due, provided that the contractor has given written notice of three working days.

The contractor is also entitled to suspend works if the employer is declared bankrupt, is subjected to reconstruction proceedings, or if the employer's financial situation is of such nature that the employer must be assumed to be unable to meet its obligations. However, if the employer has provided adequate security for the performance of the remainder of the contract, the contractor will not be entitled to suspend works.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party's grounds for termination must be set out (e.g. in a termination notice)?

If AB 18 or ABT 18 has been agreed, the employer will be entitled to terminate the contract in whole or in part with immediate effect if:

- the contractor causes material actionable delay in the execution of the works where such delay causes substantial inconvenience to the employer;
- the contractor causes other material delay with regard to matters of decisive importance to the employer;
- the works executed are of such quality that the employer has reason to believe that the contractor will not be able to complete the works without material defects; or
- the contractor otherwise commits a material breach with regard to matters of decisive importance to the employer.

The contractor will be entitled to terminate the contract with immediate effect:

- in the event of a material delay as a result of the circumstances of the employer or a delay on the part of another contractor where the employer does not make reasonable efforts to expedite the works to the fullest possible extent; or
- if the employer causes other material delay or commits a material breach with regard to matters of decisive importance to the contractor.

In addition, both parties are entitled to terminate the contract in the event of the other party's bankruptcy, subject to the limitations found in the Danish Bankruptcy Act.

Notice of termination must be given in writing while also issuing a written notice summoning the parties to attend a registration meeting (status meeting).

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor's profit on the part of the works that remains unperformed as at termination?

If the employer terminates the construction contract without probable cause, this in itself is a breach of contract entitling the contractor to damages, and includes profit on the part of the works that remains unperformed.

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

Force majeure has been incorporated into AB 18 and ABT 18 in relation to both the risk of damage to/loss of the works and in relation to delays. The term covers exceptional and external events beyond the parties' sphere of control. It would usually include war, riots, strikes, lockout, blockage, acts of terrorism and acts of God. It is not unusual to further define the term in the parties' contract.

In the event of damage to or loss of the works caused by exceptional external events beyond the control of the contractor, the employer will bear the risk.

In relation to delays, both the employer and the contractor will be entitled to an extension of time in the event of circumstances that are without the fault and beyond the control of the party in question. In respect of the employer, the events must also be beyond the control of other contractors working on the contract.

The ongoing war in Ukraine may constitute a qualifying *force majeure* event for contracts entered into before the outbreak of the war. However, the party claiming ease of obligations, which under the AB Standards is for time only, must demonstrate a causal effect, e.g., a supply chain issue, and fulfil relatively strict duties to mitigate a loss of time. Concerning supply chain issues, the contractor must seek out alternative sources of supply (if any), even if it entails paying higher prices (please see question 3.14).

In general, it is not possible to argue that a contract which has become uneconomic constitutes *force majeure*, but in certain circumstances, a party may be released from its obligations to perform under the contract due to such performance exceeding the threshold of sacrifice.

3.14 Is there any legislation or court ruling that has been specifically enacted or handed down to provide relief to parties to a construction contract for delay, disruption and/or financial loss caused by the COVID-19 pandemic? If so, what remedies are available under such legislation/court ruling and are they subject to any conditions? Are there any other remedies (statutory or otherwise) that may be available to parties whose construction contracts have been affected by the COVID-19 pandemic?

Danish law does not contain any specific legislation regarding construction contracts covering the COVID-19 pandemic and the contracting parties in the case of delay, disruption, or financial loss.

Nonetheless, depending on when the contract was entered into, the COVID-19 pandemic may have been a *force majeure* event or qualifying factor, subject to an assessment of the specific circumstances impacting the works performed under the contract. As an example, the supply of building material not being possible based on COVID-19-related issues, and therefore making performance impossible for the contractor, could be considered *force majeure*.

As mentioned in question 3.13 above, both parties in a construction contract can be entitled to an extension of time due to *force majeure*. The party claiming extension of time must, however, document usual requirements, and document that the hindrance was not foreseeable as well as extraordinary. The legal consequence of *force majeure* in Danish construction law is a "time, no money" cure, meaning that the party would be granted an extension of time but no compensation (please see question 3.4). However, importantly for claims based on

COVID-19, other provisions in the AB Standards – such as those related to public enforcement notices and prohibitions – may, depending on the circumstances, give rise to an entitlement to both an extension of time and compensation.

As such, no general rule can be established in relation to COVID-19 claims in Danish construction law. Anticipated future cases will, however, reveal the extent to which the courts will acknowledge parties' claims caused by COVID-19-related issues. At the time of writing, there has not been any published Danish case law on this issue. In Denmark, the COVID-19 pandemic has not been classified as a "socially critical disease" since 31 January 2022.

3.15 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

A second or subsequent owner of the building, who is not entitled under the original construction contract, can potentially pursue claims against the contractor based on the principle of succession or a claim in tort.

A claim based on the principle of succession will be subject to the condition that the third party's contracting party would be able to make the same claim towards the contractor. Such direct claims can be limited by terms in the construction contract.

If the claim is based on tort, the contractor must have acted in such a way as to give rise to liability towards the third party. Such a claim will not be limited by the terms in the construction contract.

3.16 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

Forward-purchasing agreements and collateral warranties are increasingly common in Danish real estate development projects.

3.17 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

The right of set-off is recognised under Danish law, if certain mandatory conditions are met. The right of set-off can be limited by contract, and certain claims are precluded from the right of set-off by mandatory law.

3.18 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

A duty to act in good faith towards one's contracting parties is a general principle in Danish law (please see question 3.3).

3.19 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

If certain terms of a construction contract are ambiguous, such terms are interpreted in accordance with the intended meaning of the term. They can also be interpreted using a linguistic method or to the disadvantage of the party who drafted it.

In the case of conflict between terms in the contract documents, the AB Standards prescribe in which priority the documents will apply.

3.20 Are there any terms which, if included in a construction contract, would be unenforceable?

According to the Danish Contracts Act, a contract can be modified or set aside as a whole or in part if terms or the agreement itself are deemed unreasonable or in conflict with common decency.

Generally, limitations of liability are set aside in cases of gross negligence or wilful misconduct, and besides the special offshore "knock-for-knock" regime, clauses excluding liability in such cases may be challenged in the courts and arbitration tribunals.

The AB Standards do not contain any terms which would be unenforceable.

3.21 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

The contractor/designer will be liable to perform the works and supply any design agreed upon. There is no general obligation to supply an absolute guarantee of the work.

If ABT 18 has been agreed, the contractor's liability will expire five years after handover and the contractor will not be liable for loss of business, loss of profit or other indirect loss.

If ABR 18 has been agreed, the consultant's liability will expire five years after the conclusion of services or handover. The consultant will not be liable for loss of business, loss of profit or other indirect loss. If project liability insurance has been taken out, the consultant's liability is limited to the cover provided by the insurance policy. If not, the consultant's liability is limited to twice the agreed consultancy fee, but no less than DKK 2.5 million.

3.22 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

In accordance with the Danish Statute of Limitations Act, the absolute limitation period is 10 years from the time when the claimant could have demanded that the claim be fulfilled (please see question 3.5).

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

In Denmark, legal disputes are generally resolved by public court proceedings. However, if the AB Standards have been agreed, the terms dictate a so-called dispute resolution ladder.

First, efforts must be made to resolve and settle a dispute between the parties through negotiation between the parties' project managers. The procedure for the negotiations is prescribed in the AB Standards. If these negotiations are unsuccessful, the next step can consist of mediation, conciliation, speedy resolution or arbitration.

It is also possible to initiate an expert appraisal or decision on security provided. This can be requested without preceding negotiations, for the expert appraisal, subject to the condition that it is necessary to preserve evidence which may otherwise be lost.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

The AB Standards provide for the use of different adjudication processes, such as decisions on security provided or speedy resolution.

At the request of a party and after having heard the parties, the Danish Building and Construction Arbitration Board appoints an expert to make a decision on security provided. The AB Standards provide the procedure for such decision.

At the request of a party and after having heard the parties, the Danish Building and Construction Arbitration Board appoints one or more umpires to make a speedy resolution. The procedure is similar to decisions on security provided; however, speedy resolution is applicable to a wider selection of disputes.

Dispute review boards are also commonly agreed upon, but not included in the AB Standards.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

According to the dispute resolution ladder prescribed in the AB Standards, disputes are finally resolved by arbitration before the Danish Building and Construction Arbitration Board. The arbitral procedure is governed by the Danish Arbitration Act and rules prepared by the Board.

4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

In accordance with section 38 of the Danish Arbitration Act, Denmark both recognises and enforces international arbitration awards (*cf.* also Gam, 'Recognition of foreign judgments and arbitral awards under Danish law', *Ugeskrift for Retsvæsen* 2013B, p. 185 *ff*). The party seeking the recognition and enforcement of the award must present a certified copy of both the award and the arbitration agreement with, where applicable, a certified Danish translation.

Recognition and enforcement of an international arbitration award can only be refused if one of the reasons listed in section 39(1) of the Danish Arbitration Act applies, which matches those found in the United Nations Commission on International Trade Law (UNCITRAL) Model Law.

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

In Denmark, the so-called "two-instance" principle applies, thus all cases can be tried in two court instances. Generally, all cases begin in one of the 24 district courts. The district court's ruling can be appealed to one of the two high courts. The high court ruling can only be appealed to the Supreme Court with permission from the Appeals Permission Board.

The oral hearing will begin with the plaintiff presenting the facts and documents of the case. Hereafter, party, witness and expert testimonies are given, and these are subject to examination/cross-examination. Finally, the parties present their closing statements.

The court will make the decision on the case as soon as possible after the oral hearing, and generally no later than one to two months thereafter.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

In accordance with Chapter III of EU Regulation no. 1215/2012, a court judgment given in another EU Member State will be recognisable and enforceable in Denmark, subject to the limited exceptions provided in article 45. The same applies if the court judgment is given by a Member State of the European Free Trade Association (EFTA), *cf.* title III of the Lugano Convention.

If the court judgment is given by a country outside the EU and EFTA, the judgment is – as a matter of principle – not recognisable and enforceable in Denmark. However, the foreign judgment can have evidential weight – and in some cases a very high evidential weight – if the case is tried by the Danish courts (*cf.* Gam, 'Recognition of foreign judgments and arbitral awards under Danish law', *Ugeskrift for Retsvæsen* 2013B, p. 185 *ff*).



Liv Helth Lauersen, with more than 20 years of experience, is a leading profile in construction and contract law. She has extensive experience advising domestic and international clients and is often engaged in handling leading court and arbitration cases, representing owners, contractors and technical consultants alike. Liv has conducted several landmark cases in Denmark and is experienced in handling some of the largest construction disputes whether it is through expert opinions, mediation or arbitration. Liv is also very experienced within project development and is involved in all legal aspects of a construction or infrastructure project from drafting and negotiating of the contracts to all later stages during the project and construction phase. Liv is currently ranked in Band 3 as a leading individual within the area and is a crucial part of the construction team ranked in Band 1.

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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (*NB* For ease of reference throughout the chapter, we refer to “construction contracts” as an abbreviation for construction and engineering contracts.)

As a common law jurisdiction, contracts in England require the rights and liabilities of the parties to be set out in detail in the terms of the contract. The majority of construction work in the United Kingdom (the “UK”) (particularly building work) is carried out under conventional arrangements, with a main contractor appointed under a construction contract, sub-contractors appointed under sub-contracts by the contractor, and a professional team which is engaged by the employer (with key designers sometimes novated to a contractor undertaking design and build obligations).

The type of construction contract required for a project is governed by a number of variables such as the project sector, extent of design responsibility, and size and complexity of the works.

Standard-form construction contracts can be used for more traditional procurement (where the contractor carries out the works in accordance with designs produced by the employer’s design team), e.g., the Joint Contracts Tribunal (“JCT”) Standard Building Contract 2016; and for design and build (where the contractor carries out the works and assumes some or all of the design responsibility), e.g., the JCT Design and Build Contract 2016 or JCT Major Project Form of Contract 2016.

Management contracting is one of two forms of management procurement used in the UK. Under this procurement route, the management contractor does not carry out works itself, but is paid a fee to enter into and co-ordinate a series of sub-contracts. The management contractor is required to enforce the terms of the subcontract and recover, for the benefit of the employer, the amounts paid or credited to the management contractor.

Where the contractor is engaged to manage the works for a fee but the employer engages each trade contractor directly, this is

known as “construction management”. The JCT has produced a standard-form management contract and construction management contract, although we have experience of clients using bespoke forms.

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

Collaborative contracting is becoming more prevalent, as UK government best practice guidance has featured collaborative contracting as a core requirement, with the aim of reducing costs in public procurement. The core idea in collaboration is that the risk should be actively managed during the project and adversarial behaviours replaced with mutual trust and co-operation. In this sense the NEC4 Engineering and Construction Contract reflects this ethos, with optional provisions that are collaboration related. For example, the NEC4 Engineering and Construction Contract Option C contract usually incorporates a gain/pain sharing mechanism, under which the employer shares, with the contractor, the benefit of any cost savings or the burden of any cost overruns on a 50/50 basis, which is structured around a target price. In addition, the rise in Early Contractor Involvement (“ECI”) comes with the expectation of greater collaborative activities between the contractor, owner and project designers throughout the ECI phase.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

In the UK real estate development sector, the JCT suite of contract has remained dominant, although entertaining competition is offered by the NEC (formerly known as the New Engineering Contract) suite of contracts, which offer a more pro-active approach to risk management.

International projects in the energy and engineering sector (including those involving UK-based contractors) tend to be procured using the FIDIC (International Federation of Consulting Engineers), Logic or MF/1 (Model Form) forms of contract, with the forms used dependent on the type of project/sector.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

The NEC3 Engineering and Construction Contract has been used in the UK public sector as the contract of choice on large-scale projects such as at the Olympics, nuclear projects and at Crossrail.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

A simple contract is made by one party accepting an offer made by the other party. The resulting agreement is enforceable if there are intentions to create a legal relationship and the promises are supported by consideration.

A deed is a contract in writing which complies with certain formalities under English law (i.e., guarantees must be in writing and signed by a person authorised by it in order to be effective), and is enforceable even in the absence of consideration.

The Housing Grant, Construction and Regeneration Act 1996 (as updated) (the “**Construction Act 1996**”) imposes mandatory requirements in relation to payment and dispute resolution which must be complied with in any “construction contract” (as defined by the Act). For implications of non-compliance, please see the response to question 3.3.

1.6 In your jurisdiction please identify whether there is a concept of what is known as a “letter of intent”, in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

Letters of intent are used to begin the commercial relationship. The term “letter of intent” is not a term of art, and whether the terms are legally binding or expressions of intention with no legal consequences is dependent on the terms of the letter.

Where the contractor is required to undertake some preliminary work or service, employers can issue a letter of limited authority, instructing the contractor to undertake work up to a fixed fee cap with an expiry date. Depending on the progress made on the main contract negotiation, letters of intent can be used to append the main contract terms and entitle the employer (at its sole discretion) to instruct the contractor to commence the main works; the objective being to lock in the form of main contract at the outset and fix some key commercial terms such as the price for preliminaries and rates for overheads and profit.

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer's liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors' all-risk insurance?

A requirement for public liability insurance is usually found in construction contracts. This insurance will usually cover claims

in the event of personal injury or death of a third party arising out of the performance of the construction works, or loss or damage to property other than the works. It generally will not be required once the construction work is completed.

Contractors' all-risk insurance (or contract works insurance) is a requirement set out in most construction contracts. It covers physical damage and/or loss of the works, and will typically cover damage to insured property, business interruption and the insured's liability to third parties (i.e. public liability insurance). Usually, wear and tear will be excluded.

Employers' liability insurance is compulsory for most entities that directly employ employees or labour-only sub-contractors. The policy must provide at least £5 million of cover for illness, personal injury or death of an employee, resulting from work done for the employer. There are significant fines for non-compliance (e.g., £2,500 per day).

Professional indemnity insurance is commonplace for professional consultants, contractors with design responsibilities and sub-contractors who are responsible for significant design elements. It protects against liability for damages that result from an error in their services (e.g., by way of negligent design or the negligent performance of sub-contractors).

Product liability insurance is also commonplace, and protects against liability for third-party injury or property damage, from products used in the construction works. This insurance is often required for proprietary materials or technology (e.g., escalators).

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

Whether workers are employees or contractors, and employed or self-employed, will impact their treatment for purposes of taxation and their duties with regard to health and safety. Under the Income Tax (Earnings and Pensions) Act 2003 and the Income Tax (Pay as you Earn) Regulations 2003, employers must deduct income tax and employee national insurance contributions from their employees' salaries. The Construction Industry Scheme applies similar rules to certain payments made to contractors in construction contracts. Whilst there is extensive legislation that establishes statutory requirements in relation to health and safety, a key one is the Construction (Design and Management) Regulations 2015, which set out the different duties for each type of worker.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

The regulatory framework for construction works is centred around the Building Act 1984, and the Building Regulations 2010 (the “**Building Regulations**”). The Building Safety Act 2022 received royal assent on 28 April 2022 (although not all of the Act is in force yet) as a key step in an extensive overhaul to building safety legislation following the tragic fire at Grenfell Tower in London.

The Building Safety Act: (i) introduces new building safety duties for the client, principal designer and contract, contractor and designers; (ii) extends the liability of corporate entities; (iii) sets gateways for higher-risk buildings (with “golden thread” information to be retained for the whole lifecycle of the building); and (iv) introduces changes to the limitation periods imposed by the Defective Premises Act 1972 and the Building Act 1984.

More details about the changes made by the Act can be found at www.rpc.co.uk/-/media/rpc/files/perspectives/construction/building-safety-act---client-guide.pdf.

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

Retention money being deducted or withheld by the employer, to protect it against the contractor failing to complete the works or failing to remedy defects or other contractually non-compliant work, is a precaution widely implemented in construction projects in the UK. A percentage, typically 3% of the value of the works, is deducted from each interim certificate, with 1.5% of the retention repaid at practical completion, and the remaining 1.5% repaid on issue of the notice of making good defects.

It is arguable that under English law the employer is deemed to hold retention money on trust for the benefit of the contractor, and this principle is reflected in the JCT suite of contracts. The implication of such trust arrangement is that the employer cannot treat the retention funds as its own and must comply with laws applicable to trust arrangements.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor's performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

Performance bonds or guarantees, whereby the surety guarantees in favour of the employer the due performance by the contractor of its contractual obligations (with the primary purpose of offering protection in respect of the contractor's insolvency), are a feature of UK construction projects. Such bonds or "see to it" guarantees create a secondary liability predicated on the default by the contractor of the underlying construction contract.

Performance bonds will generally be enforced by the courts if claims are properly made in accordance with the terms of the bond. A surety could seek an injunction on a claim if it considers the bond has been discharged due to a variation, waiver or settlement under the underlying contract; which was made without its consent. The terms of the bond should protect the employer against such early discharge.

As an alternative to performance bonds, on-demand bonds (which are akin to letters of credit) provide that the holder may call for payment by the surety upon giving a notice in the prescribed form, without the need to evidence breach of the underlying contract. On-demand bonds are mostly seen in international projects and English courts have generally refused injunctions to prevent calls on on-demand bonds; the material exception to this rule being where the contractor is able to establish fraud.

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

Parent company guarantees are permissible, and are usually requested by employers contracting with a subsidiary company

of a parent or ultimate holding company with a stronger financial covenant.

A parent company guarantee must comply with the formalities of a guarantee under English law and, as a secondary liability, requires default of the underlying contract. Employers sometimes ask the guarantor to act as primary obligor in order to protect the guarantee from being discharged due to some technical deficiency in the underlying contract.

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

Yes, in principle, but the status of the goods supplied will define the effectiveness of such rights. If the goods are delivered and installed on site and become incorporated into the land, the goods become the property of the employer (as landowner). If the goods are delivered to the site, a retention of title provision stating that the contractor retains title until the goods are paid for can be effective (especially with a licence to enter the property to retake the goods if payment is not forthcoming), although less so if the goods or materials are mixed.

Under English law, the parties can agree that transfer of title in goods or materials can take place at the same time, or at a different time to the date payment is made.

The JCT Design and Build Contract 2016 form provides that the goods or materials will become the employer's property once their value has been included in an interim payment, whereas the NEC 4 Engineering and Construction Contract provides that whatever title the contractor has passes to the employer upon delivery to site (so passing on title depends on the contractor having good title in the goods or materials).

The contractor cannot, without an express right, remove goods or materials from the site. The JCT Design and Build Contract 2016 provides that the contractor is not entitled to remove any goods or materials from the site, even if it has not been paid (subject to the contractor's termination rights on employer insolvency or default).

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

It is common for a third party to be appointed by the employer to supervise the works and administer the contract on the employer's behalf, e.g. in relation to issuing certificates, administering claims and undertaking inspections.

Under English law, the third party must act fairly, independently and honestly in applying the terms of the construction contract. This duty to act fairly is flexible, dependent on the facts and subject to the consultant's duty to exercise reasonable skill and care in the performance of its services.

The employer, having appointed the third-party supervisor, will have a contractual claim for damages for breach of its contractual duty of care, as well as a claim in tort, if it can establish negligence.

The contractor will have difficulty claiming against the third-party supervisor in the absence of a contractual relationship, because of the difficulty in establishing that the third party owed it a duty of care in tort to prevent the contractor from suffering economic loss.

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a “pay when paid” clause?

The Construction Act 1996, which applies to “construction contracts” (as defined in the Act), makes any provision making payment conditional on the employer receiving payment from a third party ineffective (except if the employer making the payment becomes insolvent).

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

The parties are free to agree ascertained damages for breach of contract in relation to delay or performance. In the real estate development sector, it is common to have pre-agreed damages for failure to achieve the completion date due to contractor culpable delay, whereas contracts in the energy and engineering sector also include ascertained performance damages for failure to meet the performance requirements.

The benefits of using liquidated damages are: (i) it provides certainty about the consequences of breach; (ii) it limits the contractor's liability; and (iii) it saves the employer the time and expense of pursuing claims in general damages for delay or performance failure.

English law has established a number of grounds on which a contractor may challenge the enforceability of liquidated damages provisions in construction contracts. The English courts will decide a liquidated damages clause is penal and unenforceable where the secondary obligation (i.e. the payment of liquidated damages) imposes a detriment on the contractor out of all proportion to any legitimate interest of the employer in the enforcement of the primary obligation (to ensure works are done on time or to expected quality).

Other reasons contractors could successfully resist the application of liquidated damages are: (i) if the breach is outside the scope of the liquidated damages provision; (ii) the liquidated damages clause is held to be uncertain; or (iii) the employer fails to comply with an explicit condition precedent to its right to deduct or levy liquidated damages.

Unlike in some civil code jurisdictions, the courts will not look to revise the rate of liquidated damages agreed between commercial parties, up or down. In the event that the liquidated damages provision is held to be unenforceable, it is advisable for the employer to reserve its right under the contract to claim general damages for the relevant breach.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

The employer can vary the works if it is entitled to do so under the building contract or if there is a fresh contract made between the parties which covers the extra work.

The right to vary work is subject to the variation provision set out in the contract. If a variation instruction results in the works being substantially different to the kind of work contemplated by the contract, the extra work could fall outside the scope of the contract. In such case, the employer could be liable to pay the contractor on a *quantum meruit* basis.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

In a lump-sum fixed-price contract, the contractor is entitled to carry out the entirety of the works instructed, subject to the employer's contractual right to omit any of the works. Unless otherwise stated explicitly in the contract, the right to omit will generally not entitle the employer to use the power to give the work to another contractor (including for a lower price) or to do the work themselves.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

English law will imply a number of key terms into a construction contract. It will be an implied term in a construction contract that the contractor will: (i) carry out the work in a good and workmanlike manner; (ii) supply and use materials of good quality reasonably fit for the purpose for which they will be used; and (iii) undertake that the completed building is reasonably fit for its intended purpose where that purpose is known and the contractor agrees to both design and construct the works.

The courts have rejected an overarching general concept of an implied duty of good faith, but there are examples of duties of good faith having been implied into some long-term, relational contracts, e.g. a 25-year private finance initiative contract.

Where a “construction contract” (as defined in the Construction Act 1996) does not comply with the provisions set out in the Act (e.g., in relation to payment or dispute resolution), the relevant provisions in the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011 (SI 2011/2333) shall apply. If the contract complies in part, the provisions that comply will continue to take effect, while the Scheme will then only imply terms to replace non-compliant provisions or fill in for missing provisions.

The parties should note that an entire agreement clause could limit the parties' rights to the express terms of the contract and exclude some implied terms.

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

The general rule under English law is that where there is true concurrency, i.e., delay to completion caused by more than one matter of equal causative potency for which both the employer and the contractor are responsible, the contractor is entitled to an extension of time, but he cannot recover loss and/or expense caused by the delay. The Scottish courts have taken a different approach to concurrency.

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

In cases of latent damage (i.e., not personal injuries) caused by negligence, the limitation period is the later of six years from the date the damage is caused, or three years from the date the claimant knew (or ought to have known) the material facts of the loss, the defendant's identity and the cause of action. In such cases, there is a long-stop of 15 years from the date of the negligent act/omission. In some instances where there has been fraud, concealment or mistake, time does not begin to run until the claimant has, or with reasonable diligence could have, discovered this.

A further piece of legislation to consider is the Defective Premises Act 1972 (the “DPA 1972”) and the recent amendments that have been made to it. The DPA 1972 imposes a duty on those working in relation to the provision of a dwelling to ensure that the work performed and the materials used were adequate, so that the dwelling was fit for habitation when complete. Claims for breach of this requirement originally had a limitation period of six years. This period has now been extended, so that claimants now have 15 years to bring a claim if the claim accrued or accrues after the amendments to the DPA 1972 took effect, or 30 years if the claim was accrued before the amendments were made.

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

The principal pieces of legislation here are the Limitation Act 1980 and the Latent Damage Act 1986. With most contracts, time typically begins to run from the date that the cause of action accrues. If the contract is signed as a simple contract, the limitation period is six years, though if signed as a deed then the limitation period is usually 12 years. Prior to commencing a claim, the Court will expect the parties to it to have completed the process set out in the Pre-action Protocol for Construction and Engineering Disputes. Otherwise, notices of a claim are not generally required.

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

Where a fixed lump-sum contract is silent in respect of ground condition risk allocation (whether in the contract terms or the

technical documents appended), the risk of unforeseen ground conditions rests with the contractor. Notwithstanding this general principle, there may be scenarios in which, absent a provision allocating ground risk, the employer assumes liability for unforeseen ground conditions, e.g., if the employer provides relied-upon information that is shown to be incorrect or the contractor can successfully evidence a misrepresentation claim.

Some standard-form contracts such as the JCT suite are silent on ground condition risk (which means the common law position would apply), while other forms such as the NEC suite of contracts provide limited circumstances in which additional time and cost incurred in dealing with unforeseen ground conditions would entitle the contractor to a compensation event. In design and build procurement, it is common for employers to try to allocate some or all of the unforeseen ground condition risk to the contractor.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

It is common for construction standard forms to provide contractors with time and cost relief if there is a change in law affecting the completion of the works.

A good example is that the JCT Design and Build Contract 2016 provides that, if after the base date (usually the date on which the contractor tenders its price and programme) there is a change in law which necessitates an alteration or modification to the works, the contractor is entitled to a variation (entitling the contractor to an extension of time, loss and/or expense and potentially the agreed rate for profit).

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

The contractor will typically own the intellectual property in the documents it has produced pursuant to the construction contract. The market approach is for the contractor to provide in favour of the employer (and any beneficiary entitled to third-party rights) an irrevocable, royalty-free, non-exclusive copy-right licence to use the documents for the permitted purposes.

3.10 Is the contractor ever entitled to suspend works?

In respect of any “construction contract” (as defined under the Construction Act 1996), the contractor has a statutory right to suspend performance of his obligations under the contract where any sum due under a construction contract is not paid in full by the final date for payment and no effective “pay less” notice has been given. For construction contracts outside the scope of the Construction Act 1996, the parties are free to entitle the contractor to suspend the works for non-payment, breach, or employer insolvency.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party's grounds for termination must be set out (e.g. in a termination notice)?

Construction contracts normally contain a contractual right to terminate the contract upon the occurrence of such events as insolvency or the consistent failure to make payment by the

employer. To terminate the contract in this way, there will typically be a contractual requirement to provide multiple notices to the party allegedly in breach. If a breach is so significant as to deprive the innocent party of substantially the entire benefit of the contract, then this party may be able to “repudiate” the contract. In such circumstances, no notice is required; however, the innocent party must take care not to “affirm” (i.e. continue with) the contract. Instead, the party must, through its communication or conduct, unequivocally demonstrate that it is treating the contract as being at an end.

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor’s profit on the part of the works that remains unperformed as at termination?

Whether a construction contract includes a “termination at will” provision is a commercial matter between the parties. The consequences of the employer terminating the contract at will can vary between: being required to pay for completed work up to the date of termination but with a complete exclusion for loss of profit; and the claim for profit being permitted but up to a capped position (e.g., 5% of the contract price).

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

The term “*force majeure*” does not have a recognised definition in English law. It is generally regarded as a contractual term by which one (or both) of the parties is excused from performance of the contract, in whole or in part, or is entitled to suspend performance, upon the happening of a supervening event beyond its reasonable control. A *force majeure* clause is usually intended to avoid the application of the common law doctrine of frustration. In the JCT 2016 suite, the term “*force majeure*” is used without definition but does entitle the contractor to an extension of time (but not cost) and allows either party’s employer to terminate the contract in the event of prolonged suspension (the default period being two months) of the whole or substantially the whole of the incomplete work due to *force majeure*.

A change in economic or market circumstances which makes the contract less profitable is not generally regarded as sufficient to entitle relief under a *force majeure* clause.

3.14 Is there any legislation or court ruling that has been specifically enacted or handed down to provide relief to parties to a construction contract for delay, disruption and/or financial loss caused by the COVID-19 pandemic? If so, what remedies are available under such legislation/court ruling and are they subject to any conditions? Are there any other remedies (statutory or otherwise) that may be available to parties whose construction contracts have been affected by the COVID-19 pandemic?

No such legislation is applicable in England & Wales. At the height of the pandemic in the UK construction guidance in the form of Site Operating Procedures introduced by the Construction Leadership Council had been used by the construction industry as best practice, and any time or cost relief in construction contracts for delay due to COVID-19 has been a matter for

commercial negotiation between the parties. These site operating rules are now used as a reference document only. If there was a resurgence of COVID-19, other remedies that may be available to the parties are dependent on the terms of the contract. By way of example, remedies available under the JCT suite of contracts could be: (i) delays in the supply chain caused by government-mandated shutdowns could fall within the scope of a change-in-law provision providing specific remedies; (ii) delays in obtaining a necessary permission or approval of any statutory body could entitle the contractor to time and cost; and (iii) contractors may request instructions to close the site which, if given, could amount to a variation. Even though there are no government-mandated COVID-19 restrictions in place in England & Wales at the time of writing, restrictions at the place of origination of goods or materials could delay progress of the works and any time or cost relief for such delay would be a commercial matter for the parties (although any widely drafted change in law provisions in the contract could be triggered by government restrictions imposed in other jurisdictions affecting the works).

3.15 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

The concept of privity of contract exists under English Law, i.e., only the parties to a contract acquire directly enforceable rights or obligations under it.

Exceptions to the rule on privity of contract exist in the construction sector where: (i) third-party rights are granted pursuant to the Contracts (Rights of Third Parties) Act 1999; or (ii) a third party is provided the benefit of a collateral warranty.

Third Party Rights: Under section 1 of the Contracts (Rights of Third Parties) Act 1999 a third party may be granted the right to enforce a term of the primary contract provided it is expressly identified by that contract, although it need not be identified by name. Classes such as funders, tenants or purchasers may be referred to.

Collateral Warranty: A collateral warranty is a side agreement between one of the parties to a construction contract and a third party under which the warrantor warrants to the beneficiary that it has complied, and/or will comply, with the primary contract.

3.16 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

Since a landmark legal decision severely restricted the ability of third parties to recover pure economic loss in the tort of negligence for defects in the works, there has been a surge in the use of collateral warranties or direct agreements in the English construction sector. It is expected that most construction contracts will require the contractor to enter into a separate deed of warranty, in favour of a defined category of third-party beneficiaries, under which the contractor warrants that it has performed and will continue to perform its obligations under the contract. As an alternative to collateral warranties,

third-party beneficiaries can be afforded third-party rights in a construction contract pursuant to, and in accordance with, the Contracts (Rights of Third Parties) Act 1999.

3.17 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

The right of set-off under English law is a defence (a shield not a sword) and a defendant must counterclaim if it hopes to obtain more than the claimant will obtain on its claim. Set-off is available as an equitable right (which is fairly wide) and the parties may provide for a contractual right of set-off or deduction, which is frequently found in building contracts.

The Construction Act 1996 effectively acts as a statutory exclusion of the right of set-off in “construction contracts” (as defined in the Act) if the requisite “pay less” notice has not been served in respect of a payment applied for by the contractor.

3.18 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

The contractor owes its employer a contractual duty (either express or implied) to carry out the work and, separately, to carry out design services (if any). A concurrent duty of care will also be owed in the tort of negligence (see below). Claims against the employer for breach of its obligations will ordinarily be made as a breach-of-contract claim, given the nature of the employer’s obligations.

Subject to the terms of the contract, the contractor can owe a concurrent duty in contract and tort. An employer may wish to sue in tort to avoid a claim being time barred in contract. To establish a claim in the tort of negligence, the employer must find the existence in law of a duty of care, a breach of such duty and a connection between the defendant’s behaviour and the damage (which cannot be so remote or unforeseeable as to be unrecoverable).

3.19 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

There are no rules to this effect that are specific to construction contracts as a whole. Whilst most construction contracts follow a standard format, thereby reducing the likelihood of any ambiguities arising, where ambiguities do arise, the general principles of contract law apply. As summarised in the case of *The Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd* [2018] EWHC 163 (Comm), the principles that the courts will consider when interpreting a contract include: the objective meaning of the language; the available background information; the need to consider the contract as a whole in the light of the nature, formality and quality of the drafting; the court’s entitlement to prefer an interpretation of the contract that is consistent with commercial common sense; the need to carry out an iterative analysis of how each suggested interpretation compares to the provisions of the contract; and the requirement to balance these principles.

3.20 Are there any terms which, if included in a construction contract, would be unenforceable?

In addition to liquidated damages (which are held to be penal) and any terms non-compliant with the Construction Act 1996 in respect of “construction contracts” (as defined in the Act), the Unfair Contract Terms Act 1977 imposes limits on the extent to which civil liability for breach of contract, or for negligence or other breach of duty, can be avoided; for example, exclusions of liability for personal injury or death are unenforceable.

3.21 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer’s obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

The standard of care imposed on a professional consultant at common law is to carry out its services exercising “reasonable skill and care”. The test is that of the ordinary competent professional carrying out the relevant discipline.

In design-and-build contracts, it is implied that the completed works will be reasonably fit for the purpose for which they are required. Often contractors require an exclusion from fitness for purpose liability on the basis that such liability is not covered under its professional indemnity policy, but accepting a blanket exclusion for fitness for purpose could conflict with any contractual requirement to meet specific performance requirements.

The courts have reconciled dual obligations within the same contract to exercise reasonable skill and care in the performance of the services, alongside the requirement for an absolute guarantee to achieve specific output.

3.22 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

Decennial liability does not exist in England & Wales. Latent defects insurance, the policies for which normally cover a period of 10 or 12 years, is sometimes referred to as decennial insurance. Prior to the introduction of the Building Safety Act 2022, unlike in many of the countries where decennial liability exists, there was no mandatory requirement for such insurance in England & Wales. Since the introduction of the Building Safety Act 2022, there is a legal requirement on a developer of ‘new build’ homes to provide an insurance backed warranty to the interested party for a now-extended period of at least 15 years providing that the developer will remedy any specified defect in specified circumstances.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

Construction disputes are generally resolved through negotiation, mediation, adjudication, litigation or arbitration. In the UK in 2021, the most common method of alternative dispute resolution was adjudication, followed by party-party negotiation and finally, expert determination.

Following an adjudication (a compulsory dispute mechanism for the construction industry), the decision will be “interim-binding”, i.e., it will bind the parties until the dispute is resolved

via arbitration, legal proceedings or agreement. The adjudicator's decision will usually be enforced by the successful party in the Technology and Construction Court and is unlikely to be challenged by the losing party.

Mediations involve an independent third party (the mediator) receiving a statement from both parties; the mediator will try to find common ground for achieving a settlement – their decision will not be binding.

Expert determination provides a binding outcome following an expert's review of the dispute.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

Adjudication processes exist in England & Wales under section 108 of the Construction Act 1996. The Construction Act 1996 gives a statutory right to parties to a construction contract to refer a dispute for adjudication. This statute also specifies several requirements that the compulsory adjudication clause in the construction contract must comply with. These include a requirement for the adjudicator to reach a decision within 28 days of referral (or longer if the parties agree to this) and for a duty to be imposed on the adjudicator to act impartially.

As required by the Construction Act 1996, the contract must provide that the decision of the adjudicator is binding until the matter is determined by legal proceedings, arbitration or agreement. If these requirements are not met by the contract, the relevant provisions of the Scheme for Construction Contracts (England and Wales) Regulations 1998 apply, which ensures that the statutory requirements relating to the adjudication process are incorporated into the contract.

The alternative interim dispute resolution procedure to standard adjudication is a dispute review board. This is effectively a project-specific adjudication process whereby, at the beginning of a construction project, a panel is appointed, whose role is to visit the construction site several times and provide an interim binding decision on any disputes that may have arisen.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

Although they are not compulsory, arbitration clauses are usually found in standard-form contracts (the JCT, Standard Form of Building Contract with Contractor's Design 1998 Edition (incorporating amendments 1999, 2000, 2001, 2002 and 2003) provides that a dispute may be resolved by reference to arbitration; the JCT Design and Build Contract 2016 also provides that subject to an adjudication clause, disputes or differences shall be referred to arbitration). Where an arbitration clause is included, one party will serve on the other a notice of arbitration that sets out the dispute. The notice will also require the other party to agree to the appointment of an arbitrator. The arbitrator will make a decision by way of a final and binding arbitration award.

If a dispute arises in relation to an arbitration award (i.e. those applications to the court under the Arbitration Act 1996 to challenge the arbitration award), the claim will normally be referred to the Technology and Construction Court. Here, section 10 of the Technology and Construction Court Guide should be considered when approaching the arbitration process.

4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

Under the New York Convention, the English courts must recognise and enforce foreign arbitration awards where there is an application for recognition unless a ground for refusing recognition (under section 103 of the Arbitration Act 1996) is made out. These grounds permit refusal in events such as: a party to the arbitration agreement was under some incapacity; or a party was not given proper notice of the arbitrator's appointment.

Practical obstacles may therefore include maintaining a record of the arbitration process and ensuring that any requirements in the arbitration clause are followed and recorded. A party may also face obstacles in enforcing an arbitration award where the counterparty's assets are not located in a New York Convention jurisdiction. A party may face legal obstacles to recognising or enforcing an arbitration award if recognising or enforcing the award would be contrary to public policy.

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

Generally, parties to a construction contract will need to comply with the Pre-Action Protocol for Construction and Engineering Disputes (as well as the Practice Direction on Pre-action Conduct and Protocols) prior to commencing a claim.

England & Wales has a specialist construction court within the Business and Property Division known as the Technology and Construction Court (the "TCC"). Proceedings are commenced by the issuing of a Claim Form. The Claim Form must be served within four months of issue, otherwise it expires. Following service of the Claim Form, Particulars of Claim must be served within 14 days, provided they are served within four months of the issue of the Claim Form. A defendant must then file an Acknowledgment of Service or a Defence within 14 days. If an Acknowledgment of Service is filed, the defendant then has 28 days from service of the Particulars of Claim to file its defence.

The TCC Guide confirms that where a case is transferred to the TCC, the first Case Management Conference (the "CMC") will be fixed by the court within 14 days of the case being transferred. The parties will need to file and serve a disclosure report no less than seven days before the first CMC, and should seek to agree proposals for disclosure and costs budgets no less than seven days before the CMC. Unless the court prepares an order, the claimant/applicant will need to submit a draft order for the judge to approve within seven days of the hearing. The parties will then conduct disclosure (obtaining and reviewing documents). Witness statements and expert reports will then be exchanged. Subject to any interlocutory hearings, the next substantive hearing will be the pre-trial review, which will be followed by the trial. Getting to this stage will depend on the parties' agreement as to how long individual steps will take.

A party opposing a decision by the TCC may appeal a decision that is wrong (i.e., if the decision contained an error of law/fact or incorrect exercise of the court's discretion), or if the ruling is unjust due to a serious procedural (or other) irregularity. A decision may be appealed to the Court of Appeal and, following that,

the Supreme Court. Applications for permission to appeal to the Supreme Court will usually be decided without a hearing. Decisions at this stage may take weeks, months or years to receive.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

The jurisdiction of England & Wales has several enforcement regimes, whereby the judgments of courts in certain other jurisdictions will be upheld and enforced in the courts of England

& Wales. These include the Hague Convention on Choice of Court Agreements (which covers EU Member States), the Administration of Justice Act 1920 (which covers several countries with historic links to Britain) and the Foreign Judgments (Reciprocal Enforcement) Act 1933 (which covers several countries including Australia and the majority of Canada).

For those jurisdictions not covered by an enforcement regime, the common law rules must be applied to determine if the judgments of that jurisdiction's courts will be upheld and enforced. These rules hold that such judgments will be treated as though they have created a contract debt between the parties in question. As such, an action for a simple debt will need to be brought in England & Wales by the creditor. This procedure is only available where the foreign court's judgment was final and conclusive.



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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (NB For ease of reference throughout the chapter, we refer to “construction contracts” as an abbreviation for construction and engineering contracts.)

In France, construction law is mainly a matter of private law (Civil code; Construction and Housing code). The Civil code contains several provisions on the construction contract (*contrat d'entreprise*), also known as the *contrat de louage d'ouvrage*. The construction contract (*contrat d'entreprise*) governs the relationships between the project owner (*maître d'ouvrage*) and the contractor.

The design is generally prepared by an architect/project manager (*maître d'œuvre*) who supervises the construction works on behalf of the project owner. However, engineering, procurement and construction (EPC) contracting (*conception-réalisation*) and turnkey (*clé-en-main*) contracting are becoming more and more prevalent.

Real estate development contracts (*contrats de promotion immobilière*) (Art. 1831-1 of the Civil code), in which the developer acts on behalf of the project owner who owns the land, are also a form of private law construction contract where the developer takes care of the design and construction.

While architects generally prepare the design and follow the procurement process and performance of the works, thereby acting as management contractors overseeing the works of package contractors, some designers may work on the basis of design-only contracts. This takes place in the context of specific expert design, for elements of the construction works that are performed under technical assistance contracts.

Public law construction contracts are governed by the Public Procurement code (*Code de la commande publique* – CCP). Similar to other European Union (EU) countries, these contracts will be public procurement contracts (*marchés publics*) or concessions (*concessions*). Concessions generally cover a larger scope, including design, construction and operation. Public procurement

contracts, on the other hand, may be for works only or for design and works, as well as design, construction and maintenance.

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

Collaborative contracts are uncommon in France for two main reasons. Firstly, the CCP and EU law strictly regulate the procedures for procurement of construction contracts, so it is not profitable to use collaborative contracts. Secondly, the French contractual tradition favours the risk allocation method rather than collaborative contracts.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

In contract law, the main concept is freedom of contract (Art. 1102 of the Civil code). Thus, contractors are relatively unfettered in the form of the contract they choose.

Nevertheless, in public law, contracts can (and, in practice, quite often do) refer to the general administrative clauses published on 30 March 2021 in the General Conditions of Contract for public works (*Cahier des Clauses Administratives Générales des marchés publics de travaux* – CCAG), which provide the framework and the main principles of public sector contracts.

In private law, the system is the same, with the AFNOR (*French Association for Standardisation*) NF P 03-001 standard published in October 2017 centralising the general administrative clauses applicable to private contracts, which can be quoted in the contract and become binding.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

When the construction contract is an administrative contract, the contractual documentation generally includes the following elements:

- the Special Conditions of Contract (CCAP), in which all the special conditions of the construction contract are

specified, such as the price, the conditions for termination, the penalties incurred, the exemption clause, etc.;

- the Special Technical Conditions of Contract (CCTP), in which all the special technical conditions of the contract are specified; and
- the CCAG, commonly used although not mandatory, whose provisions are applicable when the CCAP are silent.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

A distinction must be made between private and public law rules.

In private law, a contract is formed when the wills of two parties converge. Four components are necessary (Art. 1128 of the Civil code): the consent of the parties; their capacity to contract; and a lawful and certain content. The formal requirements are limited. Some obligations can be added, particularly in situations where the balance of power between the contracting parties is unequal (e.g. where the project owner is not a professional).

In public law, on the other hand, the regulations are numerous and precise. The CCP and EU law set the procedural standards to be followed, in particular to comply with the principles of freedom of access to public procurement, equal treatment and proportionality.

1.6 In your jurisdiction please identify whether there is a concept of what is known as a “letter of intent”, in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

In the strictly regulated framework of public law, the letter of intent does not exist. The pre-contractual phase, from the call for tenders through the negotiations to the signing, is completely regulated by law, and the freedom of the parties is reduced.

However, the letter of intent does exist in private law. It is the first written act by which the parties acknowledge the result of the negotiations. If it is not binding on the parties and does not create any contractual obligations, it can be used as evidence. Indeed, under French law, a party may be held liable by the other in the event of a breach of negotiations in bad faith.

If it is binding, the letter of intent will generally be an early works agreement enabling the contractor to start working on the construction design while the other key terms of the construction contract are negotiated.

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer's liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors' all-risk insurance?

A contractor's employees are covered under the general workplace accident regime, which is part of the social protection system.

Contractors' all-risk insurance (*assurance tout risque chantier*) is not compulsory, but is generally purchased by the employer, covering damages and losses during the works. The employer will also purchase insurance covering damage to the structure of the works and fitness for purpose for 10 years from taking over (*assurance dommage-ouvrage*), which is compulsory (Art. L.242-1 of the Insurance code).

While the employer will claim against its own *dommage-ouvrage* insurer, the insurer will have rights of subrogation against the contractor, who needs to purchase decennial liability insurance (*assurance de responsabilité décennale*). Decennial liability insurance is the only compulsory insurance policy for a contractor (Art. L.241-1 of the Insurance code). It is also compulsory for a designer – similar to a professional indemnity insurance in common law countries.

Architects also have compulsory individual civil liability insurance (*assurance de responsabilité civile professionnelle*). Such third-party liability insurance policies are generally purchased by participants in construction works, whether designers or contractors, even when they are optional.

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

- (a) **Labour.** There are no specific rules for employees in the construction sector, except those working on construction sites, who must hold a building and public works identification card (*carte BTP*). The French Labour code applies to workers in France. Some distinctions exist, notably between workers from another EU country and other foreign workers (residence permit/specific authorisations).
- (b) **Tax.** There is a specific VAT reverse-charging mechanism that has applied since 2014 for the subcontracting of construction works.
- (c) **Health and safety.** Health and safety standards are strictly regulated by the Labour code and by EU law. In particular, there is a general safety obligation for employers towards employees. A health and safety coordinator (*coordonnateur en matière de sécurité et de protection de la santé*) is nominated, and a general coordination plan and health and safety protection plan must be established. References to these legal health and safety requirements can be found in Arts 5.1, 5.2 and 5.3 of the AFNOR NF P03-001 standard and in Art. 31.4 of the CCAG.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

The contractor has two major obligations regarding the execution of the construction. Firstly, he must build in accordance with the instructions received, but also, and above all, he must comply with the construction rules and good industry practice (*les règles de l'art*).

These rules were partly codified in Book I of the Construction and Housing code, and can be found in the Unified Technical Documents (*Documents Techniques Unifiés – DTU*), which centralise the contractor's obligations. The rules which were codified have recently evolved, thanks to the promulgation in 2020 and 2021 of several decrees and ministerial orders following Order n°2020-71 of 29 January 2020.

In addition, in order to obtain the necessary administrative authorisations for construction, contractors are required to comply with building and fire safety standards. Fire precautions are defined by Art. L.141-1 of the Construction and Housing code and include fire prevention and fire evacuation facilities.

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

Retention clauses are possible under French law. In practice, they are frequent in the event of a delay in the completion of the work. The amount is often provided by the contract within the limit of 1/3000th of the price per day of delay, and 5% of the amount of the contract for private contracts, or 10% of the amount of the contract for public contracts.

The main purpose of the retention of a guarantee is generally to cover the repair of defects during the period of responsibility for defects. For this purpose, law n°71-584 of 16 July 1971 prohibits the retention of more than 5%.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor's performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

Performance bond guarantees are uncommon in the public sector, mainly because they are not provided for in the regulatory procedure of the CCP – although in practice they are sought after. However, performance bond guarantees are common in the private sector.

There are two main categories of performance bonds under French law: the standard guarantee (*cautionnement*) and the on-demand guarantee (*garantie autonome*). The standard guarantee (Art. 2288 of the Civil code) is a unilateral contract by which the person who guarantees an obligation binds himself to the creditor to fulfil this obligation if the debtor does not fulfil it himself. Pursuant to an on-demand guarantee (Art. 2321 of the Civil code), the guarantor undertakes, in consideration of an obligation undertaken by a third party, to pay a sum to the beneficiary of the guarantee on demand. In practice, it is rare to see fully unconditional on-demand guarantees. Performance bonds are generally closer to standard guarantees, although the drafting can vary from one project to the next.

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

Guarantees by parent companies for the actions of their subsidiaries (*garanties maison-mère*) are common. These parent company guarantees are more or less binding for the parent company, depending on the drafting. They are: on-demand guarantees (*garantie autonome*); standard guarantees (*cautionnement*); or comfort letters (*lettre d'intention*).

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

Retention of title rights are mainly provided by the mechanism of the retention of title clause (*clause de réserve de propriété*) (Art. 2367 of the Civil code). It must be contractually agreed by the parties at the conclusion of the contract.

However, suppliers of materials and subcontractors in the context of public works benefit from the privilege of *Pluviose An II* for wages related to works on the site, and for materials and objects that have been used directly in the performance of the works. Moreover, the contractor has the right to withdraw materials and supplies that have not been incorporated into the building.

There used to be a specific privilege on the proceeds of sale of a building for the benefit of unpaid contractors and architects who worked on the construction of such building, in Art. 2374, 4° of the Civil code. However, this specific privilege was terminated as a result of the general reform of the law of security interests (ordinance n°2021-1192 of 15 September 2021).

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

Construction contracts are supervised by the project manager (*maître d'œuvre*). His role is to design, coordinate and control the proper performance of the construction works. Usually in France the project manager (*maître d'œuvre*) is an architect. He acts before the works begin, especially on the preliminary studies, and directs the execution of the contracts for the works.

He is not subject to any particular duty of impartiality. He works for his client (*maître d'ouvrage*) and instructs the contractor on behalf of his client. He has a legal obligation to advise the project owner, and other specific obligations may be freely stipulated in the contract. As the profession of architect is tightly regulated in France, an architect must also comply with rules of conduct. Some of these rules are legal, others purely professional.

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a "pay when paid" clause?

"Pay when paid" clauses may be included in the contract by the parties. Nevertheless, in the private sector, the main contractor must provide payment guarantees to his subcontractors, in the form of personal and joint guarantees, or delegation of payment. The employer will normally require the main contractor to provide evidence that such payment guarantees in favour of the subcontractors have been put in place.

In the public sector, for all contracts governed by the CCP, there is a direct payment mechanism. A subcontractor has the right, once it is declared and its conditions of payment have been approved, to be paid directly by the employer. Any waiver is void. Thus, “pay when paid” clauses are of limited interest.

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

Construction contracts generally contain liquidated damages clauses (*clauses pénales*), by which a party to a contract undertakes to pay its co-contractor a lump sum in the event of non-performance of its obligations.

These types of clauses can be combined with other contractual measures. The amount of liquidated damages set in the contract is at the discretion of the parties, although there are limits: the penalty must not be manifestly excessive or illusory/derisory. Otherwise, it could be revised by a judge, in compliance with Art. 1231-5 of the Civil code.

Public construction contracts generally contain liquidated damages clauses which are very similar to the one described above. The judge will also check if the penalty is not manifestly excessive or illusory/derisory.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

In public law, the CCP provides for two types of modification: conventional (review clauses as defined in Art. R.2194-1 of the CCP); and unilateral. Indeed, as contracting authorities are public entities, they have prerogatives of public power (*prérogative de puissance publique*) allowing them, with the objective of general interest and public order, to modify the contract.

The counterpart of this modification right is that the contractor has the right to be indemnified for the additional costs. The contractor cannot oppose the unilateral modifications of the contract by the contracting authority, but he can request financial compensation for these changes.

Moreover, the modification cannot lead to a substantial change to the contract. In such case, the amendment would be irregular.

In private law construction contracts, amendments can only be made by the common agreement of the parties. Nevertheless, certain exceptions exist, notably in case of *force majeure* (Art. 1218 of the Civil code) and hardship (*théorie de l'imprévision*) (Art. 1195 of the Civil code), which allow a contract that has become excessively onerous to be unilaterally terminated.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

It is possible for the employer to omit work from the contract. In a public law construction contract, it will then have the right to maintain the financial balance of the contract. In a private law construction contract, the contractor's agreement will need to be obtained.

Omission of works is addressed in the two main contractual standards in France. Art. 15 of the CCAG states that below the 5% reduction limit for lump sum contracts and the 20% reduction limit for measurement contracts based on unit prices, the contractor may not oppose to the reduction. Similarly, Art. 11 of the ANFOR NF P03-001 standard states that, in the event of a decrease in the volume of work, the contractor may not raise any claim if the decrease is less than 10% of the initial amount. Beyond that, the contractor is entitled to compensation.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

Art. 1194 of the Civil code states that contracts bind the parties not only to what is expressly written, but also to all the consequences which equity, usage or the law give to them.

Thus, beyond correct performance of the contract, there are several implicit obligations to be complied with. Good faith in the pre-contractual phase, but also during the execution of the contract, is an example. Several obligations flow from the duty of good faith, such as the duty to inform.

Fitness for purpose is an implicit obligation in the decennial liability that applies to contractors (Arts 1792 and 2270 of the Civil code), and this means that contractors need to guarantee that: (i) the works structure will not suffer damages; and (ii) the works will remain fit for purpose for 10 years from handover. Good faith and contractual loyalty, as well as the decennial liability rules, are also implied terms in public construction contracts.

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

Completion of the work is considered a firm commitment (*obligation de résultat*), different from a “best endeavours” undertaking (*obligation de moyens*), which means that the contractor must complete the work and cannot simply prove that he has done his best (or even everything possible) to achieve this.

Therefore, in most cases, financial penalties are imposed on the contractor if the delay is attributable to the contractor. Issues of time and penalties for exceeding time limits are contractually arranged by the parties (*freedom of contract*).

In order to escape liability, the contractor can generally claim under clauses such as *force majeure*. *Force majeure* is, for instance, defined in Art. 18 of the CCAG and Art. 10.3 of the AFNOR NF P03-001 contractual standard. It includes bad weather, strikes and requisition orders.

There is no specific legal rule regarding concurrent delays. The consequences are generally apportioned between the parties depending on their respective responsibilities for the delay. Then, usually, flexibility is favoured in the interests of effective performance of the contract (e.g. in the form of extensions of deadlines and a delay management schedule).

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

Contractors, architects and technicians participating in construction works are subject to a common liability regime, which is the “builders” liability regime:

- (i) the 10-year warranty (*garantie décennale*) of Art. 1792 of the Civil code, which creates an obligation to correct any damage that compromises the solidity of the work or that affects one of its constituent elements or one of its equipment elements, making it unfit for its purpose;
- (ii) the two-year warranty (*garantie biennale*) of Art. 1792-3 of the Civil code, which guarantees proper operation of equipment forming part of the works; and
- (iii) the one-year full completion warranty (*garantie de parfait achèvement*) of Art. 1792-6 of the Civil code, which creates a one-year defects liability period covering all defects to the works.

For any other dispute stemming from a private law construction contract, there is a five-year limitation period (Art. 2224 of the Civil code) from the date when the events causing the damage were known to the aggrieved party. This period can be contractually adjusted between one and 10 years.

For claims originating from public law construction contracts, the limitation period is four years to claim debts due from the public administration. It is also important to note that specific rules and time limits are provided in the CCAG.

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

Contractual provisions setting time limits for bringing claims under a construction contract are generally upheld by French courts. Such provisions include Art. 55 of the CCAG, which provides that any disagreement must give rise to a pre-contentious claim first, and when the disagreement is related to the project of final account, the pre-contentious claim must be sent to the public authority within 30 days after receipt of the project of final account by the constructor.

The correct application of such provisions is always checked by the administrative courts, and their potential breach is sanctioned by inadmissibility of the claim (Conseil d’Etat, 16 December 2009, n°326220).

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

There are no mandatory provisions under French law. Thus, it is the parties who contractually stipulate who bears the risk of unforeseen ground conditions.

In practice, it is often the project owner who bears the risk. Indeed, this is what happens when the contract does not specify

who should bear the risk. The theory of unforeseen circumstances (*théorie des sujétions imprévues*) allows compensation to be obtained by the contractor for losses arising from unforeseen ground conditions in the context of public law construction contracts.

In private law construction contracts, the theory of unforeseen circumstances (*théorie de l’imprévision*) may play an equivalent role, in that it enables the contract to be renegotiated (modified or terminated) in the event of new circumstances, unforeseen at the time of execution of the contract, which have made the contract excessively onerous to perform.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

The situation is similar to that outlined in the previous question. There is no mandatory provision in the law. Thus, it is the parties who contractually provide who is to bear the risk of a change in law affecting completion of the works.

However, if the parties do not stipulate otherwise, in public law construction contracts the administration must ensure a certain protection against changes in law. This is particularly the case thanks to the *fait du prince* theory. This legal theory provides that the administration’s contractor is entitled to full compensation for the costs caused by a measure taken unexpectedly by the administration (that is also the employer) if this measure has disrupted the performance of the work contemplated in the contract.

In private law on the other hand, in the absence of a clause that would contractually create an obligation on the project owner, the contractor alone usually bears the consequences of a change in law.

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

Background intellectual property generally remains with the original owner, while intellectual property developed for a project (foreground intellectual property) is either assigned or licensed to the project owner.

For such foreground intellectual property, it is the architect-designer/project manager (*maître d’œuvre*) who owns the intellectual property. Art. L.112-2 of the Intellectual Property code protects plans, sketches and plastic works relating to architecture. The architect’s work is part of their intellectual and moral heritage (whether they work for a private or public person).

The moral rights of the architect ensure the protection of their work (in particular, against unreasonable modification or destruction). The economic rights of the architect over their work allow them to grant onerous licences to the owners of the construction in order to possess the rights of use, representation and reproduction. While economic rights can be assigned, the moral right remains with the architect.

3.10 Is the contractor ever entitled to suspend works?

The exception of non-performance (*exception d’inexécution*) (Art. 1219 of the Civil code) allows the contractor to refuse to fulfil its obligations if the other party does not fulfil its own. This principle can also be found in most contracts, particularly in the case of non-payment. This is, for example, provided for in Art. 53 of the CCAG on late payment.

In public law, however, these possibilities are reduced because the public administration has exorbitant rights which reduce

the contractor's ability to suspend the work. Such a suspension might be forbidden, as this could otherwise contravene the administration's obligation to ensure continuous performance of public services in the general interest.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party's grounds for termination must be set out (e.g. in a termination notice)?

It is usual to see termination clauses in public and private law construction contracts, where termination must be preceded by a sufficient period of notice, often in the form of a formal notice or a termination notice.

In public law contracts, the public authority is always entitled to terminate the contract, at any time, on the grounds of general interest, subject to prior notice and compensation of the constructor (Art. L.2195-3 of the CCP and Art. 49 of the CCAG).

The contracting authority is also entitled to terminate the contract in case of breach of contract by the contractor. Such termination is also generally subject to prior notice (Art. L.2195-3 of the CCP and Art. 50.3 of the CCAG).

Lastly, the administrative contract can be terminated by the public authority on the grounds of *force majeure* (Art. L.2195-2 of the CCP) and when specific events occur, such as the death of the contractor or bankruptcy after the receiver has agreed (Art. 50.1 of the CCAG).

On the other hand, in public construction contracts, the contractor is never entitled to terminate the contract unilaterally, except in cases of extended *force majeure*. They will always have to obtain a prior authorisation from the contracting authority or the judge, even in cases where the termination is requested on the grounds of a breach of contract by the contracting authority.

In private law, the principle is contractual freedom, but the parties may provide for termination clauses, often in the event of serious non-performance or non-payment (termination for fault). Termination may be unilateral (if provided for) or by mutual agreement of the parties. Art. 22 of the ANFOR NF P03-001 standard specifies the termination conditions.

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor's profit on the part of the works that remains unperformed as at termination?

In public law construction contracts, the public authorities can always terminate the contract in the general interest. In this case, the contractor is compensated not only for the loss suffered, but also for the loss of profit (*bénéfice escompté*). However, no fault or negligence must be attributable to the contractor.

In private law construction contracts, the conditions and consequences of termination for convenience must be agreed contractually. Otherwise, the contractor will only be compensated for the works already performed. A claim for loss of anticipated profits is unlikely to be entertained by a judge.

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

In French law, *force majeure* is provided for in Art. 1218 of the Civil code, and is defined as an event beyond the aggrieved party's

control which could not be foreseen at the time of the conclusion of the contract and the effects of which cannot be avoided, preventing the performance of the obligation arising from the contract. The aggrieved party can claim for an extension of time, and either party can terminate in case of extended *force majeure*.

A contract which has become uneconomic might lead to a claim under the *imprévision* theory, under public or private law (Art. 1195 of the Civil code); not under *force majeure*.

3.14 Is there any legislation or court ruling that has been specifically enacted or handed down to provide relief to parties to a construction contract for delay, disruption and/or financial loss caused by the COVID-19 pandemic? If so, what remedies are available under such legislation/court ruling and are they subject to any conditions? Are there any other remedies (statutory or otherwise) that may be available to parties whose construction contracts have been affected by the COVID-19 pandemic?

Following the promulgation of law n°2020-290 of 23 March 2020 on the state of health emergency, several ordinances were promulgated to ensure no penalty for delay would apply to contractors affected by the COVID-19 pandemic.

As regards administrative contracts, the French government adopted ordinance n°2020-319 dated 25 March 2021 related to the adaptation of public contracts due to the COVID-19 pandemic.

In the main, the ordinance allows the parties to extend the time limits potentially provided for in the contract. In cases where it is impossible for a party to fulfil its obligation, no penalty is incurred and its responsibility cannot be engaged.

The ordinance also contains specific provisions related to financial obligations, which are favourable to the constructor.

3.15 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

All persons who are not parties to the contract are third parties (*tiers*). Two central principles in French law apply. First, the principle of privity of contract (*effet relatif*) (Art. 1199 of the Civil code), which provides that only the parties to the contract are subject to its binding effects; third parties cannot rely on the contract. Secondly, the principle of opposability (Art. 1200 of the Civil code), which provides that the contract is opposable to and by third parties. Thus, the third party cannot demand the execution of the contract but can rely on it to prove a fact.

There are also two situations where the third party is involved in the contract because they are a beneficiary: stipulation for third parties (*stipulation pour autrui*) (Art. 1205 of the Civil code); and promises to stand surety for another (*promesse de porte-fort*) (Art. 1204 of the Civil code).

In the context of sale of construction works, any rights the seller has to claim against the contractor under the mandatory regime of decennial liability guarantee or under the general contractual liability regime are transferred to the buyer. The subsequent owner of a building will therefore be able to claim against the contractor, even if this is not expressly stipulated in the conveyancing agreement.

In public contracts, third parties can claim for the benefit of rights emerging from a "regulatory clause" (*clause réglementaire*) or any clause that directly infringes the third party's rights. The claim must be lodged within two months from the publication of the contract's award notice.

3.16 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

Direct agreements are used in France as a form of security, particularly in the context of public-private partnerships (PPP) and concessions, i.e., in project finance transactions. They will essentially be direct agreements which: (i) involve the contracting authority in the subcontract between the project company and the EPC contractor; and (ii) involve the lenders in the concession or PPP agreement between the contracting authority and the project company. The practice of collateral warranties is not as prevalent as it is in common law jurisdictions.

A specific agreement used in French project finance transactions, in addition to direct agreements, is the tripartite agreement (*accord tripartite*). Its aim is to ensure compensation of the lenders and hedging banks if the concession or PPP agreement is cancelled or withdrawn before it has become effective, but after it has been signed and a fixed interest rate set.

3.17 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

In French law, set-off (*compensation*) (Art. 1347 of the Civil code) makes it possible to extinguish debts between two persons who are reciprocally debtors and creditors of each other. It takes place as soon as it is invoked by the parties, on the date when the conditions are met, and without any maximum limit.

Set-off may be legal in origin if the debts are all due, fungible, certain, reciprocal and liquid. A set-off can be conventional and freely organised by the parties. It can also be ordered by a judge.

3.18 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

The duty of care as such does not exist in French law. There is, however, a general pre-contractual obligation to inform (Art. 1112-1 of the Civil code). This obligation to inform can neither be limited nor excluded. It remains a duty of the contractor during contractual performance. Thus, a party may be sanctioned on the basis of a failure to provide information, or on the basis of bad faith.

There are other duties of care during performance of the contract, particularly pursuant to consumer law and labour law. In recent years, French law has also developed the duty of vigilance of parent companies and ordering companies (law of 27 March 2017), which requires parent companies to take preventive measures and monitor the actions of subsidiaries with regard to compliance with respect for human rights, ethical and environmental issues and civil liability. The concrete impact of these new legal provisions remains marginal in France at this stage.

3.19 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

In a situation of conflict between the parties and in the event that the clauses of the contract are ambiguous, it is the judge

who decides by his sovereign power of appreciation, taking into account the parties' common intention.

In practice, the judge has two methods at his disposal: *in abstracto* assessment; and *in concreto* assessment. The first is to reconstruct, *in concreto*, the common intention of the parties, the reasons which led them to contract and the meaning they gave to the clauses of the contract. If this intention cannot be identified, the judge uses the *in abstracto* method and compares the interests of the parties with the average interests of individuals in the same situation. The aim is to find out what a reasonable person would have chosen in that situation. The judge then uses reference standards.

3.20 Are there any terms which, if included in a construction contract, would be unenforceable?

Although contractual freedom is the rule, some clauses may be unenforceable (deemed unwritten – *réputée non écrite*). This is particularly the case if the clause is contrary to French public order (*ordre public*) or mandatory rules (*lois de police*) within the meaning of Art. 3 of the Civil code. Examples include the decennial liability regime and the protection of subcontractors in accordance with law n°75-1334 on subcontracting, or all the rules related to public domain protection.

In addition, there are rules specific to contract law which prevent the inclusion of certain clauses. For instance, if an obligation is conditional, the condition cannot depend on the party who benefits from such obligation (*condition potestative*) (Art. 1304-2 of the Civil code).

3.21 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

The extent of the architect's obligations depends on the nature of the contract with the project owner. The liability that applies is therefore the same as that for construction law in general and depends substantially on what has been contractually agreed.

The architect/designer will be bound by decennial liability in the same manner as the contractor and other builders. If the construction works structure is defective or if the works are no longer fit for purpose within the 10 years following handover, this could be the result of faulty design. The designer would then be responsible.

3.22 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

All parties involved in construction works (contractors or engineers) are bound by decennial liability (Articles 1792 and 2270 of the Civil code). They must rectify or bear the financial consequences of rectification if, within 10 years from handover: (i) the works structure suffers damages; or (ii) the works are no longer fit for their intended purpose.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

Traditionally, disputes are settled in court (civil court for private contracts and administrative court for public contracts).

However, for reasons of time and cost, alternative methods of dispute resolution are becoming more common and are now preferred. These include, in particular, mediation and conciliation procedures. One of the aims of the CCAG and the AFNOR NF P03-001 standard is to avoid recourse to the courts by contractually setting out the methods of dispute settlement.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

The use of adjudication processes is developing in France, although there are no statutory adjudication processes yet, except for claims below €5,000 where the client is not a professional (decree n°2019-1333 of 11 December 2019). The same applies to interim dispute resolution, which makes it possible to avoid costly and slow litigation. We note in particular the development of dispute review boards, which are a mainstay of FIDIC (*Fédération Internationale des Ingénieurs-Conseils*) contracts and can increasingly be seen in French standard construction contracts, such as the CCAG for public works since 2009, the private construction contract NF P03-001 standard since 2017, and the construction subcontracts issued by the French federation of public works (*Fédération nationale des travaux publics*) since 2018.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

The use of arbitration tribunals is becoming increasingly popular in France, but it is still not in the majority and is not used specifically in public law contracts.

It occurs more frequently in private law contracts, and particularly in international contracts. Recourse to an arbitral tribunal may be stipulated by the parties in the contract (*clause compromissoire*) or decided by mutual agreement once the dispute has arisen (*compromis d'arbitrage*). The most frequently chosen arbitration rules are the rules of arbitration of the International Chamber of Commerce.

4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

As the arbitral tribunal is a private court, arbitral awards are effective if the parties comply spontaneously. If the award needs to be made enforceable, the *exequatur* procedure must be followed.

Under French law, there are only five situations in which *exequatur* is not granted (Art. 1520 of the Civil Procedure code): the arbitrators were not competent; the arbitral tribunal was set up irregularly; the arbitral tribunal exceeded the missions entrusted to it; the arbitral tribunal failed to comply with the adversarial

principle; or the award is contrary to public order. These situations are similar to those mentioned in the New York Convention.

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

In France, there is a difference between the civil courts for the private sector and the administrative courts for the public sector.

In case of private dispute, the civil court is competent to hear the case. The appeal is made to the Court of Appeal. Finally, the *Cour de Cassation*, the highest civil court, may be consulted after the appeal. Before the judge of first instance, it takes at least a year to obtain a decision, especially as the experts' reports that are required are often numerous and complex. From the introduction of an appeal to the Court of Appeal, it takes a year to a year-and-a-half to obtain a decision.

In the event of a public dispute (i.e., where one of the parties is the national government, a local government or an agency), such as a dispute regarding public works, the administrative court is competent to hear the case. Appeals are made to the Administrative Court of Appeal. Finally, the State Council (*Conseil d'Etat*), the highest administrative court, may be consulted after the appeal. Before the judge of first instance, it takes a year to obtain a decision. From the introduction of an appeal, it takes a year to two-and-a-half years to obtain a decision from the Administrative Court of Appeal.

However, there are emergency procedures known as emergency interim proceedings (*référé*). They allow the claimant to obtain provisional decisions on the constitution of a provision, guarantees or restoration.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

A distinction must be made between European and non-European countries. The Member States of the EU are subject to common rules, in particular the Brussels I *bis* Regulation of 12 December 2012, which stipulates that the judgment of a Member State has effect in all Member States. No additional procedure is necessary: the foreign European decision has the authority of *res judicata* in France, although an additional regularity check can be requested.

For court decisions made outside the EU, the traditional procedure is that of *exequatur*. Three cumulative conditions are then required: recognised competence of the foreign court; conformity of the decision with French international public order; and absence of fraud. Nevertheless, it is possible for the judgment to produce effects without binding recourse to the *exequatur* procedure (automatic recognition, probative force and *de facto* effect).



Stéphane Gasne (Partner) has solid experience of almost 20 years on large-scale projects across Europe, Africa and Asia, working with major players in the energy and construction sectors, as well as development banks, infrastructure funds and sponsors.

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Founded in Paris in 1972, DS Avocats is one of the leading independent law firms in France. Through a network of 24 offices established on four continents – Europe (Belgium, France, Germany, Italy, Spain), Asia (China, Singapore, Vietnam), North America (Canada), South America (Argentina, Chile, Peru) and Africa (Morocco, Senegal) – it is the main French law firm with an international dimension. Around 400 lawyers offer their global clients in-depth legal expertise and knowledge of market standards and practices. DS' areas of practice include construction and engineering, project finance, energy, urban development and planning, real estate, environmental law, litigation, intellectual property, corporate law, mergers and acquisitions, financing, restructuring, tax, labour, banking and finance, insurance and health law.

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Andreas Berger

1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (NB For ease of reference throughout the chapter, we refer to “construction contracts” as an abbreviation for construction and engineering contracts.)

The most important types of construction contracts continue to be the unit price (volume-based, compensation by unit price) and the flat rate (fixed compensation regardless of volume) formats. The unit price contract is typically preceded by the client's planning and is therefore a “construction only contract”. The client's planning is typically created on the basis of a separate contract with a planning firm (“design-only contract”). A flat rate contract is usually based on lower depths of planning, which is why the definition of performance interfaces between construction and planning contracts is an important issue, especially with major projects. In order to minimise interface risks, planning and construction services are combined in a uniform contractual document, especially in cases of what are known as total/general contractor contracts. In addition, there is also a general contractor agreement, which is characterised by the fact that the general contractor does not perform construction work itself, but “only” hires other companies to perform the work (“management contracting”).

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

Partnering plays a role in the context of individual major projects. General contractor models with a guaranteed maximum price and construction management models with a single-stage or two-stage orientation are used for selected projects. Using individual model elements of these early partnering contract typologies, new attempts have now also been made to strengthen partnering with special contract options. In particular, efforts are being made to make IPD and multiparty contracts practicable. Nevertheless, small and medium-sized construction projects are executed on the basis of standard contracts (see question 1.1).

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

The most common types of construction contracts continue to be the unit price (volume-based, compensation by unit price) and the flat rate (fixed compensation regardless of volume) formats. All construction contracts are based on the provisions of §§ 631 ff. BGB (German Civil Code) and, typically, on the *Vergabe- und Vertragsordnung für Bauleistungen Teil B* (Construction Tendering and Contract Regulations Part B; VOB/B).

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

There is the Federal Procurement Handbook (VHB), which is published by the ministry responsible for federal construction as a working tool for the handling of building construction projects supervised by the federal construction administrations. It contains various forms that implement the regulations of the VOB/B, on the basis of which public clients tender for and contract construction services, and conclude and execute contracts.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

In German law, a contract is concluded by two corresponding declarations of intent, called offer and acceptance. In addition to the consciousness of the respective parties to make a declaration of intent in the first place, there also needs to be the will to be legally bound. Contracts can be concluded orally, although this is unusual in the case of construction contracts. In the case of construction contracts with a consumer, the text form of the contract is required by law (Section 650 i (2) BGB). Building development contracts require notarisation (Section 650u (1) in conjunction with Section 311b (1) BGB). In the case of planner contracts, a remuneration agreement must be made in text form (Section 7 (1) HOAI (Fee Regulations for Architects and Engineers)).

1.6 In your jurisdiction please identify whether there is a concept of what is known as a “letter of intent”, in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

The letter of intent is not regulated explicitly in the German Civil Code (BGB), but the commencement of contract negotiations or the negotiation of a contract already creates a legal relationship with the duty to take the interests of the other party into account. In addition, in the run-up to larger construction projects, letters of intent are often concluded which regulate further rights and duties (for example, costs of the draft contract, etc.) between the parties.

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer's liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors' all-risk insurance?

In Germany, architects are required by law to take out business liability insurance that also covers personal injury. This is not regulated by law for construction companies, but they will often also have a business liability insurance policy. Builders regularly have construction performance insurance, which should cover any damage caused by all those involved in the project.

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

There is a whole series of ordinances and legal regulations that a construction company must comply with (e.g., Minimum Wage Act, Social Security Act, Value Added Tax Act). These laws regularly oblige the companies carrying out the construction work, but also allow recourse to the respective client if certain fees are not paid. These issues are frequently regulated in construction contracts. For example, the contractor is often required to declare that he will pay the minimum wage and hold the client free from claims by the authorities.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

Building and fire protection is regulated in the building codes of the federal states and therefore varies from federal state to federal state. The regulations included therein must generally be complied with by the contractor even without an explicit contractual agreement. Ultimately, however, the client is responsible for ensuring that the statutory requirements are complied with. In addition, there are regulations for the realisation of construction projects (recognised rules of technology), which are often written down in DIN standards that are based on building and fire protection regulations.

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

The client may retain part of the agreed payment as security after completion of the construction work and its acceptance. This is a consequence of the law (Section 641 (3) BGB), if defects are evident. A general security to cover any defects occurring after acceptance is not legally provided and must be agreed upon between the parties.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor's performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

Performance bonds are permissible, and are usual, to ensure that the contractor fulfils his obligations. However, the amount of these securities, which can be agreed in general terms and conditions, is capped by case law at 10% of the contract price. In this context, guarantees on first demand in general terms and conditions are considered invalid by German case law. In the event of a claim by the Principal, the Guarantor may rely on the same objections as the Contractor. It is also possible to avert the Principal's claim against the guarantor by way of an injunction. The Berlin Court of Appeal has ruled in favour of this in the case that the Principal had not provided a construction workman's guarantee in violation of Section 650f of the German Civil Code (BGB). However, such lawsuits are very rare.

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

Company guarantees are generally permissible outside of Section 650f BGB, but are not common in the context of construction projects. The form of these securities, which are not regulated by law, is left to the parties.

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

It is possible for suppliers to rely on a retention of title as far as purchase contracts are concerned (§ 449 BGB). In the case of construction contracts, materials delivered to the construction site generally remain the property of the contractor until they are built-in and connected to the property. Upon their installation, they become the property of the client.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

Construction supervision represents a critical service provided by architects and engineers, which specifically encompasses the determination of how far performance has progressed ahead of billing, quality control with a view to possible defects, follow-up management regarding changed or added services as well as the preparation and transaction of complex completion, acceptance, and commissioning processes. Insofar as such processes in general contractor projects are typically characterised by the fact that the general contractor bears responsibility first for coordinating and monitoring any subcontractors it uses, and the scope of performance of service providers engaged is defined according to interface aspects, the assignment of work to individual trades may well serve the purpose of controlling a high number of contractors (in the double-digits). For this reason, architectural and engineering firms can be set up quite differently when it comes to planning and monitoring, and this is true not least of all because, in many instances, technically sophisticated aspects such as fire-protection or building automation systems are to be checked as specialised fields in addition to construction-related work in a narrower sense. The architect or engineer is regularly the client's trustee, and as such, his representative of interests and therefore not neutral. Since the architect or engineer may be liable, along with the contractor, for defects that it caused by itself or with others as a joint and several debtors, the services in question entail significant potential liability for architects and engineers.

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a "pay when paid" clause?

Within a contractual chain, the obligations assumed by the parties must first be considered independently from one another, which is why a subcontractor is entitled in legal relations with the general contractor to be compensated for services rendered even if the general contractor does not receive payment from the client. Provisions that deviate from this rule may be negotiated for individual contracts on a case-by-case basis. In standard agreements, however, clauses of this nature may very well be deemed violations of the provisions on the effectiveness of general terms and conditions. Therefore, general contractors in particular are well advised to consider availing themselves of legal rights to security, with a view to minimising any risk related to advance performance.

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate

of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

Contractual penalties should be used to address instances in which binding deadlines are missed. Although the occurrence, amount or proof of specific damages do not matter to such extent, fixed penalties that accrue as a flat rate by the day may be applied on the basis of contractual-penalty clauses. The pertinent case law provides that such clauses be subjected to a critical examination regarding specificity, the significance of culpability, daily rates, and caps; especially on the basis of aspects of general terms and conditions (AGB). Irrespective of the effectiveness of contractual-penalty clauses, the claimant may assert a claim for damages in an amount exceeding the contractual penalty. If, in the event of default, an elevated liability risk looms (e.g., because construction work is performed on economically significant industrial manufacturing facilities), the parties should illustrate conceivable scenarios in a transparent manner and provide for agreements limiting liability in consideration of the amount of available insurance coverage. Generally speaking, the question of fault will almost invariably be a controversial one in cases of delays, which is why, in many of these cases, the contractor's claims for added costs on account of the duration of construction (which in building-related cases are exorbitant) are opposed by the client's claims related to contractual penalties and damages caused by delays.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

Clients are entitled to direct the performance of services that were not part of the original scope of performance. Services that are required for the realisation of the contractual object of performance may be demanded without restrictions of any kind (§ 650 b (1) sentence 1 no. 2 in conjunction with sentence 2 BGB). Services that amount to changes to the original object of performance may be demanded only to the extent that they do not impose an unreasonable burden on the contractor (§ 650 b (1) sentence 1 no. 1 in conjunction with sentence 2 BGB). In both cases, another limitation applies: both sides must first endeavour for 30 days to bring about an agreement regarding the execution and price of the service requested by the client. Only after this period has lapsed may the client direct the performance of the service in question (§ 650 b (2) BGB). According to the VOB/B, the Principal also has the right to issue orders regarding the scope of services. In doing so, he does not have to comply with the period of 30 days stipulated in the BGB, but can demand that the services be performed immediately. However, it is currently the subject of lively debate as to whether such a right to issue instructions in general terms and conditions is also effective in view of the statutory regulations in the BGB.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

Without the client's consent, the contractor is not entitled to refuse performance of tasks assigned to it, whereas the client is

entitled at any time to revoke the assignment of certain tasks given to the contractor. Under German law, this would be considered a partial termination of services already contracted out. In the event that such partial termination is effected in the absence of cause, the client must compensate the contractor at the agreed rate, even for services that were not rendered. Such payment is to be adjusted only by any expenditures the contractor saved as well as any alternative gainful activity on its part (§ 648a BGB and § 8 (1) VOB/B₁). By contrast, the possibility of partial termination for cause, such as failure to perform or remedy defects despite prior notice, is subject to limitations in that it must refer to a definable (§ 648a (2) BGB) or a self-contained (§ 8 (3) item 1 sentence 2 VOB/B) part of the performance.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

In principle, the parties are free to agree on anything they want in the contract (contractual autonomy). Limits are set by certain legal requirements (e.g., unethicity in 138 BGB). If a party wishes to use general terms and conditions, these must also be measured against legal standards (§ 305 ff. BGB). An exception applies to the provisions of the VOB/B, if these are agreed unchanged. These provisions are deemed to be valid (Section 310 (1) sentence 3 BGB). In construction contract law, there is also an obligation for the parties to cooperate (construction contract cooperation requirement). This mutual duty has been developed by case law.

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

Pursuant to § 6 (2) of the VOB/B, the contractor is entitled to an extension of the construction period if, and to the extent that, it faces obstacles to its capacity for rendering performance due to circumstances found within the client's sphere of risk or resulting from strike or a lock-out ordered by the client's trade association at the contractor's own place of operations or a business working directly for it, or due to *force majeure* or other circumstances beyond the contractor's control. Circumstances within the client's sphere of risk include approvals and plans to be obtained – but not provided in time – by the client, along with delays in advance services owed by other contractors engaged by the client. Such right to an extension of the construction period exists even if the contractor's inability to work during the period of obstruction stems additionally from factors attributable to the contractor. In such cases, however, the contractor may not demand financial compensation, since that would require that the obstacle occurred through no fault of the contractor's own and that the contractor is ready to render performance (§ 642 BGB and § 6 (6) VOB/B).

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

In Germany, claims lapse after three years as a rule (§ 195 BGB). Unless another starting date has been specified, the period of limitation commences upon the end of the year during which

the claim came about and the client learned of the circumstances giving rise thereto, as well as the identity of the obligor – or would have learned thereof if not for gross negligence. Special rules apply to warranties under service and construction contracts. These claims typically do not expire until five years have lapsed for objects of performance, the realisation of which takes the form of rendering planning or monitoring services (§ 634 a (1) and (2) BGB). § 13 (4) the VOB/B provides different warranty periods for different types of services. Nevertheless, the four-year period specified therein is typically extended to five years by way of contractual agreement.

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

Contractual time-bar provisions that deviate from the legal requirements are possible in principle, but as general terms and conditions they must be measured against the legal requirements in this regard. In particular, substantial extensions or reductions of the limitation periods in general terms and conditions will often be invalid. However, the parties may individually determine periods of limitation that deviate from the statutory periods up to absolute legal limits (e.g., the maximum period of limitation of 30 years, Section 197 BGB). For example, a longer limitation period than the statutory limitation period is typically agreed for sealing work.

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

As a rule, the parties to a construction contract regard the risk associated with unforeseen ground conditions as a quintessential client risk, which is why clients have frequently tried to transfer it to the contractor in construction contracts. The law, however, has favoured a differentiated approach in recent years, and no longer recognises the risk's assignment to the client as dogma. Instead, the contractual provisions are to be examined for details about soil conditions and any indication that, according to the contractual documents, even unanticipated deviations from such conditions have been moved into the contractor's sphere of risk. For purposes of the terms governing general terms and conditions, however, any wholesale assignment of the risk of unforeseen ground conditions to the contractor continues to be subject to stringent limitations.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

In construction contracts placed within the purview of the VOB/B, the building performance must adhere to the technical norms in place at the time of acceptance (§ 13 (1) sentence 2 VOB/B). The BGB does not contain these specifications. Nevertheless, consideration should be given to the option of applying the contractor's obligation to register concerns about the performance with which it is tasked even in constellations in which the legal – and technical – requirements undergo changes after the closing. If the contractor is required to meet the new, current requirements either under the VOB/B, or at the client's direction, it is entitled to a claim for additional compensation with respect

to the altered performance so long as the changes to the legal or technical norms could not be foreseen at the time of the closing.

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

The copyright typically rests with whoever renders the performance in question. However, protection under copyright law is not available to each aspect of performance. Instead, a certain depth of creation is needed to justify such protection for the work in the first place. If protection under copyright law is available, one must differentiate as follows: the “moral right” (*Urheberpersönlichkeitsrecht*) encompasses the right of publication, the right to be credited as the creator and protection against the defacement of the work product, all of which cannot be transferred as a rule. By contrast, “rights of use and exploitation” (*Nutzungs- und Verwertungsrechte*) with respect to the copyright may be transferred to the recipient (here: the client). Contracts typically contain specific clauses to this effect, lest it should be determined based on the object of performance in question whether and to what extent rights of use and exploitation under copyright law were transferred to the client.

3.10 Is the contractor ever entitled to suspend works?

The contractor must complete its performance on or before the agreed completion date. Even if either the contractor or the client allowed for ample time, the contractor is not obliged to work faster than necessary in order to meet the completion date. In other words, it may take breaks or adjust the number of staff assigned to the project. By contrast, setting specific contractual milestones facilitates more narrow requirements, though it is true irrespective of the number and nature of agreed deadlines that the contractor is released from its obligation to render performance if and when the client fails to assist with the contractor's performance as required – e.g., by obtaining building permits or conducting planning. In addition, the Contractor is entitled to a right to refuse performance if the Principal is delayed in the payment of invoices, fails to provide a required construction work security in due time, or if obstructions occur which make it impossible for the Contractor to carry out its work.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party's grounds for termination must be set out (e.g. in a termination notice)?

Both parties have a right to terminate for cause if the other party provides such cause, in which case only the services rendered to date are subject to compensation. Furthermore, the blameless party is entitled to damages. On the client's side, important causes for termination include defective or delayed performance by the contractor despite repeated notices as well as the contractor's insolvency or anti-competitive conduct. On the contractor's side, such causes are the client's default in payment or failure to assist despite repeated notices. § 648a BGB sets forth these principles for client and contractor, whereas the VOB/B differentiates between the client's right of termination under § 8 (2), (3) and (4) and that of the contractor in § 9.

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor's profit on the part of the works that remains unperformed as at termination?

The client may terminate the contract at any time and, thus, without cause (§ 648 BGB and § 8 (1) VOB/B). However, by way of compensation for the right to terminate freely and without cause, the client must make payment to the contractor in the full amount, such payment to be adjusted only by any expenditures the contractor saved as well as any alternative gainful activity on its part.

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

German law recognises “*force majeure*” and “frustration of performance”. In terms of provisions specific to a construction contract, such events initially give rise to a claim for an extension of the construction period. In cases in which the contract cannot be consummated because performance is impossible for all parties involved objectively, or for the obligor subjectively, § 275 BGB applies to the effect that the obligor is released from its obligation to render performance. The client's associated claims for damages or the reimbursement of expenditures are subject to a differentiated regime, with the mere inefficiency of a contract not being equated with *force majeure* or frustration of performance. Instead, this case is governed by the construct of the “lapse of the basis of the contract” (*Wegfall der Geschäftsgrundlage*) (§ 313 BGB), which applies to cases in which certain assumptions that both parties regard as essential to the contract are proved incorrect. If this condition is present, the contract is to be amended to approximate how the parties would have written it if they had foreseen such development.

3.14 Is there any legislation or court ruling that has been specifically enacted or handed down to provide relief to parties to a construction contract for delay, disruption and/or financial loss caused by the COVID-19 pandemic? If so, what remedies are available under such legislation/court ruling and are they subject to any conditions? Are there any other remedies (statutory or otherwise) that may be available to parties whose construction contracts have been affected by the COVID-19 pandemic?

With respect to construction contracts, there have been no changes in legislation or court decisions specifically attributable to the COVID-19 pandemic. The parties are essentially referred to the application of Section 313 of the German Civil Code (explained under question 3.13), although it has now been clarified by case law that certain effects of the COVID-19 pandemic may constitute a lapse of the basis of the contract in individual cases.

3.15 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

German law recognises agreements for the benefit of third parties. Parties purposely enter into such agreements in order

for third parties to assert rights on the basis of them. German law additionally recognises agreements that provide protection for the benefit of third parties, under which third parties are to be shielded by way of contractual arrangements. However, the question posed here is likely concerning the notion of subsequent owners of buildings asserting claims, including but not limited to those under warranties, against the contractor. For this purpose, one must differentiate with respect to contractual claims, such rights are available only if the original client has assigned them to the purchaser or user, whereas there are extra-contractual claims that may be asserted against the building contractor in cases of violations of absolute legal interests (e.g., life, body, health as well as property or possession).

3.16 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

Direct agreements between the Contractor or subsidiary guarantees with third parties not involved in the contract with the client are unusual in Germany. The Contractor regularly “only” concludes a contract with the client and, if necessary, also with subcontractors in order to fulfil its contractual duties. Any financiers typically conclude contracts only with the client. At most, external financiers are involved as guarantors.

3.17 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

Set-off is possible (§§ 387 et seqq. BGB). It requires that the claim which is to be adjusted is both due and undisputed. The right of set-off may be qualified by mutual agreement. However, the law governing general terms and conditions permits such restrictions only so long as the right of set-off is not qualified when it comes to undisputed or effectively established claims.

3.18 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

As a rule, the parties’ duties flow from the contract and applicable legal provisions. German law recognises duties of protection and care already in the context of the run-up to the closing (§ 311 BGB). The construction contract, moreover, imposes a “duty of cooperation” on the parties, which means that the parties to a contract subject to the VOB/B, are bound by a duty to cooperate with one another throughout contractual performance. For this reason, there are obligations and duties of cooperation and mutual information, with Germany’s Federal Court of Justice stressing that the duty of cooperation is intended to procure, among other things, that differences of opinion in cases in which one or both parties deem a contractual amendment necessary are settled amicably.

3.19 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

German law is vulnerable to the possibility of contractual arrangements requiring interpretation. The parties may specify how they want provisions in need of interpretation to be constructed. In the event that the contract is subject to the VOB/B, § 1 (2) thereof stipulates a certain order for the contractual bases in cases of conflict. As a rule, however, both the BGB and the VOB/B hold that detailed and specific contractual stipulations are to prevail over general ones, and the more recent provision is to be given preference over older ones. In addition, contractual provisions and specifications for performance are to be constructed as a cohesive whole.

3.20 Are there any terms which, if included in a construction contract, would be unenforceable?

Regulations that violate mandatory law are never enforceable. For the rest, as a matter of principle all obligations the parties addressed in the construction contract are enforceable, although there is an exception to the rule: The pertinent case law treats the client’s acts of cooperation as “duties” (*Obliegenheiten*) that are not enforceable, rather than obligations (*Pflichten*) that are. For instance, in the event that the client fails to obtain building permits or conduct planning as required, the contractor may demand that it be compensated financially for the resulting period of obstruction, and it may even terminate the contract for cause following the lapse of the applicable legal deadline. However, it cannot compel the client to obtain such building permits or conduct such planning by means of legal action.

3.21 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer’s obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

Construction and planning contracts are considered contracts for work and labour, and the same is true for building contractors responsible for planning. The contractor owes successful performance, and bears liability for defects or delays. Until the object of performance has been realised, it is required to expend the requisite resources, which is why the obligation to remedy defects exists irrespective of culpability. By contrast, the contractor is liable for damages only if it is culpable and the defect could have been avoided by applying the customary care. Such liability is unlimited as a rule unless the contract provides for limitations thereof. However, the contractor’s liability for intentional misconduct and gross negligence cannot be qualified by way of its general terms and conditions.

3.22 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

“Decennial liability” does not exist in German law.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

It is preferable that conflicts be processed and resolved by way of negotiation. If this approach fails, the dispute's resolution requires third-party support. In the event that the parties did not already agree to means of extra-judicial arbitration when entering into the contract or at a later point in time, either of them may appeal to a civil court. Legal action continues to be by far the most prevalent method of processing conflicts, and yet parties to construction contracts have become conscious of the weaknesses of legal proceedings when it comes to dispute resolution, which is why they – and those helping them to draft their contracts – frequently endeavour to include clauses designed to prevent conflict, address them and resolve them extra-judicially. Consequently, mediation and adjudication are used with increasing frequency.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

While the law does not provide for adjudication proceedings, the parties are free to do so, and any adjudication proceedings so agreed are subject to the applicable rules of procedure. Pursuant to § 650 d BGB, a temporary injunction in disputes regarding the right to give orders under § 650b, or the adjustment of compensation under § 650c, does not require that special urgency be established as the reason otherwise mandated for seeking injunctive relief once construction work has ensued. Thus, in cases such as these, temporary and very fast injunctive relief is available to bring about a preliminary resolution of the question in dispute; a final resolution may then be obtained in regular legal proceedings.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

The VOB/B, as the template for construction contracts, did and does not provide for an arbitration clause. Only § 18 (2) entitles the contractor of agreements with government agencies to appeal to the competent office for resolution in cases of differences of opinion. § 18 (3) VOB/B allows for the stipulation of extra-judicial dispute-resolution mechanisms. As a result, clauses of this nature to date are found in construction contracts only if either party or its legal counsel took care to include them. No clear favourite has emerged in Germany when it comes to the type of process agreed for conflict resolution. In many cases, mediation clauses from the association of construction and real-estate mediators (*Verband der Bau- und Immobilienmediatoren*) are incorporated (www.vdbauimm.de). Otherwise, adjudication, conciliation and arbitration clauses are used.

4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

Germany is a signatory of the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Hague

Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, which is why arbitral awards are recognised in accordance with these conventions. The recognition of an arbitral award's substantive force of law depends on whether it is consistent with the fundamental principles of the German code of law; for now, such arbitral awards are assumed to stand. As part of the enforcement of foreign arbitral awards, therefore, the party opposing enforcement must plead the reasons and prove why recognition and enforcement are to be denied.

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

The parties to a construction contract must file their claims in regional courts as a rule; only disputes worth less than EUR 5,000.00, which do not touch on the client's right to give directions pursuant to § 650b BGB, or the amount of the claim for compensation resulting from a direction given by the client (§ 650c BGB), may be brought to district courts (§ 23 no. 1 of the Court Constitution Act (GVG), § 71 (1) and (2) no. 5 GVG). Where regional courts have jurisdiction over disputes arising from construction or architectural contracts, or from engineering contracts, construction divisions – specialised in the interest of higher-quality judgments – have been set up to deal with building services (§ 72 a no. 2 GVG). Here, Germany recognises two appellate instances, with the higher regional court adjudicating appeals before Germany's Federal Court of Law examines appeals on point of law. The Federal Court of Law exclusively looks into the proper application of the law, to the exclusion of a review of the facts of the case. Given the need for frequent discovery as well as the complexity of relevant technical issues in many of these cases, legal proceedings dealing with construction matters often take longer than other civil cases, with lower-instance proceedings typically lasting between one and four years, appellate proceedings approximately two years, and cases adjudicated by the Federal Court of Justice (where an appeal on points of law has been admitted or an objection against denial of leave to file appeal has prevailed) up to three years.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

The option to enforce foreign judgments in Germany is governed by § 328 of the Code of Civil Procedure (ZPO) and in cases of judgments from signatories of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters by the Brussels Convention. This means that the judgments of foreign courts may be enforced in Germany subject to certain procedural requirements. This is not the case if the foreign courts would not have jurisdiction under German law, the defendant was unable to properly defend itself, the judgment is inconsistent with certain other rulings, recognising the judgment yields an outcome that is patently incompatible with the principles of German law or reciprocity is not guaranteed.



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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (NB For ease of reference throughout the chapter, we refer to “construction contracts” as an abbreviation for construction and engineering contracts.)

The demands of the project inform the nature of the construction contract. However, the most frequently used form is the EPC, and the design-and-build contracts which largely mitigate the risks of an employer and fix the contractor with the responsibility for design and construction. This form is popular because it reduces the costs involved in engaging a separate designer and contractor. It also reduces the potential for disagreements or conflicts which could stall the project or degenerate into disputes. In these contract forms, the parties may agree to permit sub-contracting, with or without the input of the employer, where the contractor is liable to the employer for the negligence and defaults of the sub-contractors.

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

Collaborative contracting is developing in the construction industry in Ghana, but it is not prevalent. The passage of the Public Private Partnership Act, 2020 (Act 1039) has led to an increase in collaborative contracting between state agencies and private enterprises.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

The most used standard-form contracts are the FIDIC contracts. However, other specialised standard-form contracts such as the NEC 3 suite of contracts are also used in the construction industry.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

The nature of the construction demands will dictate which type of contract is adopted for the project. However, the FIDIC contracts remain the more frequently used standard-form contract. However, it is not uncommon to find bespoke contracts used for projects involving public works.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

Ghana is a common law jurisdiction and as such, the requirements for the formation of a binding contract generally apply in Ghana. Thus, for a contract to be binding and enforceable on the parties, the elements of an offer, acceptance, consideration, and the intention to create legal relations must exist. However, the Contracts Act, 1960 (Act 25) has modified the requirement for consideration by providing that where a party makes a promise to keep an offer open for a specified time, the law regards this promise as a binding contract, even though the recipient of that promise has not provided consideration. Moreover, in certain circumstances, the Courts consider that legal obligations may be created based on a finding of promissory estoppel. Essentially, if one party makes a representation on which the other party relies to his detriment, the courts are likely to find the existence of a legal relationship depending on the peculiar circumstances of that case. While there are no mandatory legal requirements specific to construction contracts, the Contracts Act, 1960 (Act 25) has special formality provisions relating to guarantee contracts which are essential for the financial arrangements typical in construction transactions. Thus, a guarantee is void under Ghanaian law unless it is signed by the guarantor, whether the contract guarantees the due payment of a debt or the due performance of any other obligation in the sense of performance bonds.

1.6 In your jurisdiction please identify whether there is a concept of what is known as a “letter of intent”, in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

The Ghanaian Courts recognise the legal concept of the pre-contract arrangement in a “letter of intent” (LOI). However, whether the LOI is binding or non-binding depends on the language used in it. In one instance, the Court of Appeal found obligations under an LOI to be binding because the employer made representations after the LOI which caused the contractor to incur losses. The Court of Appeal adopted what it referred to as “the commercial approach to the interpretation of contracts” and held that despite an exclusion of liability clause in the LOI, the employer would be liable for the costs the contractor incurred by procuring equipment into Ghana for certification requested by the employer post-issuance of the LOI.

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer’s liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors’ all-risk insurance?

The Insurance Act, 2021 (Act 1061) requires commercial building insurance in connection with the construction of the building to cover matters such as loss or damage caused to a person. The commercial building insurance must also provide cover for legal costs connected with defending a claim of loss or damage including the costs of investigating and settling such a claim. The law makes it mandatory for commercial building insurance to cover against the hazards of collapse, fire, earthquake, storm, and flood. The law also requires that public liability insurance must be maintained for commercial buildings. For public liability insurance, the insurance contract must cover matters such as bodily injury or property damage that occurs during the policy period arising out the business activities of the insured entity. A failure to secure these insurance contracts is a criminal offence under the laws of Ghana.

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

The major legislation that regulates employment relations is the Labour Act, 2003 (Act 651). In determining whether a person is considered an employee or an independent contractor, the Ghanaian courts look to the terms of the contract and the obligations undertaken by either party. In practice, there is a trend where contractors engage the services of employment agencies who are the legal employers of workers required on the site. Thus, the employment agency will be engaged as an independent contractor who will be paid fees. If the workers are considered employees under the terms of their contract, the Employer has the obligation of paying the pension contributions. In circumstances where the employer fails to perform its obligations in respect of pension contributions, the directors of the company are liable to criminal prosecution by the state. The employer also has the

obligation to withhold employees’ taxes as stipulated under the Income Tax Act. The employer also has a statutory duty to ensure that its employees work under satisfactory, safe and healthy conditions. This includes an obligation to provide personal protective equipment, and the necessary information and training.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

There are regulations that prescribe standards and statutory requirements in relation to building and fire safety that apply to construction projects. For instance, the Ministry of Works and Housing produced the Ghana Building Regulations in 1996 (L.I. 1630) to regulate the erection, alteration, or extension of a building. Since then, the Ghana Standards Authority in 2018 produced the Ghana Building Code to ensure uniformity of standards for the regulation and compliance of stakeholders in the building construction industry, in terms of public health, general safety, fire protection, structural efficiency and integrity, and environmental integrity and sustainability.

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

It is not uncommon for the employer to retain part of the contract price for defect liability or until substantial completion of the work. Until recently, the industry practice was for the employer to retain 5% of each invoice raised as retention money for defect liability. The new trend is to tie payments to the completion of certain milestones, while retaining a portion of the contract price to cater for defect liability. Factors that may influence the percentage retained include the nature of the project and the source of funding. Key payment milestones include mobilisation, testing, and the issuance of a certificate of completion. This contractual arrangement is usually balanced for the benefit of the employer. For the employer, it ensures that a substantial part of the construction project is completed, and the contractor has the incentive to correct any identified defects during the defect liability period.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor’s performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

It is now common practice for employers to require performance bonds issued by banks and insurance companies. The bond is usually 10% of the contract price. The performance bonds are typically issued for payment on demand without the right of challenge by the bank or the insurance company. Thus, once the performance bond meets the formal legal requirement of being in writing, it is usually enforceable in the Ghanaian courts. However, there are certain instances where contractors (in some cases, the guarantor) have challenged the call on the performance bond on grounds of fraud, and successfully obtained an interlocutory injunction against the payment of the bond pending the determination of the case.

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

Parent company guarantees are usually not the primary security for the performance of a contractor's obligations. However, it may be accepted where the parent company is incorporated in Ghana and has identifiable assets in Ghana. There are no restrictions on the nature of such guarantees as they are purely contractual. Typically, entities undertaking infrastructure projects incorporate special purpose vehicles as a limited liability company for the construction project. Thus, in certain circumstances, a parent company guarantee may be required if the business exigencies of the deal make it necessary.

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

The right of the contractor to retain title in relation to goods and supplies is largely contingent on the nature of goods and materials supplied. Under Ghanaian law, where properties or fixtures become a part of the land considering the degree of annexation, it may be difficult for the contractor to enforce the right to retention in respect of such material. The right of retention may be better enforced in respect of goods and supplies that are easily removed from the land or property in question.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

Employers often engage the services of a third party with requisite expertise to supervise the project and act as an 'umpire' between the employer and contractor. The supervisor/project manager's duty to act impartially arises under common law. In reality, the scope of this duty to be impartial may be impaired by the appointing procedure.

The employer, having appointed the project manager, retains the right to bring an action against him for breach of duty or negligence except where the project manager is jointly appointed by the parties, in which case the contractor can also maintain a claim against him. It is also common for the supervisor to be appointed by the project financier and the obligations of impartiality and liability for breach of duty apply in much the same way.

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a "pay when paid" clause?

The inclusion of a 'pay when paid' clause is purely contractual. Although rare, an employer may require a contractor to pre-finance a project and claim payment after it has been paid.

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

There is no restriction on the inclusion of liquidated damages in a construction contract. The Ghanaian courts are, however, reluctant to enforce 'penalty clauses' which permit an affected party to recover liquidated damages considerably greater than the actual loss incurred. However, where the lump sum pre-fixed as liquidated damages is a genuine pre-estimate of loss, the courts will uphold payment of such amounts.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

There is no industry specific law for construction contracts in Ghana, so the general contractual rules often apply with modifications provided under specific contract types. A construction contract may impose a mutual variation obligation or may permit the employer to vary some aspects of the work (often of a minute nature) by notice to the contractor.

Generally, a variation which substantially alters the agreed scope or character of the contract may result in a termination of the entire contract at the option of the contractor or an amendment of the existing contract to provide for an extension of time or additional payment.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

The terms of the contract will determine the employer's right to omit work from the contract and its performance or outsourcing of the omitted work. Other factors that may influence the exercise of such right include the cost model of the project, i.e., variable cost or lump sum. Under a lump sum model, the contractor is entitled but not legally guaranteed to carry out the entire contract.

Also, the effect of the omission on the entire project must be considered. Where the omission materially affects the character of the contract, or the intended performance by the employer will interfere with the main contract, the contractor may terminate the contract for cause.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

Terms may be implied into construction contracts based on industry usage/custom, conduct of the parties, or by operation of law. There is, however, no set of agreed terms that are implied in construction contracts under Ghanaian law.

Fitness for purpose and duty of care are often implied into construction contracts, and are derived from the express contractual term that the contractor is deemed to be suitably qualified to carry out the works for which it was contracted.

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

The rule on concurrency is not codified under Ghanaian law and is often resolved in accordance with the terms of the contract. In most cases, a contractor is entitled to an extension of time for concurrent delays, but compensation may not be payable unless it is contractual.

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

There is no industry-specific limit for construction contracts, so the six-year statute of limitation for contracts applies to construction contracts. Time starts to run from the date the cause of action accrued.

Specific time limits may apply to different causes of action arising from a construction contract. For example, a claim under negligence is statute-barred after the expiration of three years from the date the cause of action accrued. However, a court may extend the statutory time limit on stated grounds.

Additionally, parties to a construction contract may benefit from the exceptions provided under the law by bringing an action for equitable reliefs, such as specific performance of a contract. Similarly, where under a construction contract, a party makes a written acknowledgement of a debt or makes part payment, the time limit is extended.

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

Parties to a contract have the liberty to determine time limits for claims and the courts will enforce such terms, if they are consistent with the statutory limitation period. The form and substance of notice of claims are contractual and the courts would usually uphold the parties' terms.

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

Unforeseen ground conditions are not codified under Ghanaian law and are often determined under the contract. Where ground conditions are material to the contract, the parties may impose a term that requires mutual testing prior to the commencement of the project. In such instance, any unforeseen risk discovered after this mutual testing will entitle the contractor to compensation for additional corrective works or may result in mutual termination of the contract and payment of *quantum meruit* to the contractor for work already done.

In other instances, where the contract is silent on ground conditions, the contractor will be saddled with the cost of

corrective work if possible. Conversely, if the employer makes a representation on the fitness of ground conditions for the project, the contractor can bring an action for misrepresentation.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

Changes in law are usually dealt with contractually. Standardised construction contracts impose the obligation on each party to bear the risk of a change in law affecting the completion of a project. The risk is often monetary but in rare cases where the change in law prevents continuation of the project, the contractor may be entitled to compensation on *quantum meruit* basis.

In sectors prone to frequently changing legislations, contractors may insist on 'legislative protection' clauses which provide cost and time relief (in the form of extensions) for changes in law affecting project timelines. The majority of the structured construction projects include provisions which allow the contractor to vary cost, timeline and scope where a change of law affects the previously agreed terms of the construction contract.

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

Generally, the employer owns the intellectual property to the design and operation of the property under a construction contract. Also, in instances where an employer requests bespoke work, the construction contract will include terms expressly vesting the intellectual property in the employer, and this is often factored into pricing of a contract.

3.10 Is the contractor ever entitled to suspend works?

In the absence of express provision in a construction contract or legal restriction on suspension, a contractor can suspend works by notifying the employer in writing.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party's grounds for termination must be set out (e.g. in a termination notice)?

Grounds for the automatic termination of a contract are contractual. Fraud and insolvency events are often stated as grounds for automatic termination of a construction contract. A party may also terminate on written advance notice (usually between one and three months) where the other party materially breaches the terms of a contract and fails to remedy such breach after notice of breach is served, and on expiry of the remedy period provided by the non-defaulting party. There are no legal requirements on the form of the termination notice.

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor's profit on the part of the works that remains unperformed as at termination?

Construction contracts usually provide for termination for convenience clauses with some variations. Some contracts provide for early termination, usually exercisable within the

initial project phases, while others provide for termination for convenience clauses subsisting through the project life span. A key determinant for the inclusion of these clauses is the cost of exercising such right (i.e., compensation payable to the contractor, which in some cases may be the full contract amount or cost plus financing).

The courts act as final arbiter in determining what is fair compensation for termination for convenience. The Ghanaian High Court, in the interpretation of NEC 3 contracts, recognised the standard-form contract compensation model as reasonable in compensating a contractor for termination for convenience.

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

The concepts of *force majeure* or frustration are well established under Ghanaian law. The former is subject to common law doctrines while the consequences of frustration are codified under the Contracts Act. The law permits a severance of the frustrated parts of a contract from a contract, and has been applied in some construction contracts.

Force majeure is not defined under Ghanaian law, but it is generally interpreted as unforeseen circumstances which prevent the performance of a contract; i.e., pandemics, wars and natural disasters. However, events such as lockouts and supply chain challenges which may constitute a '*force majeure*' are often negotiated on a case-by-case basis. Similarly, the period for continuance of a *force majeure* event which may entitle an affected party to terminate a contract may differ for each contract.

The Ghanaian courts have adopted the common law approach that a change in economic viability of a contract is not generally sufficient to ground a *force majeure* claim in itself.

3.14 Is there any legislation or court ruling that has been specifically enacted or handed down to provide relief to parties to a construction contract for delay, disruption and/or financial loss caused by the COVID-19 pandemic? If so, what remedies are available under such legislation/court ruling and are they subject to any conditions? Are there any other remedies (statutory or otherwise) that may be available to parties whose construction contracts have been affected by the COVID-19 pandemic?

No specific legislation was enacted to provide relief to contracting parties who were affected by the COVID-19 pandemic.

3.15 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

The law generally excludes a third party from benefitting under a contract unless such third party is specifically designated as a beneficiary. The Ghanaian courts have further developed the doctrine that foreseeable third parties may claim under a contract in limited circumstances. In a construction contract, this may include a project financier, first purchasers, or tenants having an interest in the building during the defect liability period.

To strictly limit enforcement of these exceptions on privity, standard-form construction contracts expressly exclude the application of the statutory provision on foreseeable third parties.

3.16 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

Lender-funding accounts for the majority of engineering and construction projects in Ghana, and this translates to the prevalence of direct agreements or collateral warranties with project financiers. In specialised or capital-intensive construction contracts, a direct agreement incorporating the terms of the main construction contract is entered into between the contractor and project financier. Such direct agreement may, in addition to the standard collateral warranties, grant 'employer-like' powers to a project manager appointed by the lender. Construction contracts may also adopt a separate deed of warranty for anchor tenants and forward purchasers.

3.17 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

The right of set-off arises out of contract and as an equitable right of contracting parties. It is common for parties to include a right of set-off in their construction contracts, but this is often limited to undisputed debts. A set-off cannot be made against future debt or disputed debt. Most construction contracts generally limit the right of set-off as this may be abused by the employer in a staggered payment model or by the contractor in an advance payment situation.

3.18 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

Parties to a construction contract owe a duty of care to each other. This is often an express term but, in some instances, has been implied into the terms of a construction contract as industry custom. The contractual duty of care is often applied concurrently with the duty of care in tort for negligent acts of a contracting party.

3.19 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

Where an ambiguity arises, the general rules of contractual interpretation apply with the purposive approach being favoured by the Ghanaian courts. The courts adopt a 'commercial approach' to the interpretation of contracts to give effect to the intention of the parties.

3.20 Are there any terms which, if included in a construction contract, would be unenforceable?

The courts will not enforce a term of any contract which is contrary to public policy or statute. Of commercial importance is the reluctance of the Ghanaian courts to enforce penalty clauses in contracts which permit an affected party to recover a lump sum considerably greater than its loss.

3.21 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

In the absence of specialised legislation for construction contracts, implied common law terms apply to a designer's duty of fitness for purpose, and duty to exercise reasonable skill and care expected of a professional carrying out the relevant discipline. Where the design contract is decoupled from the construction contract, there is an implied term of fitness of purpose, but there is no legal requirement for the designer to provide an absolute guarantee.

The appointment procedure of the designer may inform the extent of the designer's liability. The employer may impose a requirement for the designer to provide as a collateral agreement, a guarantee to the contractor where the employer appoints the designer. Conversely, the contractor may require, as a condition for the construction contract, a guarantee from the designer in respect of the work where the employer employs the designer.

3.22 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

The concept of decennial liability or latent defect insurance is not provided under Ghanaian law, but may be included in a construction contract. Latent defect insurance, typically for a 10-year period post completion, may be included in a construction contract with such terms as to the scope and extent of liability being determined by the parties.

With specific reference to commercial buildings (i.e., schools, hospitals, office spaces) as defined under Ghanaian law, the law requires the owner of a commercial building to insure, and maintain commercial building insurance over, the property.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

The mode of dispute resolution adopted for the resolution of construction disputes generally depends on the contractual terms adopted by the parties to the construction agreement. Thus, depending on the terms of the contract (whether it is based on FIDIC or NEC3 standard forms), and the business needs of the parties, they may adopt expert determination, negotiation, mediation, dispute adjudication boards, and international commercial arbitration or litigation. In most cases, international arbitration or litigation is treated as a last resort for dispute resolution.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

Statutorily, Ghana does not have legislation that specifically regulates adjudication for construction disputes. Such processes are generally a matter of contractual arrangement. However, there are certain aspects of the transactional process for construction projects which are regulated by statutes which prescribe a dispute resolution method. For instance,

the Public Procurement Act 2003 (Act 663) which regulates the public procurement process, provides that a contractor who is aggrieved by a decision of the public procurement entity may seek a review from the procurement entity itself first, and then follow up with a complaint to the Public Procurement Board.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

While arbitration is normally treated as a last resort, it is generally preferable to litigation for the resolution of construction disputes. The Alternative Dispute Resolution Act, 2010 (Act 798) permits both institutional and *ad hoc* arbitration, where the arbitration agreement selects Ghana as the seat of arbitration. Thus, the parties may either submit the dispute to an arbitral institution and have that dispute administered under the rules of the chosen arbitral institution, or the parties may constitute an arbitral tribunal on an *ad hoc* basis to conduct the arbitration. While the arbitration is pending, and especially before the constitution of an arbitral tribunal, Act 798 allows the parties to seek redress from the High Court for provisional measures and interim orders for the preservation of assets, property and the grant of injunctions.

4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

Ghana is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). The New York Convention has been incorporated into Ghanaian law through Act 798. Thus, the Ghanaian Courts recognise and enforce foreign arbitral awards that comply with statutory requirements. A party seeking to enforce a foreign arbitral award must first apply to the High Court for leave of court to enforce the award in the same manner as a judgment of the High Court. In this application, the party seeking to enforce the foreign award must demonstrate that: (a) the award was made by a competent authority under the laws of the country in which the award was made; (b) a reciprocal arrangement exists between Ghana and this country, or that the award was made under the New York Convention; and (c) there is no appeal pending against the award. It is essential to submit an original copy of the award or an authenticated award and the arbitration agreement. If this application is granted, the award may be enforced as if it were a judgment of the High Court. However, the High Court will refuse to enforce a foreign arbitration award if the award has been annulled in the place of arbitration; the challenging party did not receive sufficient notice to enable it present its case; a party lacking capacity was not properly represented; the award does not deal with the issues submitted to arbitration or that the award contains a decision beyond the scope of the matters submitted for arbitration.

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

The High Court of Ghana is typically the court of first instance in circumstances where the contract provides for court

proceedings in Ghana. The aggrieved party (the Plaintiff) will issue a writ of summons setting out the reliefs demanded against the defaulting party. During the pendency of the action, the parties would be entitled to apply for orders of injunction, preservation, and security for costs. A dispute in the High Court may last for a period between two to four years. This estimation may vary based on the strategic objectives of either party. Upon delivery of final judgment by the High Court, a party dissatisfied with the decision of the High Court has a right of appeal to the Court of Appeal within a period of three months. Once the Notice of Appeal is issued, the Registrar of the High Court will issue conditions of appeal which the appellant must satisfy before the record of appeal will be compiled by the Registrar. Once the record of appeal is ready, it is transmitted to the Court of Appeal and then the appeal timelines for submitting written submissions is kickstarted. In practice, this process may last anywhere between 18 and 24 months. However, the Court of Appeal is not the final court of appeal. The final appellate court is the Supreme Court which has a similar appellate process to the Court of Appeal. Thus, after the judgment of the court of first instance, it may take about one to three years for a decision by the Supreme Court (the final court of appeal).

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

Ghana is not a signatory to any international treaties for the enforcement of foreign judgments. Thus, there are two

regimes for the enforcement of foreign judgments in Ghana. First, foreign judgments may be enforced under the registration system pursuant to the terms of the Foreign Judgments and Maintenance Orders (Reciprocal Enforcement) Instrument (L.I. 1575). Under L.I. 1575, the judgments of specified foreign courts may be registered and then enforced as a judgment of the High Court in Ghana. The party seeking to enforce the judgment may commence the process by filing an application in the High Court for the registration of the foreign judgment. Anyone aggrieved by the order of registration may apply to set aside the registration of the foreign judgment. The enforcement of judgments of the foreign courts mentioned in L.I. 1575 are more straightforward. Second, the foreign judgments may be enforced in Ghana under the common law approach. Under the common law system, the party seeking to enforce the judgment may have to issue a writ of summons and then sue on the basis of the foreign judgment which is treated as evidence of the debt. One of the strategic options to speed up the enforcement of the foreign judgment under common law is to initiate summary judgment proceedings. Essentially, the party enforcing the judgment will be requesting the High Court to grant judgment summarily based on the foreign judgment since the Defendant arguably has no defence to the action. The success of this strategy however depends on the defences raised by the party resisting the enforcement of the foreign judgment.



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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (NB For ease of reference throughout the chapter, we refer to “construction contracts” as an abbreviation for construction and engineering contracts.)

There are no standard types of construction contract in Greece (officially the “Hellenic Republic”). Greece is a civil law jurisdiction. The Greek Civil Code (“GCC”) provides, on the one hand, the general contract rules which govern every contract (including construction contracts), and on the other hand special contract rules stipulating deviations from and/or additions to general contract rules, as applicable to specific types of contracts.

Articles 681 – 702 GCC regulate the “*contract for works*” (i.e., the construction contract) which is a reciprocal contract by which the contractor undertakes the obligation to perform the works and the employer is obliged to pay the agreed fees. GCC applies to private contracts, as well as to public contracts in a supplementary manner subject to the specific provisions of public works legislation.

Based on the freedom of contract principle (reflected in article 361 GCC), the parties in a construction contract are free to agree on the type and regulate the terms of the construction contract, subject to mandatory law provisions (*jus cogens*). Thus, contracts may include both design and construction obligations, or design only, or management contracting arrangements, and are privately negotiated by the parties.

Standard forms of contract (e.g. FIDIC) may be used in major or industry large-scale projects, based on freedom of contract principle. FIDIC terms or concepts, properly adjusted to take into account Greek law, may also be included in a construction contract.

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

Parties are free to enter into any collaborative contract serving their specific needs. Collaboration between contractors is usual especially in major private or public projects through joint

venture schemes or *consortium* agreements. There is no standard form of collaborative contract. See also question 1.1 regarding the freedom of contract principle.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

There are no industry standard forms of private construction contracts in Greece. That said, FIDIC standard forms of contract are typically used as benchmark for the formulation and negotiation of construction contracts in major or industry large-scale private projects, and/or where the contracting party is a foreign investor. See also question 1.1.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

Public works contracts and procurement are regulated by specific legislation, in principle by Law 4412/2016 (as amended and in force) which, *inter alia*, transposed the EU Directives on public procurement 2014/24/EU and 2014/25/EU. Contracts for public works are subject to the GCC as well in a supplementary manner; however, in cases of conflict, the legislation for public works prevails.

Public project contracts are governed in principle by standard contract documents (“model tender documents”) issued by the Hellenic Single Public Procurement Independent Authority (“HSPPA”), including standard terms published by other public-governmental tendering authorities. Design-build contracts are common in projects involving public works as well as in concession projects.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

Under Greek law, a contract between two parties is, in principle, a synthesis of at least two concordant declarations of will (articles 185, 192 GCC) with an intention to bind oneself. In order to create a legally binding contract, the following requirements must be met:

- a mutual agreement (offer and acceptance);

- an intention to create a legally binding contract; and
- the capacity of the parties to conclude contracts.

Consideration is not required according to Greek law. In principle, contracts are not subject to any kind of formalities, unless the law expressly provides otherwise (158 GCC). As a matter of standard practice, construction contracts are evidenced in writing.

1.6 In your jurisdiction please identify whether there is a concept of what is known as a “letter of intent”, in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

The concept of a “*letter of intent*” is recognised in business practice in Greece. To the extent that a letter of intent simply indicates the intent of the parties to engage into negotiations, describes the framework of any negotiations, or describes the matters that may be included into a contract, it does not constitute an “agreement” or an “offer” to contract under Greek law, and thus a letter of intent it is not a binding legal document. Thus, to avoid relevant disputes on whether any such letter is binding, the parties are advised to include an explicit statement that any such letter is not binding and is subject to agreement.

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer’s liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors’ all-risk insurance?

In private contracts, the parties are in principle free based on freedom of contract to agree on any insurance scheme and regulate the relevant risks of the contract. Although some legislative provisions have been adopted providing an obligation to have in place third-party civil liability insurance in private construction works (design and construction), in practice such provisions have not been activated since their application depends on the issuance of further special legislative acts which have not been issued.

With respect to the relevant risks in relation to private construction contracts, according to article 698 GCC, as long as the works are in progress, the risk of the works is borne by the contractor. The risk is transferred to the employer as of the delivery of the works project to him, or from the point where the employer is in default as to the acceptance of the works. The employer bears the risk of accidental destruction or deterioration of the materials supplied by the employer. Article 698 GCC is a provision of non-mandatory law, and the contracting parties may elect to regulate their contractual relationship in a different manner.

A compulsory insurance that must be in place when carrying out construction work is employees’ insurance through the National Social Security Fund (social security insurance); this insurance does not cover any civil liability in respect of death and personal injury.

As a matter of practice, it is very usual that the contractor and the employer are insured against the relevant special risks of the project, especially for works – projects that are subject to financing by financial institutions. Based on the particularities of each construction project, it may be appropriate that the parties also request advice from insurance advisors.

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

Contractors engaged in construction projects have several obligations deriving from generally applicable legislation, including obligations to obtain several licences and permits required for the execution of the works (environmental, building, installation and operation licenses, requirements in relation to health & safety, planning, employment, anti-corruption and bribery, etc.).

By way of example, article 662 GCC, provides that the employer is obliged to make such arrangements regarding the conditions and the premises of work where the works are performed, as well as the accommodation, installations, machinery, or tools that are necessary to protect the life and health of the employees.

In the case of private construction contracts, and depending on the nature and the specific provisions of the construction contract, registration with other competent authorities may be required under labour and social security legislation (e.g., the owner of the project may need to be registered with the competent social security authorities as “employer” and pay the relevant social security contributions calculated on the basis of a minimum presumed number of required wages).

Contractors are subject to tax registration and other reporting formalities for tax purposes. Import duties may also be applicable depending on the type/origin of equipment imported into Greece by the contractor.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

There are numerous mandatory technical standards and norms, included in laws, codes and regulations, that may be complied in relation to the performance of technical works in relation to building and fire safety (e.g., minimum standards for earthquake protection, electricity connection works standards etc.), depending also on the size and particularities of the relevant project, e.g., Law 4067/2012 (as in force) (New Building Regulation) and Presidential Decree 41/2018 (as in force) on building fire safety. Based on the particularities of each construction project, it may be appropriate that the parties request advice also from special technical advisors and experts.

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

Article 694 GCC provides that the fees of the contractor must be paid upon the delivery of the works. If the parties have agreed that the delivery of the works and the payment of the fees will be made in milestones, the fees are payable upon the delivery-completion of the relevant milestone. However, this provision is not mandatory law, and so the parties may agree differently, i.e., it can be agreed as matter of contract that the employer will be permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when the works are substantially complete and/or any agreed defects liability period is complete or a prepayment of the fees (or part thereof), installment payments etc.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor's performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

As a matter of standard practice, especially in large construction projects, it is very common that the performance of the obligations of the contractor is secured by a number of performance bonds (letters of guarantee) issued in principle by banks and/or insurance companies (e.g., advance payment bond, performance bond, retention bond, warranty bond etc.). In general, parties are free to agree on the security scheme in relation to the performance of contractor's obligations. Such bonds/letters of guarantee are in principle on first demand, i.e., immediately payable by the issuer upon the first demand of the beneficiary without any right or obligation of the issuer to verify the substance or the validity of the claim and/or raise any objection for payment based on the principle "pay first, litigate later".

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

Company guarantees, issued by a parent and/or affiliated company to guarantee the performance of the obligations of a subsidiary company if the latter defaults on its obligations, are common. The existence of a legal claim, based on a contractual obligation or otherwise, is a necessary requirement for holding a collateral in the form of company guarantee. In general, parties are free to agree on the terms of such company guarantee. According to article 849 GCC, a contract for guarantee is considered null and void unless it is in writing.

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

Under article 695 of the Greek Civil Code, the contractor has, as a security for his claims arising from the contract, a legal pledge on the movables in his possession which belong to the employer and which the contractor has constructed or repaired. This provision is not mandatory law, thus the parties may agree differently and exclude such right of the contractor. No such right is available to the contractor in relation to the construction of immovable works, in which case the goods and supplies used in the works are deemed to be incorporated into the works and thus the title of property is transferred to the employer. In practice, it is common to negotiate specific provisions in construction contracts regarding the retention of title rights and transfer of ownership over goods and supplies used in the works.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

Greek law does not provide the notion of the engineer as described, for example, in FIDIC contracts (Red & Yellow books), however the concept of supervision is usual. As a matter of contract and especially for large construction projects, the parties often agree that the employer may appoint a third-party consultant or engineer to supervise the works. However, the engineer's role is not usually so decisive as in FIDIC contracts, where the determinations of the engineer may be final and binding upon the parties. There are no standard norms and regulations regarding the engineer's statutory duty of impartiality in such cases, but it is a matter of contractual formulation/negotiation between the parties. Public contracts are regulated by specific legislation where statutory provisions regarding supervision apply.

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a "pay when paid" clause?

See question 1.10 regarding article 694 GCC and time of payment. This provision is not mandatory law, thus the parties may agree differently, e.g., a "pay when paid" clause. However, the enforceability of any such clause, as with every contractual clause, will be subject to the non-violation of the principles, *inter alia*, of good faith, which plays a crucial role with respect to the interpretation and performance of contractual obligations (articles 173, 200, 281 and 288 GCC) or the prohibition of abusive exercise of rights (article 281 GCC).

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

Greek law provides for the notion of the penalty instead of the liquidated damages notion applicable in common law jurisdictions. A monetary penalty clause is a contract whereby a party (debtor) promises to pay a specific monetary amount to the other party (creditor), in case the debtor does not timely or properly fulfil its obligations (article 404 GCC), without it being necessary for the creditor to prove that it has suffered prejudice (article 405 GCC). Penalty clauses are valid and enforceable under Greek law, and explicitly regulated in the GCC (articles

404 – 409) subject to mandatory provisions of GCC, e.g., on limitations of liability, or on the fundamental principles (breach of good faith and conduct contrary to good morals (*bonos mores*), abuse of right etc).

According to article 409 GCC, if the penalty which has been agreed is disproportionate or excessive, the court/tribunal, following an application of the debtor, may reduce it to the “due/proper measure” considering all pertinent circumstances at the judge’s/arbitrator’s discretion. This provision protects the debtor (usually the weaker party on whom the creditor can impose onerous terms) and is a mandatory law; an agreement on a waiver of this right is not valid (article 409 par. 2 GCC). As a matter of defence against a penalty, any party may argue as a matter of mandatory law that a penalty clause is, in principle: (a) an invalid restriction of liability in the event wilful misconduct (intentional breach) or gross negligence; and/or (b) disproportionate/excessive.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

The parties in a construction contract are free to include a right of the employer to vary the works to be performed under the contract as well as to agree on the relevant terms (e.g., process, entitlement to additional cost etc.). In the absence of an agreement, the parties may negotiate any variation to the works which will be an amendment to the contract; it may also be a matter of interpretation, based on the general principles of contract law (e.g., good faith), whether any variation or change in the works instructed by the employer falls under the scope of the initial contract and therefore it is obligatory for the contractor to perform. To the extent, however, that it can be proved that the performance of any such works is excluded from the obligations/contractual scope of the contractor, then an additional agreement (either new or amendment) will be required.

Public contracts are subject to specific provisions of specific legislation applicable to public works (mainly articles 156-155 of Law 4412/2016 (as in force)).

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

Subject to any relevant and applicable provisions of the contract or/and any additional agreement of the parties, works cannot be omitted by the contractor; in such a case the contractor would be in breach of contract and the employer would be entitled to exercise their rights under the contract and the law (e.g., claim for compensation). The employer may carry out the omitted work himself or procure a third party to perform it, and it can then claim the relevant costs from the contractor, without prejudice to any other rights of the employer under the contract and the applicable law.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

GCC provides, among others, for general contract rules which govern every contract (including construction contracts) as a

matter of mandatory law. Greek contract law is premised on certain fundamental principles underpinning/pervading all private contracts, such as, among others: the general principle of good faith, which plays a crucial role with respect to the interpretation and performance of contractual obligations (articles 173, 200, 281 and 288 GCC); the general duty not to cause prejudice to third parties and to refrain from acts contrary to good morals (articles 914 and 919 GCC); the prohibition of the abusive exercise of rights (article 281 GCC); and the principle that the contract must not be contrary to a prohibitory provision of law, or contrary to *bonos mores* (article 178 GCC). In addition, based on the good faith principle, the contractor has an obligation to keep the employer informed regarding the budget, the evidence of the works and costs incurred, and the provision to the employer of the manuals regarding the operation and maintenance of the project.

For example, under Greek law, when totally unforeseen circumstances and conditions change the parties’ agreement and, as a result, the parties’ obligations are untenable, the court can rule the termination of the contract and the reasonable reimbursement of the parties (articles 288 and 388 GCC). Parties may elect to exclude the application of any non-mandatory law provisions.

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

When both parties are in parallel/concurrent delay, either party’s contribution to the delay will be individually assessed (and therefore reflected in the relevant time schedule individually), so the contractor’s potential entitlement for an extension of time and/or additional costs is principally a matter of causation and factual evidence.

In general, and subject to contract provisions specifically regulating the matter differently, under article 685 GCC, if during the performance of the works for some reason the timely or proper performance of the works is at risk, the contractor is obliged to advise the employer accordingly without delay; failing to do so, contractor will be liable for the prejudicial consequences.

According to article 686 GCC, if the contractor delays the commencement or/and the execution of the works in accordance with the contract and the timely completion of the works becomes impossible, the employer may rescind the contract and obviously the contractor will not be entitled to an extension of time, provided however that the employer has not delayed the works by its fault. For any delay caused by the employer’s fault, the contract will, in principle, be entitled to an extension of time.

In addition, as a matter of general principles of contract law, the principle of contributory negligence may also apply pursuant to article 300 GCC providing that if a person who has suffered loss (injured party) has contributed to such loss through its own fault (including by failing to mitigate its loss or warn the other party thereof), the court at its discretion may refrain from adjudicating any damages claimed by the injured party or may reduce its amount as the court may deem fit.

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

The general statutory limitation for claims under contractual liability is 20 years (article 249 GCC). However, specifically as

regards claims of the employer arising from defects in the works, the statutory limitation period is: (a) 10 years from the approval of the works with respect to buildings/immovable works or other immovable infrastructures; and (b) six months from the approval of the works with respect to all other works (article 693 GCC). Certain other claims, such as the entitlement of the contractor to payment under the contract or the claim of the employer for non-performance or inadequate performance (other than with respect to defects), are subject to a statutory limitation of five years (article 250 GCC). As regards claims in tort, the general statutory limitation is five years starting from the date on which the injured party became aware of the damage and of the identity of the compensating party (article 937 GCC), and in any case, within 20 years from the date on which the tortious conduct took place. The statutory limitation provisions are mandatory law, and may not be excluded or modified (shortened) contractually.

If the parties stipulate in the contract a liability time limit in the meaning of article 556 GCC with respect to a defect or lack of an agreed quality, i.e., if the contractor guaranteed for a specific time period the proper operation of the works, then in case of doubt, the statutory limitation starts from the point where the defect has arisen instead of the date of approval of the works (thus the statutory limitation period is practically prolonged).

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

See answer to question 3.5. In principle, the statutory limitation provisions are mandatory law and may not be excluded or modified (shortened) contractually. However, it is supported under Greek legal theory that time limitation of liability, and thus contractual time limits to bringing claims, may be found valid in the event of mere negligence; any such limitation would be invalid in case of gross negligence or wilful misconduct. See also answer to question 3.20 regarding article 332 GCC and clauses limiting liability for wilful misconduct (intentional breach) or gross negligence. A statutory limitation period is interrupted if the debtor recognises the claim in any way.

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

Usually, the employer undertakes to provide unhindered access to the site to the contractor and thus in principle bears the risk of unforeseen ground conditions unless the parties agree otherwise. Article 685 GCC, par. 2, provides that if during the performance of the works, the site designated by the employer has defects, the contractor is obliged to notify the employer in this respect without delay otherwise the contractor will be liable for the prejudicial consequences. In addition, general provisions of GCC may apply. For example, see answer to question 3.3 regarding totally unforeseen circumstances and conditions.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

The parties are free to include relevant provisions in their contract. In the absence of any contractual arrangement, each party will bear the risk of a change in law affecting its scope of

responsibilities, and obligations under the contract with respect to the completion of the works, subject to any relevant applicable law provisions. The general provisions of GCC with respect to unforeseen circumstances (articles 288 and 388 GCC) may also apply – see questions 3.3 and 3.7.

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

In principle, the creator of the relevant products (i.e., a designer or an architect) is the owner of the intellectual property rights, however the economic right to use and exploit the materials is transferred to the employer as a matter of standard practice. The moral part of intellectual property remains with the creator.

3.10 Is the contractor ever entitled to suspend works?

There is no explicit provision in the special contract rules applicable to contracts for works in relation to the right of the contractor to suspend the works. The contractor may establish or exercise the right of suspension under the general principles of the GCC (e.g., *force majeure*, or the inability to perform in the event that the employer does not co-act with the contractor if it is required for the execution of the works). The parties can freely agree in the contract any event/circumstances under which the contractor could be entitled to suspend the works. In principle, if the employer is not fulfilling its main obligation to pay the contract price, it becomes a debtor in default and will be liable towards the contractor under the general provisions of GCC.

As a matter of general principles of contract law, the debtor, on certain conditions of non-performance by the other party, is entitled to suspend his own performance. In these cases, the law grants him purely defensive rights (pleas), which have temporary effect, leading only to the suspension of the performance and not the negation (rejection) of the right of the creditor. These provisional remedies are stipulated in the GCC and are the “right of retention” (*jus retentionis*) (articles 325 – 329 GCC) and the “plea of unperformed contract” (articles 374 – 378 GCC). Rights of suspension may also be established under a *force majeure* event.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party's grounds for termination must be set out (e.g. in a termination notice)?

As regards the employer, one of the remedies available to the employer under Greek law is the right to rescind the contract in case of major defects rendering the project useless, if the project lacks the agreed qualities (article 689 GCC), in cases where the commencement of the works or the progress of the works is delayed in a way that is contrary to the contract and the timely completion of the project would be impossible (article 686 GCC), or in cases where the actual budget of the project exceeds the budget guaranteed by the contractor (article 697 GCC).

Furthermore, article 700 GCC provides that the employer has the right of termination for convenience by notice to the contractor at any time up to the completion of the works, provided that he pays all the remaining contract price, minus any cost savings/benefits for the contractor as a result of early termination. Such right is not mandatory law and can, in principle, be excluded by an agreement of the parties under the contract.

As regards the contractor, the GCC's provisions on contract for works do not contain an explicit right of termination by

the contractor. As per the general provisions of the GCC, the contractor could establish a right to terminate the contract on the basis of the following provisions (the same principles apply also to termination by the employer, in a manner complementary to the special contract rules applicable to contracts for works): (a) employer's default (articles 383, 387 GCC); (b) termination for "serious ground" (article 288 GCC); (c) termination in case of material change in circumstances (article 388 GCC); and (d) the inability to perform without default (articles 336, 380 GCC).

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor's profit on the part of the works that remains unperformed as at termination?

As a matter of market practice, it is common for the parties to agree that the employer can terminate at any time and for any reason. See question 3.11 regarding article 700 GCC (termination for convenience).

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

Although the GCC does not include explicit references to *force majeure*, this concept is recognised under Greek law. Parties are also free to include contractual arrangements in relation to *force majeure* in their contract. According to the subjective theory, which is prevalent in Greek case law, *force majeure* encompasses events which could not have been foreseen and could not have been averted even by measures of extreme care and prudence on the part of the debtor. *Force majeure* applies only as long as there is a causal link between the *force majeure* event and the impossibility or delay of performance. As soon as the *force majeure* event ceases to cause impossibility or delay of performance, a debtor who does not perform is in default. The affected party has an obligation to promptly notify the other party of any *force majeure* event (articles 336, 288 GCC). In the case of permanent frustration of the contract, a right to terminate may be granted to the affected party. Other remedies-claims that the affected party may invoke are related with the suspension of the contract, the temporary waiver of contractual obligations, the adjustment of the contract price, etc. See also questions 3.3 and 3.7 regarding unforeseen circumstances. The provisions of failure to perform contractual obligations (article 335-336) may be also invoked.

3.14 Is there any legislation or court ruling that has been specifically enacted or handed down to provide relief to parties to a construction contract for delay, disruption and/or financial loss caused by the COVID-19 pandemic? If so, what remedies are available under such legislation/court ruling and are they subject to any conditions? Are there any other remedies (statutory or otherwise) that may be available to parties whose construction contracts have been affected by the COVID-19 pandemic?

In private construction contracts, there is no specific legislation enacted to provide relief under the COVID-19 pandemic. For public works contracts, specific, non-binding guidelines have been issued by the Hellenic Single Public Procurement Independent Authority and opinions by the Legal Council of State, providing that COVID-19 pandemic can be treated as

unforeseen circumstances, which may result in the amendment of the terms of the contract, subject to the decision of the competent tendering authority.

In terms of court rulings (which do not have the force of precedent/case law), there is no general tendency, and each case is assessed on an *ad hoc* basis. COVID-19 or similar pandemic events will, in principle, be treated as unforeseen circumstances, and/or *force majeure* events, regulated by any relevant provisions of the contract and the applicable law. The general provisions of GCC with respect to unforeseen circumstances may also apply. See also questions 3.3, 3.7 and 3.12.

3.15 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

Under the rule of "privity of contracts", rights and obligations are exclusively conferred to the contracting parties. Exceptions to that rule, according to which third parties may acquire the right to enforce a contract, are found in practice, in certain cases of contractual stipulations for the benefit of third parties, lease and sublease of immovable property, construction contracts (between the employer and the contractor's employees), etc.

In general, there must be either a special law provision or a specific explicit or implicit obligation under the contract to the effect that the contractor will assume certain responsibilities towards a third entity (410 GCC). It is then the third party which obtains the right to claim a certain benefit or exercise a right under the contract in its own name.

The application of the general provisions of law for liability in tort of the contractor against third parties cannot be excluded. In case of construction of a building that will be sold or leased by its employer to a third party, the contractor may bear direct (civil and criminal) responsibility towards the third party not as a matter of contract (i.e., as an exception to the rule of "privity of contract") but as a matter of law (tort), e.g., if the building is not compliant with the minimum specifications provided by law in terms of safety of buildings; provided, however, that any such defect can be attributed to the contractor.

3.16 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

As a matter of practice, if funders provide financing in construction projects, the scheme of direct agreements may be used, based on which the contractor undertakes certain obligations towards the funders or/and certain commitments to comply with contractual provisions and requirements imposed by the funders. The use of direct agreements is not particularly common, except in large-scale projects and/or in project finance.

3.17 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

Set-off right of claims between the parties under a contract is possible, and explicitly provided in articles 440 GCC *et seq.* The

main conditions under the GCC are the following: (a) claims subject to set-off need to be mutual, i.e., the debtor of one claim must be the creditor of the other, and of the same nature (e.g., of monetary nature); (b) both claims must be due; and (c) the one party (P1) must declare by giving notice to the other party (P2) regarding the exercise of the set-off right. The parties can freely agree a set-off mechanism based on different contractual arrangements in the contract.

3.18 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

Any party under any contract (including construction contracts) owes a duty of care to the counterparty, mainly based on the good faith principle (288 GCC). Article 288 GCC aims at ensuring the existence of a minimum level of fairness, reasonableness, and decency in transactions, and as a provision of mandatory law (*jus cogens*), also imposing free-standing, ancillary obligations on parties. Good faith under Greek law is a dynamic notion and therefore its exact content and scope is left to be determined on the facts of each case by courts – in respect of which they have wide discretionary power. The application of the principle of good faith exists concurrently with any contractual obligations and liabilities. This intervenes in the relation between two parties to a contract by limiting, complementing or weakening the rights or obligations that arise by virtue of parties' contract or the law, either by increasing or reducing the obligations of a party.

3.19 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

Greek courts take a broad approach to the question whether vagueness or ambiguity exists. As a matter of practice, if a Greek Court is faced with contractual language that could be interpreted in more than one way, or with a factual background that puts into doubt the meaning of the allegedly "clear/plain" wording of a contract, the court will proceed to interpret the contract pursuant to articles 173 and 200 GCC (the main rules regulating the process of contractual interpretation) providing that when interpreting a declaration of will, the true intention shall be sought without adherence to the words, as well as that contracts shall be interpreted in accordance with the requirements of good faith, taking also into consideration trade usages.

3.20 Are there any terms which, if included in a construction contract, would be unenforceable?

In principle, terms in a construction contract (and every contract under Greek law) that are contrary to mandatory law provisions (*jus cogens*) would be unenforceable. As regards specific provisions of GCC for contract for works, terms that are contrary to the statutory limitation periods regarding the claims of the employer arising from defects in the works (article 693 GCC) or terms contrary to article 702 GCC pursuant to which the workers employed by a contractor for the construction of a building or other immovable installation shall have a direct claim against the employer with respect to their salaries up to the amount that the employer owes to the contractor will be null and void. As a matter of general contract law, for example,

pursuant to article 332 GCC, clauses limiting liability for wilful misconduct (intentional breach) or gross negligence are null and void; the same applies for terms that are contrary to a prohibitory provision of law (article 174 GCC) or contrary to *bonos mores* (article 178 GCC) etc.

3.21 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

Under Greek law there is no statutory provision rendering the designer's obligations "absolute" and/or requiring the designer to give an absolute guarantee in respect of his work. Parties are free to include contractual arrangements in the contract subject to the provisions of mandatory law. In principle, general clauses limiting liability for wilful misconduct (intentional breach) or gross negligence are null and void. In other words, the parties may limit their contractual liability only for simple (not gross) negligence. The application of the general provisions of law for liability in tort of the designer cannot be excluded.

3.22 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

In principle yes, to the extent it refers to the 10-year statutory limitation period applicable to buildings/immovable works. As noted in the answer to question 3.5 regarding the claims of the employer arising from defects in the works, the statutory limitation period is 10 years from the approval of the works with respect to buildings/immovable works or other immovable infrastructures. Article 692 GCC provides that after the approval of the works by the employer, the Contractor shall be released from any liability for its deficiencies, unless and to the extent that upon delivery of the works such deficiencies could not have been ascertained by means of a proper examination or where they were fraudulently concealed by the contractor (latent/hidden defects).

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

Parties in private construction contracts are free to agree on the dispute-resolution procedure applicable to the dispute. Disputes are resolved in principle by litigation with recourse to the national courts or by (domestic or international) arbitration. Alternative forms of dispute resolution, such as mediation or adjudication by expert, may also apply.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

See also question 4.1. Under the Greek legal system, there is no statutory adjudication process in construction contracts, nor is it common place to use standard industry practice adjudication process, such as the Dispute Adjudication Board (DAB) under FIDIC contracts. However, as a matter of contract, parties are free to agree on a relevant adjudication procedure and/or

an expert determination process, subject to the provisions of mandatory law, and provided that the rights of access to justice and judicial protection are not violated.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

In general, the Greek legal framework regime welcomes general dispute settlement, including disputes arising from construction contracts, via arbitration. Arbitration is particularly common in the context of disputes arising out of international contracts, especially for large-scale and complex infrastructure projects. The majority of these are referred to institutional arbitration.

Greece has adopted a dualistic arbitration legal system, distinguishing between domestic arbitration legislation (mainly found in the Greek Code of Civil Procedure (the “GCCP”); chapter 7, articles 867-903), and legislation relating to international arbitration, namely Law 5016/2023 on International Arbitration (recently enacted), which is based on the UNCITRAL Model Law (including its 2006 amendments). Within the framework of an international arbitration, parties are free (principle of freedom of contract) to select and agree on the place, language and governing law of the arbitration.

4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

Greece is a signatory party of the New York Convention (ratified by Legislative Decree 4220/1961) (“NYC”), which means that foreign arbitral awards are enforceable unless there are specific grounds for refusal. In addition, pursuant to article 45 of the new Law 5016/2023 on International Arbitration, the provisions of the NYC are generally applicable to all foreign arbitral awards. The Greek Code of Civil Procedure also applies. Greek courts have generally adopted a favourable position towards foreign arbitral awards and have thus refused recognition and enforcement only in exceptional cases, related mostly to public policy grounds. Any party opposing the recognition of an international award may invoke any of the grounds listed in Art. V of the NYC, while the court may, on its own motion, refuse recognition and enforcement only if it rules that the subject matter of the dispute was not arbitrable under Greek law, or that the recognition and enforcement of the award would be contrary to Greek international public policy (article V(2) of the NYC). A revision of the substance of the award is strictly forbidden.

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

Court proceedings in Greece (litigation) in relation to commercial (including construction) disputes is regulated mainly by the

provisions of the GCCP. There are no specialist civil courts in Greece, i.e., handling disputes about construction, buildings, and engineering. The structure of the Greek civil courts includes:

- Courts of First Instance (*Protodikeio*);
- Courts of Appeal (*Efeteio*), to which the defeated party is entitled to file an appeal against the decision of first instance court and challenge the legal, as well as the factual, grounds of the judgement; and
- the Supreme Court (*Areios Pagos*) seated in Athens which is a court of cassation and entitled to review questions of law/legal defects of the judgements of the Courts of Appeal.

The process and the main stages in civil proceedings are in principle summarised as follows:

- filing an action with the competent Court of First Instance which must set out, *inter alia*, the full particulars of the claim and the factual background;
- service of the action to the defendant through a court bailiff;
- filing of pleadings and documentary evidence, including affidavits and witness statements, as well as supplementary pleadings by which each party responds to the pleadings of the other party;
- trial/hearing (in principle a typical process) and issuance of judgment (first instance judgement);
- filing of an appeal by the defeated party and issuance of judgment (court of appeal judgement); and
- filing of an appeal of cassation before the Supreme Court.

Time of issuance of judgments depends, in principle, on the workload of the competent court and the complexity of the case. For example, Courts of Attica, Greece (Athens, Piraeus) have a very increased workload as they are dealing with disputes concerning a very large part of the population of the country. Normally it may take at least one to three years for each level of jurisdiction.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

In general, Greek courts accept the recognition and enforcement of foreign judgments in accordance with the applicable provisions of EU law, international and/or local law. It is also noted that the Recast Brussels Regulation has facilitated and simplified the enforcement procedure, and established the free circulation of the EU judgments falling within its ambit. Absent any applicable special regime under EU regulations or multilateral international conventions and bilateral treaties, the domestic legislation governing the recognition and enforcement of foreign judgments in Greece is the GCCP. Where EU regulations or international conventions and bilateral treaties are applicable, these instruments supersede the national provisions of the GCCP. In general, if a foreign judgment is contrary to public policy or *bonos mores*, it will not be recognised and enforced in Greece.



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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (NB For ease of reference throughout the chapter, we refer to “construction contracts” as an abbreviation for construction and engineering contracts.)

The construction industry in India does not entirely subscribe to any one standard form. Some commonly used forms are heavily influenced by the International Federation of Consulting Engineers (“FIDIC”), the Institution of Civil Engineers (“ICE”), and the model published by the Indian Institute of Architects (“IIA”).

The construction industry is driven by the Government as the Employer/Owner (directly or indirectly). Management contracts are prevalent but the owner will usually look at a single point of responsibility under the lead consortium member.

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

Collaborative contracting is common in the real estate sector in India, where the landowner and real estate developer enter into a joint development agreement. The formats have evolved through industry usage and practice, keeping in mind the role of the statutory regulator. Normally, the landowner provides the land, and all other responsibilities fall on the developer.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

Please see the answer to question 1.1.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

The authority responsible for public works is the Central Public Works Department at the national level, and the State Public

Works Departments operate at the state level. The Central Public Works Department has released several General Conditions of Contract for engineering, procurement and construction (“EPC”) contracts and construction works. The public-private partnership (“PPP”) model is common in the development of large and complex infrastructure projects. The Government has issued guidelines and Model Concession Agreements for various projects, specifically for the purposes of the road, airport, railway and ports sectors, among others. The modes of contracting regularly employed by government organisations include Build-Own-Operate, Build-Operate-Transfer, Design-Build-Finance-Operate-Transfer, etc. Standard contracts provided by the FIDIC are often used for large infrastructure projects.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

The Indian law of contracts is codified (Indian Contract Act, 1872). It is largely based on English Common Law. For any binding contract to come into existence, there should be an agreement between two or more parties who are competent to contract, and the parties must have entered into the agreement with their free consent, for a lawful consideration and a lawful object. These requirements are mandated by the Act (Section 10). Further, rudimentary requirements of a valid offer, followed by an acceptance of an offer, with the intention of entering into a legally enforceable agreement not void in law, are other essentials of a valid contract. The Indian Contract Act recognises common law doctrines, including recognising implied terms and *contra proferentem*.

1.6 In your jurisdiction please identify whether there is a concept of what is known as a “letter of intent”, in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

The legal position in India as regards a Letter of Intent (“LOI”) is well settled, and can be understood while referring to the common law principle to the effect that an agreement “to enter into an agreement” does not create any legal relation between parties, nor is it legally enforceable before a court of law.

An LOI merely indicates a party's intention to enter into a contract with the other party in the future. Normally, it is an agreement to "enter into an agreement" which, as mentioned above, is neither enforceable nor does it confer any contractual rights upon the parties. However, depending on their wording, some aspects of an LOI may contain binding obligations – confidentiality, exclusivity of dealings and governing law/jurisdiction, amongst others, may create such obligations. In certain circumstances, an LOI may be construed as a letter of acceptance of the offer resulting in a concluded contract between the parties. It largely depends on the intention of the parties that can be drawn from the terms of the LOI, the nature of the transaction and other relevant circumstances. If parties have acted on an LOI, as if there is a binding obligation, it can be held as constituting a binding contract between them. In India, a binding contract can also result from conduct alone.

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer's liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors' all-risk insurance?

The standard type of insurance policy opted for by the employer, contractor or a sub-contractor separately or jointly is the Contractor's All Risk Policy ("CAR Policy"). All major construction contract projects expressly provide that a CAR policy must be put in place during the construction stage. Federal legislation requires any business, including construction projects, employing more than 10 people, to procure registration under the Employees' State Insurance Act, 1948 ("ESI Act").

Presently, the ESI Act mandates every employer to provide for its workers' insurance. The Act covers both workers employed directly under an employer and through a contractor. The insurance procured by an employer/contractor under the mandate of the ESI Act covers contingencies such as maternity leave, sickness, temporary or permanent physical disablement, or death owing to the hazards of employment, which may lead to loss of wages and the earning capacity of an employee.

The Code on Social Security 2020, *inter alia*, proposes to simplify, amalgamate and replace the existing central labour legislation, including the ESI Act. Chapter IV of the Code requires that the employer pay the employer's and the employee's contribution in respect of every employee, whether directly employed by him or by a contractor. It is applicable to every establishment in which 10 or more employees are employed. Benefits such as sickness, maternity benefits, payment arising out of employment injury, medical benefits, funeral expenses or disablement are covered under the Code. Notably, through this Code, social security has, for the first time, been extended to workers in the unorganised sector, which includes contract workers. It further mandates every employer (except those belonging to, or under the control of, the Central Government or a State Government) to obtain compulsory insurance for his liability for payment towards gratuity from any insurance company.

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

The following are some of the statutory requirements which must be complied with:

- (a) **General Requirements:** As stated above, all construction contracts must satisfy the requirements of the Indian Contract Act, 1872 to be legally enforceable. There are no statutory requirements specifically in relation to construction contracts.
- (b) **Labour:** All employers and contractors are required to comply with the relevant labour legislation in force in India or in the state/city concerned. The onus of complying with such labour laws falls upon an employer or a contractor, depending on the legislation. Labourers (workmen) are afforded legal recognition through the definition of the word "workman" under the Industrial Disputes Act, 1947 (Federal legislation), which entitles them to various statutory benefits and fair treatment at the hands of their employer/contractor. Further, the Contract Labour (Regulation and Abolition) Act, 1970 must be complied with by any principal employer/contractor who hires 20 or more contract labourers for an "establishment". The said Act requires the principal employer to register its establishment in accordance with the Act, whereas all such contractors must obtain a licence from the authorised licensing authority specified in the Act.

In order to regulate the condition of service of inter-state (migrant) labourers, the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 requires all contractors who employ five or more inter-state migrant workmen to register themselves. It aims to protect and/or provide a migrant worker's right to equal wages, displacement allowance, home journey allowance, medical facilities, etc.

The Workmen's Compensation Act, 1923 requires compensation be paid to workers if injured in the course of employment, as per a minimum guaranteed schedule. Under the Minimum Wages Act, 1948, the employer is required to pay the minimum wage rates as may be fixed by the relevant government. Further, the Payment of Wages Act, 1936, read with the Amendment Act, 2017, ensures that the employees receive wages on time and without any unauthorised deductions.

The Code on Wages, 2019 ("Wages Code") seeks to consolidate and replace four Acts: the Payment of Wages Act, 1936; the Minimum Wages Act, 1948; the Payment of Bonus Act, 1965; and the Equal Remuneration Act, 1976. It extends to all establishments, employees and employers unless specifically exempt. The Wages Code, *inter alia*, provides for a national floor rate for wages, which is to be determined by the Central Government after taking into account the minimum living standards. It further provides for a review of the minimum wages at intervals not exceeding five years. The Codes, however, have not yet been brought into force (see question 1.7 above).

- (c) **Tax:** Under the Income Tax Act, 1961, a person responsible for paying any sum to a contractor for carrying out any work (including supply of labour for carrying out any work) is required, at the time of payment, to deduct a tax commonly known as Tax Deducted at Source ("TDS"). The Works Contract Tax is applicable to contracts for labour, work or service. Prior to 1 July 2017, the Central Government and State Government levied Service Tax and VAT, respectively, on works contracts. However, after the roll-out of the Goods and Services Tax ("GST"), works contracts (in relation to immovable property) are treated as supply of services and, at present, taxable at rate of 18%. In the first instance, tax is payable by the person supplying the services/goods. The Building and Other Construction Workers Welfare Cess Act, 1996, which applies to 10 or

more building workers or other construction workers, has been enacted for the welfare of construction workers, including regulating the workers' safety, health, and other service conditions. A cess of 1% is collected from the employer on the cost of construction incurred. The Code on Social Security, 2020, once implemented, will mandate the collection of a cess for the purposes of social security and the welfare of building workers at a rate not exceeding 2% but not less than 1% of the cost of construction incurred by an employer. (See question 1.7 above.)

- (d) **Health and Safety:** Social security legislation, such as: the Employee's Compensation Act, 2009; the ESI Act; the Maternity Benefit Act, 1961; the Payment of Gratuity Act, 1972; the Employees' Provident Fund and Miscellaneous Provisions Act, 1952; and the Sexual Harassment at Workplace (Prohibition, Prevention and Redressal) Act, 2013, mandatorily applies to all employers and contractors hiring labourers or workmen in the construction industry. The Code on Social Security, 2020, seeks to amalgamate and replace legislation such as: the Employee's Compensation Act, 2009; the ESI Act; the Maternity Benefit Act, 1961; the Payment of Gratuity Act, 1972; the Employees' Provident Fund and Miscellaneous Provisions Act, 1952; and the Sexual Harassment at Workplace (Prohibition, Prevention and Redressal) Act, 2013. Further, the Code on Occupational Safety, Health and Working Conditions, 2020 mandates compliance with the occupational safety and health standards declared under the Code or the rules, regulations, bye-laws or orders made under the Code. (See question 1.7 above.)

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

For every construction project, parties are required to obtain several permits (including environmental permits) from various government departments in order to ensure that the construction is being carried out in a safe manner. Contractors and subcontractors are required to comply with the applicable regulations and good industry practice as stipulated in their agreement. In major infrastructure projects, it is common for a safety audit to be required at the design stage and also post-construction, to ensure conformity with safety requirements under the contract.

The Building and Other Construction Workers (Regulation of Employment and Condition of Services) Act, 1996, was enacted to regulate the employment and conditions of service of building and other construction workers and to provide for their safety, health and welfare. It applies to any establishment which employs, or in the preceding 12 months employed, 10 or more building workers in any building or other construction work. Section 40 (2) (k) of the Act empowers the "Appropriate Government" to make rules regarding the precautions to be taken in case of a fire. The rules mandate the employer to devise an emergency action plan in case of a fire or explosion, among other related matters.

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

Yes. In construction contracts, provision for retaining part of the purchase price for the given situations is fairly common. Parties may also agree to deposit the purchase price in an escrow

account to ensure a level playing field for both the employer and the contractor. The contract may also provide that the employer, prior to completion of the works, releases the retention money provided the contractor furnishes an unconditional bank guarantee equivalent to the retention money.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor's performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

Yes, performance bonds/performance guarantees are commonly stipulated. Similarly, an employer may require a corporate guarantee from the parent company of the contractor.

A bank guarantee is independent of the contract between an employer and a contractor, and normally unconditional. Therefore, unless otherwise provided, a guarantor shall be obliged to unconditionally honour a guarantee as and when called upon by the employer. The employer normally requires the contractor to keep the performance bank guarantee valid until the defect liability period is over or the completion certificate is issued. The beneficiary of the bank guarantee, i.e., the employer, must make a demand for payment under the bank guarantee, should a need so arise, before expiry of the validity period stipulated in the bank guarantee. A demand made by an employer for payment after the validity period will not be honoured by the bank.

The courts have held that, in order to restrain the encashment of a bank guarantee, there should be a strong *prima facie* case of fraud or special equities in the form of irretrievable injustice. Thus, commitments of banks must be honoured free from interference by the courts.

A recent 2023 decision of the Delhi High Court restrained encashment of an unconditional bank guarantee as the employer kept coercing the contractor for multiple extensions, even post project completion.

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

Yes. See question 1.11.

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

Yes, it is possible. Right of lien over goods arises from the contractor's right to be duly paid for the goods supplied to an employer. The existence of right of lien over goods, and the scope of such right, is determined by a contractual clause to that effect. Lien over goods whose ownership passes over to an employer upon delivery to, or affixation on, a construction site may exist if contractually provided for. However, most construction contracts do not provide for the contractor's title rights to the goods and supplies made for the works.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

Yes, construction contracts are commonly supervised by third parties appointed by the employer in the role of either an architect or an engineer. The scope of their functions, and of their duties, is contractually defined.

Whilst the engineer or architect usually has a contractual duty to act impartially between the contractor and employer, in practice this rarely happens.

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a “pay when paid” clause?

Yes. Such clauses are valid under the Indian Contract Act, 1872.

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

Yes. Stipulating a certain amount to be paid by a contractor to its employer as liquidated damages is permissible. Such damages are governed by Section 74 of the Indian Contract Act, 1872, which provides that if a sum is named in the contract as the amount to be paid in case of such breach of contract, the party complaining of breach is entitled to receive the said amount, “whether or not actual loss is proved to have been caused”. Section 74 has been judicially interpreted and the following principles have been laid down:

- Only reasonable compensation can be awarded as liquidated damages.
- Notwithstanding a liquidated damages clause, the *factum* of damage or loss caused must be proved (the burden for which is on the claimant).
- The court must find the liquidated damages to be a genuine pre-estimate of the damages.
- The expression “whether or not loss is proved” in Section 74 has been interpreted to mean that if there is a possibility to prove actual damage or loss, such proof is required. However, where it is difficult or impossible to prove the actual damage or loss, the liquidated damages amount named in the contract, if it is found to be a genuine pre-estimate of the damage or loss, can be awarded.
- The proof of loss or damage may be circumstantial, and the court does not look for arithmetical exactitude.

- The amount named in a contract serves as a ceiling or a cap on the sum that can be awarded, and not the amount that will mechanically be awarded.

If parties have agreed to a genuine pre-estimated sum of money as liquidated damages, then they are deemed to have excluded their right to claim an unascertained sum of money as damages.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

Variations in the works to be performed under a construction contract may be ordered by an employer or an engineer. However, variations must not be of such a nature as to alter the character of the contract and must be within the ability of the contractor to execute. A contractor is entitled to additional payment for the same.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

Yes, works may be omitted from a construction contract by an employer or an engineer if there is an express term in the contract permitting omission. The employer cannot omit the work on non-*bona fide* grounds to deprive the contractor of its legitimate dues.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

Yes. Indian law recognises both express and implied terms in construction contracts. Implied terms are read into a contract while examining the intent of the parties, and must not offend the commercial purpose of the contract. While there is no agreed set of terms which can be implied in a construction contract, certain obligations are understood as impliedly binding on both the employer and the contractor. For example, a contractor is expected to perform its tasks while exercising a standard of care, and must provide such materials as are fit to be used for the stipulated works.

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

The Indian position on concurrent delay is not settled. However, Indian courts routinely refer to and rely on English cases. In situations where there are concurrent delays on part of the employer and contractor, an employer may rely upon delay to substitute an extension of time for payment of any monetary damages to a contractor, whereas a contractor may rely upon it to defend against the imposition of liquidated damages upon itself. Therefore, in cases of concurrent delays, a contractor would be entitled to an extension of time and not compensation for any loss it may have suffered due to the delays (see: *De Beers UK Ltd v.*

Atos Origin IT Services UK Ltd [2010] EWHC 3276 (TCC)). A contractor would be entitled to an extension of time for the period of delay caused by the relevant event notwithstanding the concurrent effect of the other event (see: *Walter Lilly & Co Ltd v. Mackay* [2012] EWHC 1773 (TCC)). Indian courts have generally adhered to this position (see: *Bhagheeratha Engineering Ltd. v. National Highways Authority of India*, ((2019) SCC OnLine Del 7885, *National Highways Authority of India v. Pate/KNR (JV)*, FAO (OS) (COMM) 184/2018 and *Essar Projects (India) Ltd. & Ors. v. Gail (India) Ltd.* [2012] Arb P. No. 424).

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

The Limitation Act governs the time period for filing a court action and a claim before the arbitral tribunal. As per the said Act, the limitation period in relation to a breach of contract is three years from the date on which the breach occurs or the cause of action arises. The time period can be extended under certain circumstances, for instance, in the case of acknowledgment.

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

Section 28 of the Indian Contract Act provides that an agreement curtailing the period of limitation prescribed by law is void.

Indian courts recognise a distinction between clauses curtailing the time period within which the claim can be referred to arbitration, and prescribing the period to notify the claim. Any time period stipulated to notify the party's intention to make claims is valid, though it indirectly curtails limitation. However, there are also judgments wherein a stipulation to this effect has been held to be in violation of Section 28 of the Indian Contract Act.

Usually, no particular forms are prescribed for the notification of claims. The law recognises that the substance of a document is more important than the form (see: *Alok Kumar Lodha and Ors. v. Asian Hotels (North) Limited*, (2020) SCC OnLine Del 1789).

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

It is for the parties to agree in the contract as to who shall bear the risk of unforeseen ground conditions. Construction contracts generally put all such risk on the contractor.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

Most large construction contracts contain change-in-law stipulations. Generally, an employer bears the risk arising out of a change in law, and any resultant delays can lead to grant of extension of time.

Section 64A of the Sale of Goods Act, 1930 provides that (subject to a contract to the contrary) in the event of an increase

or decrease in tax or the imposition of new tax in respect of goods after the making of any contract for the sale or purchase of goods, in the absence of any stipulation as to payment of such tax, any increase would entitle the seller to add the equivalent amount of the contract price and the buyer would be liable to pay the increased sum to the seller. However, in case of a decrease in tax, the buyer would be entitled to deduct the equivalent amount of decreased sum from the contract price and the seller would be liable to pay that sum to the buyer. The provision is applicable to any duty of customs or excise on goods and to any tax on the sale or purchase of goods.

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

Generally, a contract for service contains clauses that empower an employer to claim ownership over all intellectual property as may be created by an employee in the course of his employment. Indian law also provides for employment as an exception to an author's ownership over his intellectual property. Therefore, in the case of construction contracts, ownership of intellectual property in the form of design of the works concerned should vest with the employer.

3.10 Is the contractor ever entitled to suspend works?

A contractor may suspend performance of its obligations under a construction contract on grounds provided for in the contract, or in accordance with its statutory right to do so under the Indian Contract Act, 1872. Occasions when a contractor may suspend performance include considerable delay by an employer, non-payment of dues for work performed, *force majeure*, etc.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party's grounds for termination must be set out (e.g. in a termination notice)?

The Indian Contract Act allows a party to rescind/terminate a contract in the event of breach by the other party, including refusal to perform or disabling himself from performing (Section 39 of the Act). See also question 3.13 (frustration). A statutory or common law ground of breach need not be expressly provided in a contract; however, other instances of breach should be specified in the contract.

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor's profit on the part of the works that remains unperformed as at termination?

No. Construction contracts usually specify events on the occurrence of which an employer can terminate the contract. In most cases, the contract provides for a cure-period notice to be given by the employer prior to termination. If termination is for the employer's convenience, the contractor is usually entitled to termination payment and compensation. If the contract has been wrongfully terminated, the contractor is entitled to compensation. See also questions 3.11 and 3.20.

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

The concept of a *force majeure* event is well recognised in the Indian legal system. The doctrine of frustration of contract is acknowledged in Section 56 of the Indian Contract Act. A contract is considered frustrated if the performance of an agreed set of obligations becomes impossible or unlawful, either before or after the conclusion of a contract. Section 56 of the Act thus recognises *force majeure* events as grounds for frustration.

However, an exception to Section 56 states that if the event was within the reasonable contemplation of the promisor, or if the contract is frustrated due to acts attributable to the promisor, the promisee shall be entitled to compensation for any loss it suffers due to non-performance of the promisor's obligations under the contract.

In addition, Section 56 does not apply to instances of mere inconvenience, economic unfeasibility, or if performance of the contract has become more burdensome but without impossibility.

The Supreme Court, in *Energy Watchdog v. CERC* (2017) 14 SCC 80, held that *force majeure* clauses are to be narrowly construed. Further, where the parties have a specific *force majeure* clause in the agreement, the provisions of the Indian Contract Act, 1872 would not apply.

3.14 Is there any legislation or court ruling that has been specifically enacted or handed down to provide relief to parties to a construction contract for delay, disruption and/or financial loss caused by the COVID-19 pandemic? If so, what remedies are available under such legislation/court ruling and are they subject to any conditions? Are there any other remedies (statutory or otherwise) that may be available to parties whose construction contracts have been affected by the COVID-19 pandemic?

The Department of Expenditure of the Ministry of Finance, in a Circular dated 19 February 2020, announced that the disruption of the supply chains due to the spread of Coronavirus would be covered by the *Force Majeure* Clause ("FMC"). The Ministry of Finance further announced measures through an Office Memorandum dated 13 May 2020 for relief and credit support for businesses. In providing relief to contractors, all central agencies and ministries were directed to give an extension of up to six months for completion of contractual obligations, including in respect of EPC and concession agreements. It also covered obligations such as completion of work, intermediate milestones and extension of a concession period in PPP contracts.

The memorandum clarified that invocation of the FMC would be valid only where the parties were not in default prior to 19 February 2020. It also clarified that invocation of the FMC does not absolve all non-performance, but only non-performance attributable to the restrictions imposed due to the pandemic. To ease companies' cash flow position, government agencies were directed to partially release bank guarantees, depending on the percentage of work completed.

The Ministry of Road Transport and Highways ("MoRTH"), in a Circular dated 3 June 2020, also categorised COVID-19 as a *force majeure* event, and announced several reliefs for contractors, concessionaires and developers of road construction projects affected by COVID-19, including extension of time, waiver of penalty for delay in submission of performance security or bank guarantee, direct payments to sub-contractors, and compensation for loss of toll fee revenue. By an Office Memorandum dated

6 October 2020, MoRTH extended the relief measures for a further period of three months.

The Delhi High Court, in a decision dated 12 June 2020 in *MEP Infrastructure Developers Ltd. v. South Delhi Municipal Corporation*, ((2020) SCC OnLine Del 2439) observed that the COVID-19 pandemic qualifies as a *force majeure* event, relying on circulars issued by the Ministry of Finance as well as the MoRTH memorandum. The judgment has been upheld in appeal.

In *M/s Halliburton Offshore Services INC v. Vedanta Limited & Anr*, ((2020) SCC OnLine Del 2068), the Delhi High Court, in relation to a construction dispute, held that the country-wide statutory lockdown was *prima facie* a *force majeure* event.

3.15 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

Third parties cannot bring claims or enforce terms of a contract against a party to a contract. This principle emanates from the doctrine of "privity of contract", which confers rights and obligations arising out of a contract only upon parties to a contract. Therefore, in the landscape of construction law, a contractor cannot be subjected to claims from third parties to a construction contract. However, third parties are entitled to a remedy under tort law for injury suffered due to negligent acts of a contract. Therefore, a contractor may be subjected to claims under tort law for negligence.

3.16 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

Collateral warranties or direct agreements are not usual in construction and engineering projects in India.

3.17 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

Yes, parties in a construction contract can set off their claims and dues against each other. Should mutual negotiations fail, recourse can be taken to court and arbitration. In law, a set-off is different from a counterclaim. A counterclaim can exceed the sums claimed by the opposite party but a set-off is limited by the sum claimed and pertaining to the same cause of action.

3.18 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

The doctrine of "duty of care" originates from tort law and extends to all persons who, on a reasonable contemplation, can be expected to be affected by the acts or omissions of a person. The doctrine of "duty of care" can also be invoked in construction works, and a liability for negligence may arise from any harm caused to persons who could foreseeably be seen to be affected.

3.19 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

Where the meaning of an agreement is not certain or capable of being made certain, that agreement is considered void.

It is necessary to attempt to resolve any ambiguity by resorting to well-recognised rules of contractual interpretation, such as the rule of literal interpretation, harmonious construction, giving effect to the intention of the parties, and resorting to an interpretation which upholds the business efficacy of the contract (to be applied in that order). If the ambiguity is still not resolved, the parties may resort to the rule of *contra proferentem*.

3.20 Are there any terms which, if included in a construction contract, would be unenforceable?

Some terms which may be unenforceable in a construction contract are as follows:

- (a) clauses empowering an employer to unilaterally terminate a contract without any remedy to a contractor;
- (b) unilateral and substantial alteration of the character of a contract by adding/omitting obligations of a contractor;
- (c) clauses for payment of an unreasonable sum in the form of liquidated damages;
- (d) clauses absolutely restricting a party from enforcing his rights under, or in respect of, any contract;
- (e) clauses that limit the time within which a party may enforce his rights; and
- (f) clauses which would defeat the provisions of any law, or which are opposed to public policy.

3.21 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

The extent of a designer's liability in contract may be limited to the terms of the contract. Indian law does not recognise an "absolute liability" on the designer or the possibility to treat the designer as a guarantor. However, the designer's liability may extend to third parties in tort and may not be restricted to contractual limitation stipulations. The Indian law of tort and negligence is largely based on English common law. English cases are regularly referred to and relied upon.

3.22 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

No, the concept of decennial liability is not recognised in India. Defect liability clauses in construction contracts broadly cover such liability of the contractor. Liability under the defect liability clause is generally for a period of six or 12 months after completion of the project.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

There are multifarious ways of resolving disputes recognised in India. These include resolution through litigation, arbitration,

mediation, conciliation, dispute resolution boards and judicial settlement. Arbitration is the most commonly used mechanism to resolve construction contract disputes. Mediation and conciliation hardly ever succeed when the Government is involved in high-stakes disputes.

Recently, on 8 February 2023, the Government of India introduced a draft dispute resolution Scheme called the 'Vivad Se Vishwas IP' with the aim of settling contractual disputes involving Government Undertakings. It proposes a voluntary settlement scheme by offering graded settlement terms depending on the stage of the dispute. For instance, if an award is passed against the Government undertaking but it has not yet been challenged, then the settlement amount can be 60% of the awarded sum including interest till the date of payment. Suggestions were invited from the stakeholders and are currently under review.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

In the absence of a statutory enactment, the adjudication process is subject to the parties' agreement. The clause is rarely used. Dispute review boards, on the other hand, are common. However, in practice, it is often the case that either the disputes review board is not constituted in a timely manner, or its decision is not voluntarily accepted. It may therefore be concluded that the Government's mindset is to only accept an arbitral award as the proper dispute resolution mechanism, especially in high-stakes disputes.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

Construction contracts invariably provide for arbitration. The Arbitration and Conciliation Act, 1996 ("Arbitration Act") is the governing law. The Arbitration Act is essentially based on the United Nations Commission on International Trade Law ("UNCITRAL") Model Law, 1985, and UNCITRAL Model Arbitration Rules, 1976. Broadly, the Act has two parts. Part I is an elaborate code providing for all arbitrations seated in India (domestic or international arbitrations). Part II essentially provides for enforcement of foreign awards (see question 4.4). India is an arbitration-friendly jurisdiction with a pro-arbitration Act and a good track record of enforcement for foreign awards.

4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

Yes, India is a signatory to the New York Convention and the grounds on which the enforcement can be resisted are as specified in the NYC. The limitation period for enforcement of a foreign award is 12 years. Legal obstacles include judicial delays and issues concerning remittance in foreign currency. The losing party is usually directed to deposit the awarded sums in court pending resolution of the challenge grounds. This is to safeguard the interest of the successful party. The deposit is, however, in Indian Rupees. Several grey areas such as exchange rate issues; Indian tax issues on interest have arisen but not conclusively settled by the courts.

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

Proceedings before a court are initiated upon the receipt of a plaint by one of the parties. The court then serves summons on the opposing parties to file their written statement. Issues are thereafter framed by the court and the case posted for trial. Evidence-in-chief is in the form of sworn affidavits and cross-examination is conducted in front of court-appointed commissioners. The claimant's evidence is led first.

A claimant may request the court for a summary judgment in case of a certain debt or on lack of defence being available to the respondent wherein a judgment is sought without trial.

Parties may prefer an appeal to a High Court or to a two-judge bench of the High Court. If parties are not satisfied with the judgment of a High Court, a Special Leave Petition may be filed to the Supreme Court of India against any such judgment within a period of 90 days from the date of the impugned judgment.

Indian courts are slow and clogged. The time taken can vary from jurisdiction to jurisdiction. Generally, a court case can take 10 to 15 years to progress through the various stages of appeal.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

A foreign judgment may emanate from a "reciprocating" territory or a "non-reciprocating" territory. If it is from a reciprocating territory, the judgment is enforceable as a decree but subject to six defences that are available to the defending party. In the case of a non-reciprocating territory, a fresh suit would need to be instituted in India on the basis of the foreign judgment. Here too, the defendant can only use six specified grounds to defend itself. The six grounds available to the defendant (in either situation) are:

- (a) That the judgment has not been pronounced by a court of competent jurisdiction.
- (b) That it has not been given on merits, i.e., it is a default judgment.
- (c) That it is founded on an incorrect view of international law or a refusal to recognise Indian law (if applicable).
- (d) That the proceedings were opposed to natural justice.
- (e) That it has been obtained by fraud.
- (f) That it sustains a claim founded on breach of law in force in India.

Major jurisdictions that have been notified as "reciprocating territories", for the purposes of judgments from their superior courts, include the United Kingdom, United Arab Emirates, Singapore and Hong Kong, among others.



Sumeet Kachwaha has over 44 years' experience in the legal profession, mainly in dispute resolution, corporate and commercial law. Mr. Kachwaha has been recognised in Band One of the Arbitration section of *Chambers Asia* since 2009. He features in *Who's Who Legal* in the Construction, Arbitration, Procurement, Government Contracts and Asset Recovery sections, and has a Band One ranking in the Dispute Resolution section of *The Legal 500 Asia Pacific*. He is also listed in GAR's *Who's Who Legal* Arbitration section and ranks in the *India Business Law Journal's* "A List" of "India Top 35 Lawyers". He has handled some of the leading and landmark commercial litigations ever to come before Indian courts. Mr. Kachwaha has also been involved on the non-contentious side in several high-stakes projects in infrastructure, power, construction and telecoms.

Mr. Kachwaha has previously served as a Chair of the Dispute Resolution & Arbitration Committee of the Inter-Pacific Bar Association (three-year term) and as the Vice-President of the Asia Pacific Regional Arbitration Group. He is currently serving on the Advisory Board of the Asian International Arbitration Centre (formerly known as the Kuala Lumpur Regional Centre for Arbitration).

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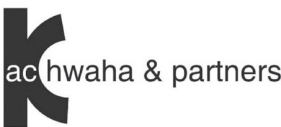
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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (NB For ease of reference throughout the chapter, we refer to “construction contracts” as an abbreviation for construction and engineering contracts.)

Law No. 2 of 2017 on Construction Services, as lastly amended by Law No. 6 of 2023 on Stipulation of Government Regulation *in Lieu* of Law No. 2 of 2022 on Job Creation into Law (“**Construction Law**”), does not regulate the standard form of construction contract. In general, Indonesian contract law recognises freedom of contract principle stipulated under Article 1338 of Indonesian Civil Code (“**ICC**”), where the parties to a contract are free to include any provisions they wish, subject only to mandatory provisions of Indonesian law. Article 47 of Construction Law provides provisions that must be included in the construction contract, which we will explain further in the answer of question 1.5.

- (i) We have a type of contracts placing both design and construction obligation to the contractor. Minister of Public Works and Public Housing (“**MoPWH**”) Regulation stipulates that in the design-and-build contract, the contractor has unified responsibility for the design and implementation of construction.
- (ii) We have a design-only type of contract. This is a contract between the employer and the construction consulting services provider to carry out construction planning. Elucidation of Article 47 of Government Regulation No. 22 of 2020 on Implementing Regulation of Construction Law, as amended by Government Regulation No. 14 of 2021 (on Alteration of Government Regulation No. 22 of 2020 on Implementing Regulation of Construction Law) (“**GR No. 14/2021**”) stipulates that the construction planning covers the design calculation and the preparation activities based on standards and methods that have been selected and carried out by the expert.
- (iii) Based on our understanding, management contracting is an arrangement where the owner enters one contract with the managing contractor, that subcontracts all its design and construction obligations, and the managing contractor is not required to carry out any construction works. The managing

contractor’s roles, among others, are to conduct tenders and carry out contracts directly with subcontractors. We have not experienced this type of arrangement in Indonesia.

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

The collaborative contracting model is an arrangement where the employer, contractor, and consultant working together as a team to achieve common goal. Collaborative contracting emphasises co-operative working relationships between the employer and all participants in the contract. As far as we are aware, collaborative contracting is not commonly used in Indonesia. In Indonesia, the contract between employer and contractor, contractor and subcontractor, and employer and consultant are usually made separately.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

The most commonly used standard forms of construction contracts in Indonesia are the standard forms published by the International Federation of Consulting Engineers (“**FIDIC**”). The MoPWH informs in one of its articles that FIDIC contract has been adopted by Indonesia since 2010, especially for projects funded by foreign aid such as the World Bank, ABD, and JICA. Further, MoPWH informs that a standard FIDIC contract has been made in Indonesian language to increase the use of FIDIC contracts in Indonesia, to create a fair and balanced contract between the employer and the contractor.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

A project involving public works means a project which has an impact on the interest of the nation, and/or public interest. The selection of the contractor that involves in public works must be selected through the selection process. If the project is funded by the state finance, then the contract must use a standard form as provided by the Head of the Government Goods/Services Procurement Policy Agency (LKPP). Nevertheless, if the project does not involve a state finance, then the contract can be drawn up based on an agreement of the parties.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

In order to be valid and binding, a contract must fulfil four conditions, as stipulated under Article 1320, namely: (i) there must be consent of the individuals who are bound thereby; (ii) there must be capacity to conclude an agreement (adult or already married and not under conservatorship); (iii) there must be a specific subject-matter (e.g., construction service); and (iv) there must be an admissible cause (not violating laws and regulations, public order, and decency).

Construction Law obliges the contract to be made in writing and must comply with the prevailing laws of Indonesia. Further, Construction Law stipulates that construction contract must be drawn up in the Indonesian language. If the construction contract is entered into by foreign party, it must be made in Indonesian and English language, where the Indonesian version shall be the prevailing language in the event of discrepancies. It is also compulsory for building failure provision to be stipulated.

Construction contract must at least govern the following provisions: (a) identity of the parties; (b) work description (scope of work, value of work, etc); (c) rights and obligation of the parties; (d) labour; (e) payment system; (f) dispute resolution; (g) termination of contract; and (h) *force majeure*.

Furthermore, Article 76 GR No. 14/2021 provides that a construction contract must consist of:

- (a) a letter of agreement, consisting of:
 - (i) description of the parties;
 - (ii) consideration;
 - (iii) scope of work;
 - (iv) subject matters, such as the contract price, contract period; and
 - (v) list of binding documents along with their hierarchical order;
- (b) particular conditions of the contract (e.g., disbursement of guarantees, down payment, payment of work performance);
- (c) general conditions of the contract (e.g., general provision, the rights and obligations of the parties, dispute resolution);
- (d) employer documents which are part of the tender documents as the basis for contractors to prepare an offer, which contains the scope of work, specifications, drawings, bills of quantity and price;
- (e) proposal or bid, which prepared by the contractor based on the tender documents containing method, bid price, master schedule, and resources;
- (f) minutes on agreement/clarification between employer and contractor;
- (g) a letter of acceptance from employer; and
- (h) a letter of undertaking commitment from contractor.

Article 1339 of ICC stipulates that a contract does not only bind matters explicitly stated in the contract, but also all things according to the nature of the contract are obligated based on appropriateness, customs, or law. Thus, a construction contract, despite the freedom of the parties to set out its terms and conditions, will also have to comply with the statutory requirements and not disregarding appropriateness and the best practice in construction industry.

1.6 In your jurisdiction please identify whether there is a concept of what is known as a “letter of intent”, in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

Yes. In practice, the concept of letter of intent (“LOI”) is known in Indonesia, although there is no specific regulation on letter of intent under Indonesian Law. Generally, a LOI is not legally binding since it is only a written statement detailing the preliminary understanding of parties who plan to enter into a contract. The parties may, however, agree that the letter or some provisions in the LOI are binding (e.g., asking to be countersigned). Under the jurisprudence, several judges considered that the LOI was binding to the extent that it fulfils the validity of agreement under 1320 of ICC.

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer’s liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors’ all-risk insurance?

Article 47 of Construction Law stipulates that construction contract must at least stipulate workers protection provision which contains the obligations of the parties on the health and safety, as well as social security.

Law No. 13 of 2003 on Labour, as amended by Law No. 6 of 2023 on Stipulation of Government Regulation in Lieu of Law No. 2 of 2022 on Job Creation into Law (“**Labour Law**”), and the Law No. 40 of 2004 on National Social Security System (“**NSS System Law**”) require employers to register their workers as participants to the Social Security Administration Agency (“**BPJS**”). Article 18 of NSS System Law stipulates that the types of social security in the BPJS are among others, such as health insurance, work accident insurance, and death insurance.

We found no provisions in the Construction Law, GR No. 14/2021, or Ministerial Regulation which require contractors to provide an all-risk contractor. Nevertheless, in practice, all-risk insurance is commonly requested by project owners in construction projects.

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

There are statutory requirements on the labour, tax, and health and safety. It is not, however, compulsory to stipulate tax matters under the construction contracts. For labour matters, the Construction Law and GR No. 14/2021 regulate workers, protection and the obligation for workers to have work competency certificates. For tax, despite non-expressive stipulation in the contract, the service provider is obligated to withhold its employee’s income tax and deposit it to the state’s treasury. Meanwhile, for health and safety matters, Article 84 of GR No. 14/2021 stipulates that the implementation of construction services must comply with the principle of sustainability by implementing the security, safety, health, and sustainability standards. To achieve

the principle of sustainability, the employers, and contractors in the implementation of construction services must have a construction safety management system (“SMKK”). In addition, the health and safety provisions are regulated under Law No. 1 of 1970 on Work Safety, Government Regulation No. 50 of 2012 on Implementation of Work Safety and Health Management System and Minister of Manpower Regulation No. PER.01/MEN/1980 of 1980 on Work Safety and Health in Building Construction.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

Yes. The provisions related to building and fire safety are regulated under the Law No. 28 of 2020 on Building as amended by Law No. 6 of 2023 on Stipulation of Government Regulation in Lieu of Law No. 2 of 2022 on Job Creation into Law (“**Building Law**”) and Government Regulation No. 16 of 2021 on Implementing Regulation of Building Law (“**GR No. 16/2021**”). Building technical standard is guidelines containing provisions, criteria, quality, methods and/or procedures that must be met in building development activities starting from technical planning and construction implementation, building utilisation, and maintenance, to destruction activities. Both service provider and service user in the construction contract must comply with the building technical standards to fulfil construction security, safety, health, and sustainability standards to prevent building failures. Articles 30 and 31 of GR No. 16/2021 stipulate that every building must be protected with a fire hazard protection system through a fire extinguishing system, fire alarm, fire smoke control system and fire control centre to fulfil building safety aspects.

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

The Construction Law and GR No.14/2021 are silent regarding this matter. Generally, the employer’s right to retain part of contract price for the works as a retention is always stipulated in construction contract in Indonesia. For instance, for a construction project financed with state finances, PR No. 16/2018 stipulates that the retention is 5% of the contract price is used as a maintenance guarantee of construction work during the maintenance period. This retention will normally be released after the maintenance period is completed.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor’s performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

Performance bonds are permissible and common in construction contracts in Indonesia. Article 47 of Construction Law and its elucidation stipulate that construction contracts must include provisions on the scope of work, which also covers guarantees for work performance. The guarantee may take the form of insurance or guarantees issued by banks or non-bank institutions. Guarantees provided may vary from project to project.

The project owner will normally ask for a guarantee issued by the bank, in the form of a bank guarantee.

Disbursement of performance bonds may be restrained through a request in an interlocutory decision, as an interim award until a final decision on the merits of the case is rendered. One judge prohibited the disbursement of the bank guarantee (as a performance guarantee), since it could be detrimental to the plaintiff (in this case as a contractor) in later days until the defendant (in this case as an employer) is proven to have defaulted on the agreement.

According to Indonesian Law, performance bonds are a guarantee agreement that can be liquidated in the event of default. Article 1820 of ICC stipulates, guarantee is an agreement, by which a third party (banks or others), for the benefit of the creditor (employer), binds itself to fulfil the agreement of the debtor (contractor), if the debtor themselves do not fulfil it. Furthermore, Article 1 paragraph (3) of Decree of the Board of Directors of Bank of Indonesia No. 23/88/KEP/DIR on the Granting of Guarantees by Banks stipulates that a guarantee (performance bonds) is a document issued by a bank which results in an obligation to pay the beneficiary (employer) if the guaranteed party (contractor) defaults.

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

It is permissible to guarantee the performance of subsidiary companies and there is no restriction on the nature of such guarantee.

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

Retention of title by the contractor in relation goods and supplies used for the works is not usual in Indonesia. Normally, the material used in the works will become the property of the employer when it is delivered to the site. This is essentially what has been provided under the ICC on the sale and purchase of goods. Any exception to that provision should be possible if it is specifically regulated under the contract.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

Yes. Article 49 of GR No. 14/2021 stipulates that employers may use construction consulting service providers for construction supervision activities, where the construction consulting service providers act for, and on behalf of, the employer in accordance with the provisions in the construction contract.

Construction Law, GR No. 14/2021 and Minister Regulation do not explicitly stipulate the duty to act impartially.

The Construction Law, however, recognises the professionalism principle in the construction services implementation as a professional activity that upholds the value of professionalism. Article 75 paragraph (1) of Construction Law stipulates that construction workers who provide construction services (i.e., construction consulting service) must be professionally responsible towards their work result. Elucidation of Article 75 paragraph (1) further explains that the responsibilities of the construction workers (i.e., consulting service providers) are in accordance with the code of ethics of each profession involved. Thus, construction consulting service providers must comply with the code of ethics. For instance, the National Association of Indonesian Consultants (“INKINDO”) in point 2 of the professional code of ethics provides that each Member of INKINDO is obliged to “act honestly, impartially and with full dedication to serve the task giver and the community”. Although it is not expressly stipulated under the law, the duty to act impartially can be seen as the appropriateness as stipulated under 1339 of ICC.

If the construction consulting service providers breach such duty, the contractor may report a violation of ethical conduct to the relevant organisation of service provider and may claim for breach of contract on the basis of the good faith principle.

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a “pay when paid” clause?

There are no restrictions on “pay when paid” clauses in both Construction Law and GR No. 14/2021. Thus, the “pay when paid” clause may be included in the construction contract if agreed by the parties.

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

Yes. This is done to ensure that the contractor carries out its duties based on the contract, therefore the damage is determined in advance. This concept is regulated under Article 1304 of ICC on obligation with the threat of punishment, where a party is required to do something (e.g., pay delay damages) due to late performance. On this matter, it should not be pre-estimated. In contrast, if the agreed damages are for compensation and not for delay damages, then it should be pre-estimated.

We did not find any decision specifically revising the liquidated damages; however, on another case with similar problems, i.e., damages, it was shown that these could be revised or rectified by the judge if it is considered to be violating the sense of justice and decency. In addition, the judges may revise the damages if the claimed damages are, among other things: (i) not in accordance with the economic situations at that time, such as COVID-19; or (ii) if the interest for the compensation is a lot greater than the interest determined by bank.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

Laws and regulations are silent on this matter. The employer is normally entitled to vary the work to the extent it is agreed by the parties under the contract. There is no limit on such right under the prevailing laws and regulation.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

Construction law and regulations are silent on this matter. If agreed by the parties, the work can be omitted, and the employer can either perform the omitted works by themselves or procure service of third party to perform it.

If the project is using the state’s treasury, the volume of the work under the contract can be omitted if there is discrepancy of the site condition during the implementation with the drawings and/or technical specification as set forth under the contract.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

Both terms might be implied in a construction contract. As per Black’s Law Dictionary, a fitness-for-purpose obligation means a warranty, implied by law, if the seller (contractor) has reason to know of the buyer’s (employer’s) special purposes for the item, that the item is suitable for those purposes. Construction Law does not have an expressive term of “fitness for purpose”. Nevertheless, since the construction contract must specify the work specification, that term should be seen as part of the contract. The same applies to the obligation if a building failure occurs (see question 3.22). The duty to act in good faith is the principle and expressive obligation under Article 1338 paragraph (3) of ICC. Hence, that duty is implied under the construction contract although it is not specifically stipulated.

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

Construction Law is silent on this matter. Therefore, it depends on what is agreed by the parties.

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

Below are the time limits for the exercise of rights under construction should be taken into consideration:

- (a) the time limit agreed by the parties under the agreement;
- (b) the general time limit for a claim, according to Article 1967 of ICC is 30 years; and

- (c) for a building failure claim, according to Article 65 paragraph (2) of Construction Law, the general time limit is 10 years from the date of final delivery of construction services.

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

No one position is taken by the court, as the court may consider the contractual limit to be binding or consider it as not binding, especially when the contractual limit is different than the statutory limitation. For the form and substance of notice, there should be a written demand from the non-defaulting party to the defaulting party giving a certain period to rectify the default.

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

The Construction Law and the ICC are silent on that matter. Therefore, the *force majeure* provisions under Article 1244 and 1245 of ICC are applicable. It is more likely that the unforeseen ground condition affects the contractors, than the employer. If this occurs, the contractor may refer to that provision, if due to *force majeure*, the contractor is unable to perform according to the contract.

If one refers to FIDIC, when unforeseen ground condition exists and the contractor suffers delay and/or incurs cost due to these conditions, the contractor is entitled to: (i) an extension of time; and (ii) additional cost to the engineer, provided that contractor notifies the engineer, and engineer determines that the risk is unforeseen and the extension of time and additional cost is related to the unforeseen conditions.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

The risk can affect either the employer or contractor. Change in law may affect the contractor unable to import some materials required in the project, thereby delaying the project. In contrast, the employer may have to be satisfied with the alternative material used in the project.

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

Under Law No. 28 of 2014 on Copyright, the party who owns the intellectual property is the one who created the design. In practice, it is normally agreed that the contractor who owns the intellectual property for its documents provides royalty-free licence for the employer to use the contractor documents.

3.10 Is the contractor ever entitled to suspend works?

Yes, to the extent it is agreed by the parties. Normally, the contractor may suspend the works if the employer fails to make the payment to the contractor.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party's grounds for termination must be set out (e.g. in a termination notice)?

The common ground which entitles a party to automatically terminate a contract is if the other party becomes bankrupt or insolvent or enters liquidation.

Moreover, there is no legal requirement to terminate a contract under the prevailing laws other than what is stipulated under the contract.

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor's profit on the part of the works that remains unperformed as at termination?

Yes, we have seen and experienced such provision many times. If the employer exercises such right, they will generally have to pay the amount of work that has been carried out by the contractor and no payment whatsoever on the unperformed works.

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

Yes, the *force majeure* concept is known under ICC. The remedy for the affected party is the exemption on cost, loss, and interest.

The term "uneconomic" can be defined as "not economically practicable" (*Merriam Webster Dictionary*). It is not commonly understood as part of *force majeure*. However, one legal scholar says that reasons of economic constraints might be used as a basis for avoiding contractual obligations, such as *clausula rebus sic stantibus*. This term is, according to the legal scholar, connected with the principle of good faith under the ICC. In addition, that opinion is supported by jurisprudence, which holds that *force majeure* related to changes in circumstances/hardship/*rebus sic stantibus* serves as the reason for the defendant to be declared as not having committed any default. The judges essentially consider that the *force majeure* related to changes in circumstances have fundamentally changed the balance of an agreement and caused the value of its implementation to be very high for the party using it, or the value of implementing the agreement is drastically reduced (uneconomic) for the receiving party, and the event only arises or is known to the injured party after the contract is concluded.

3.14 Is there any legislation or court ruling that has been specifically enacted or handed down to provide relief to parties to a construction contract for delay, disruption and/or financial loss caused by the COVID-19 pandemic? If so, what remedies are available under such legislation/ court ruling and are they subject to any conditions? Are there any other remedies (statutory or otherwise) that may be available to parties whose construction contracts have been affected by the COVID-19 pandemic?

No. Nevertheless, COVID-19 has been categorised as a national disaster, according to Presidential Decree No. 12 of

2020. Hence, we view that COVID-19 may be considered as a *force majeure* to the extent that the COVID-19 is hindering any party to do its performance under the contract. The regulation does not provide any available remedy. Thus, Articles 1244 and 1245 of ICC will be applicable as well as the contract provisions.

3.15 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

Article 1318 of ICC in general stipulates that the other party is entitled to claim the benefit of contractual right, provided that that party is the beneficiary or assignee.

In terms of building failure, Construction Law provides that a third party is entitled to claim for the damages suffered by it due to building failure.

3.16 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

In Indonesia, the direct agreements or collateral warranties are commonly used only between contractor and the funder. Nevertheless, it does not rule out the possibility of using the direct agreements or collateral warranties, as long as this is agreed by the parties.

3.17 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

Yes, this is in accordance with Articles 1425 to 1435 of ICC. The set-off can be done provided that: (i) both credits are due, collectible and can be calculated; (ii) there are two parties who owe each other reciprocally under two different agreements; and (iii) the credit must be of the same amount. The set-off cannot occur for the loss of right obtained by a third party.

3.18 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

According to Black's Law Dictionary, duty of care means a legal relationship arising from a standard of care, the violation which subjects the actor to liability. We do not have that express term under ICC and Construction Law. Nevertheless, a duty of care might be seen as appropriateness considered to be a binding obligation in the agreement (Article 1339 of ICC). A duty of care may also be understood as appropriateness that is included when an unlawful act or tort is assessed. Despite the non-expressive term "duty of care", if it is assessed as part of appropriateness, it should be considered as intra-contractual and concurrently exist with other contractual obligations.

3.19 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

Yes, the rules of interpretations are governed from Articles 1342 to 1351 of ICC. There are several provisions dealing with ambiguous terms. Article 1343 of ICC provides that when the words are construed to have different meanings, the intent of the parties must be assessed despite strict reading of the words. Article 1344 of ICC provides that when a promise can be given two different meanings, then a choice must be made on the meaning that enables such promise to be realised. Further, Article 1345 of ICC stipulates that when words can be given two meanings, a choice must be made on the meaning that is in line with the character of an agreement.

3.20 Are there any terms which, if included in a construction contract, would be unenforceable?

Yes, according to Article 1337 of ICC, when the terms are considered as violating the law, ethics, and public policy, as well as appropriateness as set forth in Article 1339 of ICC, then such provision or terms can be considered or declared to be unenforceable.

3.21 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

There is no obligation for the designer to provide an absolute guarantee in respect of his work. However, as under the Construction Law the service provider (i.e., architect or designer) is responsible for the occurrence of building failure, and there is no qualification over that responsibility, that responsibility may be considered to be absolute.

3.22 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

Yes, decennial liability is recognised under Construction Law. It applies in terms of building failure, a concept through which one of the parties is liable for building failure if in conducting construction service, that party does not fulfil the standard of security, safety, health, and sustainability. The period of building failure is determined according to the construction life plan, but does not exceed 10 years after the handover of construction work.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

In Indonesia, construction dispute generally resolved through: (i) court; or (ii) alternative dispute resolution, namely dispute board and arbitration.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

Yes, we have a statutory adjudication process under Law No. 30/1999 on Arbitration and Alternative Dispute Resolution ("**Arbitration and ADR Law**") (see question 4.3). The same applies for the construction dispute board. The implementation of that process, however, depends on the agreement of the parties.

According to MoPWH No. 11/2021 on Procedure and Technical Guideline on Construction Dispute Board, the general procedures for construction dispute board to make a decision are as follows: (a) notice; (b) document review; (c) hearing; (d) site visit; (e) internal dispute board meeting; and/or (f) issuance of a formal judgment.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

Yes. According to Arbitration and ADR Law, dispute resolution through an arbitration is based on an arbitration agreement. The arbitration agreement waives the jurisdiction of the court to try the dispute. The arbitration proceeding should complete no later than 180 days, in private, and using Indonesian language unless agreed otherwise. The parties can choose whether to use national or international arbitration institution, including their rules. The mechanism of an arbitration proceeding will involve:

- (a) submission of claim;
- (b) submission of answer by the respondent within 14 days since copy of the claim was received;
- (c) attempt of amicable settlement by the tribunal – if the settlement is reached, the tribunal draws up a deed of settlement which is final and binding, and if the amicable attempt is unsuccessful, the proceeding will continue;
- (d) both parties are given the last opportunity to explain each standpoint in writing and present evidence which is deemed necessary to support their standpoints within a period determined by the tribunal;
- (e) examination of witnesses and experts before the tribunal are conducted based on the civil procedural law; and
- (f) rendering the award.

The award is made based on the law or based on justice or appropriateness. The rendering of award must be made no later than 30 days after the proceeding is closed. The arbitration award is final and legally binding for the parties. The award must then be submitted and registered to the registrar of the district court within 30 days since the award was read.

Any party may apply for the annulment of the award if the award allegedly contains the following elements: (a) letters or documents submitted in the proceeding which are admitted to be false or declared as false; (b) there is a decisive document found concealed by the opposing party; or (c) the award was rendered based on deceit by one of the parties in the proceeding. The application for annulment must be submitted in writing no later than 30 days from the submission and registration of the award at the district court.

4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

Yes, since Indonesia already ratified the New York Convention 1958 through Presidential Decree No. 34/1981. In addition, the international arbitration award must fulfil the requirement under Arbitration and ADR Law, as follows: (a) the award is decided by an arbitrator or tribunal that is a party on treaty on recognition and enforcement of international arbitration award (New York Convention 1958); (b) the award is in the scope of commercial law; (c) it does not violate public order; and (d) it already obtains the exequatur from District Court of Central Jakarta.

The legal obstacles on enforcement are generally based on what has been stipulated under the New York Convention 1958, e.g., invalidity of the arbitration agreement, violation of due process, excess by arbitrator of their authority, irregularity in the composition of the tribunal or arbitral procedure, award not binding, suspended, or set aside, the dispute is non-arbitrable, and violation of public policy.

The practical obstacles may refer to no period for the obtainment of the exequatur, non-clarity of the assets of the debtor, non-clarity of the concept of public policy.

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

According to Circular Letter of Supreme Court No. 2 of 2014 ("**SEMA 2/2014**"), the duration for first instance proceeding is a maximum of five months. The process is as follows: (i) filing of the claim; (ii) exceptions and answers; (iii) rejoinder; (iv) counter plea; (v) examination of evidence from both parties; (vi) conclusions; and (vii) decisions. The final decision of the first instance court can be appealed to the high court. Despite the five months requirement, the court proceedings duration generally exceed that period.

Referring to SEMA 2/2014, the appeal process on the high court can be carried out for a maximum of three months. The process covers application for appeal, examination, and decisions. In addition, the decision of the high court can be applied for cassation to the supreme court (final court proceeding).

According to Decision of Head of Supreme Court No. 214/KMA/SK/XII/2014, the duration for cassation is maximum 250 days. The cassation process covers application for cassation, examination, and decisions.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

No, according to Article 436 of RV, decisions of foreign court are not enforceable in Indonesia.



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Leks&Co is an Indonesian law firm specialised in construction and real estate and other related sectors, focusing on litigation and arbitration. *The Legal 500*, *asialaw*, and the *Asia Business Law Journal* recognise the firm as the market leader in the real estate and construction practice areas. The Firm, for three consecutive years, has been recognised as "Top Tier" by *The Legal 500* in Real Estate and Construction. The Firm was also recognised by *asialaw* as a "highly recommended" firm in real estate and "recommended" firm in construction. Recently, *Asia Business Law Journal* crowned the Firm as the winner of 2021 Indonesia Law Firm Award in real estate practice area. Leks&Co is also shortlisted as "construction and real estate firm of the year" in *The Legal 500* Southeast Asia Award 2023 along with the other distinguished reputable regional law firms.

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Dr. Rouhollah Saberi

1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (NB For ease of reference throughout the chapter, we refer to “construction contracts” as an abbreviation for construction and engineering contracts.)

There are two sets of standard construction contracts in Iran. The first set is devised by the Plan and Budget Organization (PBO – a governmental organisation whose tasks are, among other things, guiding and monitoring the development of the country as well as management, guidance and leadership of the country’s technical and executive system and qualification, rating and evaluation of consulting engineers and contractors) and include Construction Contract (Leaflet No. 4311) (essentially based on FIDIC Red Book with variations disrupting the balance of rights and obligations originally envisaged in the Red Book); Consulting Services (By-law No. 1401/476645) encompassing consulting, designing and supervision services by the engineering firms and sometimes used as a design-only contract; Procurement and Construction Contract (By-law 101-183406); Engineering and Procurement Contract (By-law 101-62703); Design-Build for EPC Industrial Projects (By-law No. 1402/114650 issued on 2023-05-30 and to become effective six months later, which has replaced Leaflet No. 5490) (hereinafter the New EPC Contract); and Design-Build for EPC non-Industrial Projects (By-law No. 101-85428) and Contract for Management Contracting (By-law No. 105-735-54-201).

The Ministry of Petroleum has also rolled out some standard contracts more or less the same as the ones introduced by the PBO which are used in the oil, gas and petrochemical projects.

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

Collaborative contracting is not known or used in Iran.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

Construction Contract (Leaflet No. 4311), Consulting Services (By-law No. 1401/476645), Design-Build for EPC Industrial Projects (Leaflet No. 5490 and Contract for Management Contracting (By-law No. 105-735-54-201) are most commonly used in Iran.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

Use of different standard construction contracts devised by PBO are mandatory in public works.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

According to Art. 190 of Iran Civil Code, every contract must meet four requirements to be valid, namely: a) mutual intention and consent; b) capacity; c) a definite thing as subject-matter; d) lawful cause. Where public works are concerned, the award of the contract must be according to the Tendering Law of January 2005.

Although it is not mandatory to have a written contract, almost invariably all construction contracts are in writing. Public works contracts must be in writing.

1.6 In your jurisdiction please identify whether there is a concept of what is known as a “letter of intent”, in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

As far as public works are concerned, our understanding of the Tendering Law is that when the winner is decided, the public body and the winner must enter into a contract during the validity of the tender or an extension thereof. No Letter of Intent (LOI) concept seems to be implied by the Tendering Law.

In other contexts, a LOI is issued after the winner of a tender is determined and requires the winner to start the work prior to the formal execution of the contract. The contract (comprising the tender documents and the winner's proposal) is applicable to the works done after the LOI, and prior to the contract execution.

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer's liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors' all-risk insurance?

According to Art. 38 of the Social Security Law, where works are carried out through contracting, the employer must require the contractor to insure its employees with the Social Security Organization and pay the premiums accordingly. Additionally, it is common practice that the contractor must procure the following insurance policies: Erection/Construction All-Risk Insurance; General Liability Insurance; transportation insurance for the material/equipment; and insurance for construction machinery.

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

Those who work on site are either employees of the contractors/subcontractors who are covered by the Labor Code and Social Security Law, or the independent individual subcontractors who are not subject to the Labor Code. The distinction between the employees and independent contractors is not clear-cut in the Iranian legal system.

There are extensive bodies of law and regulations dealing with the income tax of the employees (Direct Taxation Act and its by-laws). Chapter 4 of The Labor Code addresses the General Protection and Hygiene in Workplaces. The by-laws passed by the High Council of the Occupational Safety also deal with the health and safety of the employees.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

The Regulation on prevention of firing and firefighting in workplaces (October 2012) specifically deals with fire safety in the workshops and is applicable to construction contracts. Chapter 3 of the Building National Regulations also deals with fire protection in buildings.

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

Nothing in the laws provides for retention of part of the contract price to be released after the defects liability period, or when the works are substantially complete. However, the standard construction contracts do provide for such retentions. Where public works are concerned, as per Art. 6.d of the Regulation on Guarantees for Public Transactions, retention of the contract price (up to 10 per cent) (so-called "good performance retention") is mandatory.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor's performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

Performance bonds issued by banks are prevalent in the Iranian construction sector. They are often on demand, though issue of conditional guarantee is also possible.

It is common practice by the contractors to apply to the courts for interim injunction to block the employer's call on guarantees. Therefore, if the courts are (as per Art. 310 of the Civil Procedure Code) satisfied that there exists an emergency to restrain the owner's call on the guarantee, an interim injunction will be issued. Such injunctions are not uncommon in Iran.

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

It is permissible, but not so common, for a parent company to guarantee the performance of a subsidiary. Generally speaking, these are not on-demand guarantees, and there are no restrictions on their nature.

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

It is possible, but not usual, for contractors to retain their title to the goods and supplies until full payment is effected by the owner. Art. 380 of the Civil Code allows the seller to take back the goods in the hands of the buyer due to non-payment and buyer's insolvency, meaning that retention-of-title clauses are not prevalent in the construction sector. Additionally, Art. 37.a and Art. 53.5 of the Construction Contract and the New EPC Contract (respectively) provide that title to the goods and material will pass to the owner once payment for them is done. A corollary of this proposition is that the contractor is entitled to remove from the site those goods and materials for which payment is not effected. However, it is not clearly stated in the standard contracts, and our experience is that the contractor prefers to receive the payment for the goods and material rather than removing them from the site.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

In design-bid-build projects where the Construction Contract is used, a third party who is hired under the Consulting Services

Contract (CSC) will supervise the construction process. Under Design-Build contracts, the third party is retained under Contract for Management Contracting. Under the earlier versions of the CSC, there was no hard and fast rule on the position of the Engineer in differences that arise between the employer and contractor. It was believed that the Engineer represented the employer and had not duty to act impartially. In the latest edition of the CSC, Art. 30, titled “Third Parties and/or Contracts”, provides that, “Where performance of the services of this contract by the Engineer requires the use of powers or carrying out the obligations provided for in other contracts, the following will apply: 30.1. In case the powers or obligations are not envisaged in Exhibit 2, the Engineer, in performing such powers and obligations must, taking into account of its technical know-how and experience, act as an impartial person”. Given that this new version of CSC was issued in December 2022, it is not clear how this provision will be applied and interpreted. Based on our experience, the contractors will not normally sue the Engineer, even if the Engineer commits gross negligence. They prefer to sue the employer because it is richer.

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a “pay when paid” clause?

“Pay when paid” clauses are not used in standard construction contracts in Iran. Their use in the bespoke contracts is almost non-existent. The reason, apart from not being familiar with the concept on the Iranian construction industry’s part, might be that the inclusion of a term like this might make the whole contract voidable. This is because, as per some influential scholars, construction contracts are essentially a hire (service) contract in which the consideration for the hire (service) and the time of payment must be definite, and making the payment conditional upon the payment by those who are higher in the chain will make the payment time indefinite, which in turn makes the hire contract null and void.

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

According to Art. 230 of the Civil Code this is possible. It provides that “If in a contract the amount of compensation to be paid in the event of its non-fulfilment is laid down, the court may not order the contract-breaker to pay more or less than the sum fixed”. The prevailing view is that such liquidated damages (LDs) do not need to account for the real loss suffered by the innocent party. Therefore, it can be totally irrelevant and disproportionate to the actual damages. In recent years however, the courts and arbitrators have tried to, particularly in sales contracts where the LDs have been more or less equal to the sales price, nullify such clauses as being harsh, unfair and unconscionable; particularly because their enforcement will bring about the result that the sold item and its price

will be owned by a single party (either the buyer or the seller) which contradicts the very essence of a sales transaction, i.e., sold item in return for the price.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

The standard construction contracts are cognisant of the fact that the scope of work may vary in the course of the contract and all of them provide for deletion, addition and/or varying of the works. Such additions, deletions, and/or variations are normally limited to plus/minus 25 per cent of the contract price.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

Work can be omitted from the contract, but the standard contracts are not explicit if the employer or a third party can carry out the omitted work. Our understanding from other provisions of the contract, particularly those dealing with the contractor’s right to ask the employer for the termination of the contract, is that nothing can prevent the employer from doing the omitted work itself, or hire a third party perform it.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

Generally speaking, it is difficult to imply terms into contracts, particularly in construction contracts. They are lengthy and wordy, which gives the impression that they are complete and there is no need to imply terms into them. The position of law on good faith is not clear. Some scholars, especially those familiar with French law would say that there is an overarching duty in the Iranian contract law to act in good faith, but there is not a consensus on the existence of a general good faith duty in Iranian legal system. There is a distinction between obligations of result and obligations of means in our legal system. One might say that construction contracts are, as a general rule, obligations of result (to either satisfy a purpose set out in the laws and regulations, for instance habitability of buildings for human use, or the requirements of the employer set out in the contract).

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

Concurrent delay is not specifically dealt with in the standard contracts, and we are not aware of any court ruling on it. Based on general rules (Art. 4.3 & 14 of the Civil Liability Act and Art. 526 of the Criminal Code), where two or more events cause delay, the liability will be apportioned taking into account the extent to which each event was responsible for the delay. In essence, this means that the contractor is entitled to the extension of time and costs incurred due to delay, to the extent the delay is attributable to the employer.

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

Save for very limited occasions in the Commercial Code, statutes of limitations do not apply in civil cases. Therefore, theoretically, the parties may sue each other any time a cause of action exists or arises. Based on the standard contracts, where the employer and contractor approve the final statement, the parties waive any rights or claims against each other, save for claims or disputes raised prior to the final statement but agreed to be settled later.

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

Contractual time limits to bringing claims before a court or arbitration tribunals are generally characterised as a subset of exclusion clauses which are, as a general rule, valid and enforceable if they are reasonable. Exclusion clauses may not be enforceable where the beneficiary of the clause commits wilful misconduct or gross negligence. Also, Art. 391 of the Commercial Code and Arts 237 and 289 of the Civil Code suggest that the parties are free to agree on the time limits during which a claim for liability may be brought against the other party.

The form of the notice is not dealt with specifically in the law. Normally the form and substance of the notices are agreed upon in the parties' agreement which provides that they must be in writing, sometimes to be sent via email, telex or fax. As far as the substance is concerned, notices are subject to the general rules of interpretation.

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

Where the works are done based on the Construction Contract, the risk of unforeseen ground conditions seems to be borne by the Employer, based on Art. 23 of the general conditions. As far as the New EPC Contract is concerned, the contract provides for the endorsement of a bundle of documents under section 1 of the Exhibit No. 18 entitled "Basic Technical Documents", among which is the underground conditions information, if its provision is the Employer's responsibility as per Art. 40.3. Once the contractor has endorsed the Basic Technical Documents, the responsibility for sufficiency and accuracy of those documents will shift from the Employer to the contractor. Where there are defects and deficiencies in the documents provided by the Employer but not included in the Basic Technical Documents for the Contractor's endorsement, the responsibility lies with the Employer.

Despite all the above, Art. 37.5 provides that the Contractor confirms that it has thoroughly reviewed all the documents received from the employer including those related to underground conditions, and thus has full knowledge of the place where the works are carried out. Therefore, there seems to be a conflict between Art. 37.5 on the one hand, and other provisions of the New EPC Contract that deal with the endorsement, Basic Technical Documents and the responsibility thereof, because if the Employer furnishes the documents related to underground conditions to the Contractor but does not include it in Sec. 1 of Ex. 18 as Basic Technical Documents, the Contractor will still

be responsible for its content as per Art. 37.5. This means that the time and costs related to unforeseen underground conditions are borne by the Contractor.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

In the New EPC Contract, Art. 71.6 provides that where the risk of the change in the laws and regulations which increases the costs of completion or prolongs the project must be borne by the Employer. The same seems to be applicable to other standard contracts, given Art. 542 of the Civil Code which provides that in the contract for agricultural partnership (*Mozare'eh*) the land tax is the land owner's responsibility.

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

As a general rule, intellectual property in the design (including patents, copyrights, design patents and know-how) vests in the party who has developed the design. This seems to be the case in the New EPC Contract (Art. 9) which provides that such IPRs belong to the Contractor but the Employer has ownership of the documents furnished by the Contractor under the Contract and has the right to use them to operate, repair or maintain the property developed under the contract. Art. 9.1 however, includes another part which blurs the lines of ownership and seems to require some modification to clearly set out the IPRs boundaries. It provides that "if the Employer decides to use the same documents in the development of other projects or plans, the responsibility for any discrepancy, conflict and error lies with the Employer" meaning that the Employer has a *carte blanche* to use the underlying design in the documents. Consequently, if the Contractor disagrees, this article should be modified.

3.10 Is the contractor ever entitled to suspend works?

Prior to issuance of the New EPC Contract, the standard contracts did not provide for the Contractor's right to suspend the works. The New EPC Contract in Art. 65.2 allows the Contractor to suspend the works if the Employer fails to perform its obligations under Arts 40, 44, 46, 47, 45.1, 58.4 or 60.3, and such failure hinders the Contractor's performance, wholly or partially.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party's grounds for termination must be set out (e.g. in a termination notice)?

The standard contracts always provide for the Employer's right to terminate the contracts for cause, i.e., if the Contractor fails to fulfil its obligations under the contract. In this case, a notice will be served by the Employer setting out the details of the Contractor's breaches. The Contractor has the right to dispute the Employer's notice by setting out its grounds. If the Contractor does not respond, or its response is not acceptable to the Employer, the contract may be terminated by the Employer. In cases of public works, the termination decision will be made by a panel in the government. If the panel approves the termination, the Employer must send a notice to the Contractor informing it of such a decision.

Additionally, in cases where the Contractor's company is wound up, or (where public works are concerned) if corruption charges against the Contractor are proved or if the Contractor is prohibited from involvement in public contracts as per the Act on Prevention of the Ministers, Parliament representatives and public officials from involvement in public contracts, the Employer will have the right to terminate the contract. In this case, a termination notice must be served detailing the reason for termination.

Prior to the New EPC Contract, if the Employer did not perform its obligations, the Contractor had to ask the Employer to terminate the contract, i.e., the Contractor could not directly and promptly terminate the contract. The New EPC Contract in Art. 69, provides for the Contractor's right to terminate the contract due to non-performance by the Employer. To exercise its termination right, the Contractor must furnish a notice to the Employer. If the parties do not agree on how to proceed with the works within 21 days from the Contractor's notice, then the dispute must be referred to the Permanent Board of Dispute Prevention and Settlement (PBDPS), referred to in Art. 75.1 of the general conditions. In case the PBDPS rules in favour of the Contractor, it may terminate the contract with a notice.

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor's profit on the part of the works that remains unperformed as at termination?

Termination for convenience (or termination without cause) is almost invariably provided for in the standard contracts (for instance, Art. 67 of the New EPC Contract). Accordingly, the Employer will only pay for the works carried out until the termination and the damages incurred by the Contractor to its subcontractors, if those damages are reasonable. The contracts were not explicit on whether the Contractor could claim anything other than the price of the works carried out until the termination and the Contractor could, arguably, claim for lost profits and overhead. However, Art. 67.8.6 explicitly provides that the Contractor may not claim any damages or losses due to termination for convenience by the Employer.

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

Arts 227 & 229 of the Civil Code deal with *force majeure* and its effect. If *force majeure* exists, then the affected party is relieved from the liability to pay damages otherwise payable due to non-performance. The standard contracts usually provide that if *force majeure* lasts for a certain period of time (in the case of the New EPC Contract, 182 days) then either party is entitled to terminate the contract.

The fact that a contract has become uneconomic in a situation after its conclusion does not seem to qualify as *force majeure*. Where the contract does not provide for price adjustment in case of a situation which makes the contract uneconomic, arguably, the Contractor is entitled to ask for price adjustment. Legal scholars believe that the contract price must be escalated to take care of such conditions. We have not come across any court judgement that had actually escalated the contract price due to such conditions.

The New EPC Contract has introduced the hardship concept into the contract. Art. 73.2 provides that hardship does constitute a *force majeure* event. The difference is that *force majeure* renders the

contract performance impossible (either temporarily or forever), whereas hardship makes the performance extremely difficult or costly. According to Art. 73.2.1, if the Contractor believes that hardship has made the contract execution difficult and slow, it may, as per Art. 64.1, ask the Employer to extend the time, and Art. 73.2.2 provides that if the Employer approves the hardship and in case the laws and regulations lack any provisions for termination or price review, the Contractor may terminate the contract as per Art. 69. In such a situation, the Contractor will not be entitled to any payment more than that envisaged in the contract.

3.14 Is there any legislation or court ruling that has been specifically enacted or handed down to provide relief to parties to a construction contract for delay, disruption and/or financial loss caused by the COVID-19 pandemic? If so, what remedies are available under such legislation/court ruling and are they subject to any conditions? Are there any other remedies (statutory or otherwise) that may be available to parties whose construction contracts have been affected by the COVID-19 pandemic?

Yes. By-law No. 1400/216997 dated 3 August 2021 was issued to remedy the consequences of the COVID-19 pandemic. It only applied to the public contracts for which the Contractor's tender was submitted to the Employer before 20 February 2020. It did not cover extension of time (if any) which was explicitly subject to the contract terms, and only covered the performance between 7 April 2020 to 22 September 2021 of the contracts for which the final statement was not finalised. It essentially increased the gross amount of the interim and final statements related to the above-mentioned period. Apart from the remedy provided for in this by-law, the Contractors could seek the application of other remedies envisaged in the contract itself (such as extension of time). Where applicable, *force majeure* remedies such as termination could also apply.

3.15 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

Art. 196 of the Civil Code provides that the parties to a contract may undertake an obligation in favour of a third party. Therefore, if the Contractor undertakes an obligation towards a definite third party (for instance the second owner of the building who is known at the time the construction contract is concluded) or a class of third parties who is capable of being ascertained at a later time (for instance any subsequent owner of the building), then the beneficiary may bring a claim for defects against the contractor. Otherwise, the second or subsequent owner of the building may only bring a claim against the contractor if the construction contract is transferred/novated to them, or the Employer's rights thereunder are assigned to them.

3.16 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

Collateral warranties or direct agreements between the Employer/Contractor with other parties who have an interest in the project is not common in Iran.

3.17 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

According to Art. 295 of the Civil Code, if P1 and P2 owe each other certain amounts of money they are automatically set-off, provided that both debts are of the same kind (for instance if a debt in IR. Rial and the other one in Euro, they cannot be set-off) and both are debts due, i.e., a debt which is not yet due may not be set-off against a debt which is already due. The parties may restrain their set-off rights. For instance, the Employer may agree that it will not set-off the sums due to the Contractor with other debts owed by the Contractor created by other dealings among them.

3.18 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

Everyone is obliged by law to refrain from doing anything which harms others. It is an extra-contractual duty which, despite some scholars, exists concurrently with the contractual obligations, as the prevailing view maintains.

3.19 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

In case of ambiguity, Arts 1301 & 1304 of the Civil Code implicate the application of the *Contra Proferentem* rule. Despite differences as to the existence of good faith as a separate source of obligations and contract interpretation in the Iranian legal system, it is widely accepted that good faith will be taken into account in preferring two competitive interpretations of contract to give credence to the one which is not fraudulent or arbitrary. Additionally, a contract must be interpreted as a whole, meaning that if an interpretation results in total or partial disregard of a provision of the contract, it must be set aside. Also, where there are two conflicting interpretations, the one which results in the invalidity of the contract must be disregarded based on Art. 223 of the Civil Code.

3.20 Are there any terms which, if included in a construction contract, would be unenforceable?

According to Art. 232 of the Civil Code, terms which are: (i) impossible to fulfil; (ii) useless and unprofitable; or (iii) illegal, are null and void and incapable of enforcement, but they do not nullify the contract.

3.21 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

As concerns the designer's liability, two different views exist. Some scholars believe that the designer's responsibility is an obligation of result, so that if the design fails for whatever reason, the designer is liable. Others believe that the designer's

responsibility is an obligation of means which means that the designer must exercise due skill and care. Given Arts 26.2 & 8.1 of the Consulting Services, we believe that the latter view is more tenable, particularly where the project is of a special nature (such as those in the oil, gas and petrochemicals sectors) or where the design is related to cutting-edge technology. In other situations, for instance the design of the residential or commercial buildings, the obligation of result might be a preferable view.

3.22 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

Decennial liability is not provided for in the laws of Iran, but it seems that the builders and designers' liability is more extensive than the decennial liability recognised in France or elsewhere. It means that if the collapse of the building or compromise of its structure or integrity is proved to stem from the builders or designers' failure to comply with the laws, regulations, by-laws, codes and standards, then the designer or builder (or both) might be liable for the damages caused, even if the building's collapse is more than 10 years after its hand-over or completion. Therefore, the deciding factor seems to be the causation between the damage and the acts or omission of the builder/designer. The liability is believed to be based on tort, where there is not a contract between the builder/designer and the claimant. Between the Employer and the designer/builder, the liability may arise both in contract and in tort.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

Litigation and arbitration are the two most commonly used mechanisms through which the construction disputes are resolved. In the case of public works, there is a divide in the interpretation of Principle 139 of the Constitution which provides that the disputes regarding government property and public goods cannot be referred to arbitration, unless the Cabinet of Ministers approves such a referral. To solve the problem, Art. 53 of the Construction Contract (there are similar provisions in other standard contracts) provides that in case of disputes, the parties may refer it to the arbitration where the arbitrator is designated by the president of the PBO which is a governmental organisation. In this case, the dispute will be decided by the High Technical Council (a council within the PBO). The members of the tribunal who decide each individual case are not appointed by the parties to the dispute, rather they are government employees assigned with the task of dispute resolution. Awards issued by such tribunals will be enforced by the courts. Where the Employer is the Ministry of Petroleum (MOP) or the companies affiliated thereto, there is a by-law by the MOP which requires submission of the disputes between the MOP affiliated Employers and contractors to MOP Dispute Resolution Boards, consisting of three persons of legal, financial and technical backgrounds, all of whom are MOP employees and appointed by MOP. This procedure seeks to avoid the protracted, costly and time-consuming litigation process and to pave the ways for continuation of the project where dispute arises in the middle of it. However, if the contractor is not satisfied with the result, it may go to the court. If the decision is rendered in favour of the contractor, its execution must be approved by the board of directors of the Employer, and if denied, the contractor may pursue its claim in the courts.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

Dispute review/adjudication boards are not known in Iran. The New EPC Contract in Art. 75.1 has introduced the concept and its procedure. Accordingly, the parties must constitute the Permanent Board of Dispute Prevention and Settlement (PBDPS). The Employer and Contractor will each have a representative in the PBDPS, and the head of the board will be appointed and removed from that position mutually. However, if the Employer believes that the head of the board is not impartial, the Employer, while providing its reasons and evidences to the Contractor, will remove the head of the board. If the parties fail to agree on the head of the board, the Employer must, within 14 days, introduce at least three candidates who are not in the Employer or Contractor's organisation and are not related to any of them to the Contractor. The latter will have seven days to elect the head of the board. In cases of a dispute among the parties in relation to the Contract, each party may refer the dispute to the board. Where there are issues that might turn into a dispute in future, the parties may jointly ask the board for an advisory opinion. Where the board has knowledge of some issues that might turn into a dispute between the parties, it must notify the parties thereof. The board must within 28 days (or any mutually extended period) from the date it has received the application to resolve a dispute, issue its opinion. In cases of special technical issues, the board will determine the technical reference to examine the case more thoroughly. Where reference is made to technical references as per Arts 7-3-2 and 51.9 of the general conditions, the parties must act in compliance with its opinion. Other matters including legal and financial, in the discretion of the board, may be referred to impartial experts for a more thorough review. The board's decisions are made by the majority of the votes and will be communicated to the parties by the board head. The board's review is not arbitration and the parties are free to accept or reject the board's decisions. The Note under Art. 75.1 provides that where the dispute is under Art. 7-3-2 (non-approval of the Contractor's documents by the Employer), the note under Art. 49-4-4 (disagreement as to the cost and time impact of a variation), Art. 51-9 (ambiguity on the interpretation or deduction from the tests or technical inspections), Art. 59-3 (where the Employer has not opined on the start of performance tests), and Art. 69-2 (termination of the contract by Contractor due to Employer's default) and either party rejects the board's opinion, the parties must act according to the board's opinion until the dispute is resolved according to Arts 75-2 (dispute resolution by the Dispute Settlement Tribunal of the Employer) and 75-3 (arbitration by the High Technical Council of the PBO or, if possible, any other arbitration procedure as agreed by the parties in the particular conditions).

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

Arbitration is a method of dispute resolution based on the Civil Procedure Code and the International Commercial Arbitration Act. It might be *ad hoc* or institutional (Arbitration Center of Iran Chamber of Commerce (ACIC) and Tehran Regional Arbitration Center (TRAC) being the most prominent arbitration institutions in Iran). The arbitration award is final and binding on the parties and there are limited instances in which

an arbitration award might be challenged in the first instance courts, whose judgements are capable of appeal before the courts of appeal. Depending on the parties' agreement or the applicable rules of arbitration, there might be a single arbitrator or a tribunal of three arbitrators. The single arbitrator must be appointed by the parties. To constitute a tribunal, each party appoints an arbitrator and the two will agree on the head of the tribunal. In case of disagreement or failure to agree, the single arbitrator, the party-appointed party or the head of the tribunal, as the case might be, will be appointed by the courts or the appointing authority, where the parties' agreement has so provided. Although the arbitrator is not obliged to conduct in-person proceedings, the usual procedure is that there will be one or two (sometimes more) sessions and the parties' have the right to exchange their briefs in any numbers, unless the tribunal is of the view that they are no longer needed. The challenge of the arbitrator is recognised both in domestic and international arbitrations. Once the proceedings are over, the tribunal will issue its award either unanimously or by majority. The dissenting arbitrator may provide their reasons for disagreement with the majority in the award. The request for the annulment of the award will be heard by the courts of first instance, their decisions being appealable before the court of appeal. Once the arbitration award is issued, it can be executed unless the defendant brings the annulment suit before the courts and asks for the stay of the execution and provides the court with compelling evidence and reasons for the annulment.

4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

Iran is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and international arbitration awards are recognised and enforced accordingly, subject to Art. 5 thereof.

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

The litigation process starts with the plaintiff's petition which must have certain condition, among them the name and address of the defendant, evidence, details of the plaintiff's claims and its demands from the court, factual and legal grounds upon which the plaintiff would constitute the suit. This petition will be notified to the defendant, along with the date and time on which the court will conduct the in-person proceedings, depending on the time available to the courts. Given the technical nature of the construction suits, the court will appoint experts (starting from one and where the expert's opinion is objected to by either party, the number of the experts will go up to three and five and in some extreme cases to seven, nine, 11, 13 and 15). Once the court decides that the parties had enough time to present their case and all the inquiries are made and the experts report are filed in the case, the court will issue the judgement which is subject to appeal. The court of appeal consists of three judges and the judgement might be issued by the majority. Construction proceedings are notorious for being settled late in the courts due to the complexity of such contracts and disputes. The judgement of the court of first instance cannot be expected

to be issued under 12 to 18 months. Appeals may take around the same time. Complex construction disputes may take several years to settle in the courts. Almost all the judgements of the first instance courts in construction disputes which are not appealed to can be heard before the supreme court, which deals only with questions of the law and not the facts.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

According to the “Execution of Civil Judgments Act” (Aban 1356-Oct. 1977) (Arts 169-179), recognition and enforcement of a civil judgment rendered by a foreign court through the courts of Iran is possible, both at law and in practice, if the following

conditions are met: (i) the judgment is not contrary to the public order or good morale; (ii) the judgment is not contrary to the international conventions and special laws of Iran; (iii) the judgment is final, definite and enforceable in the country where it is rendered; (iv) a contrary judgment has not been issued from the Iranian courts; (v) the subject matter of the judgment is not exclusively within the jurisdiction of the Iranian Courts; (vi) the judgment is not related to immovable property located in Iran; (vii) the enforcement order is issued by a competent authority in the country where the judgement is issued; and (viii) the foreign judgement is not in conflict with a judgement rendered between the same parties on the same subject matter prior to the judgement its enforcement is sought, whether in Iran or a third country. If the country where the judgment is issued has some kind of cooperation agreement on civil and commercial legal and judicial matters (such is the case between IR. Iran and UAE) the enforcement will be streamlined, provided that the conditions mentioned above are satisfied.



Dr. Rouhollah Saberi's practice concentrates on construction and engineering contracts particularly in the context of the oil & gas, petrochemical and power sectors. He has worked as adviser to major oil and gas contracting companies in Iran and was involved in the negotiation, drafting and finalising numerous high-value EPC and DBF (EPCF) contracts, particularly in the oil and gas sector, has dealt with different types of standard construction contracts (among them FIDIC contracts) as well as claims and disputes arising thereof and played a key role in high-stake contentious litigation and arbitration of complex construction disputes.

Dr. Saberi has published a book on The liability for defective design and workmanship in EPC/Turnkey contracts addressing the issue in the US, UK, German, French and Iranian legal system. His second edition of Licensing agreements is also a comparative study of the IPRs licensing in the US, UK and Iran.

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We help clients with all their construction-related needs, ranging from preparation of tender and project documents to the resolution of disputes pertinent to project. Our expertise encompasses both industrial projects (oil & gas, petrochemicals, process plants and power, among others), infrastructure and commercial property development. We provide our clients with a unique perspective on construction projects because our lawyers are involved in both project development and dispute resolution which enriches their horizon of the project life cycle. For those clients who require a financing element in the project we provide integrated project delivery and financing design and negotiation services to optimise the whole process. Having worked with different generations of risk service buy-back contracts for oil and gas E&P operations in Iran and DBF contracts (more frequently referred to as EPCF contracts in Iran) lends us a competitive advantage to cater for projects needs both in terms of the delivery and its financing. Our cutting-edge mastery of project-financed transactions, bankability and risk analysis and mitigation strategies will increase the clients' opportunities for financing. We have worked as members of the management committees in the upstream oil and gas contracts, having

first-hand knowledge of the dynamics of the steering committees in joint ventures and dispute adjudication boards (DAB). We have represented our clients at all court levels in Iran. We also have the experience of representation in *ad hoc* arbitrations as well as institutional arbitration, mainly before Arbitration Center of Iran Chamber of commerce (ACIC). We conduct our own advocacy, thereby providing a seamless, streamlined and more cost-effective service. Oil and gas, Finance, project finance/Islamic finance, foreign investment in Iran, Intellectual Property, litigation and arbitration are other core competencies of our firm.

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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (NB For ease of reference throughout the chapter, we refer to “construction contracts” as an abbreviation for construction and engineering contracts.)

The Italian legal system allows for the execution of various types of contracts depending upon the activities and needs of the parties. In particular, the following are permissible: (i) contracts covering the design and execution of works; (ii) contracts covering solely design; and (iii) construction contracts covering solely the works. The employer may entrust the design and/or works to:

- a general contractor, in which case, the entire work to be completed shall be subdivided into “work packages” to be entrusted by the general contractor to various subcontractors and sub-suppliers (for example, facade provider), coordinated by the general contractor;
- a single contractor who may subcontract a portion of the activities; or
- to various contractors, subdividing the design and/or works into several separate contracts, each signed by the employer.

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

The Italian legal system provides for various forms of collaboration among contractors. Enterprises can establish *consortia*, temporary groupings, joint ventures or enter into pooling contracts in order to “use” the technical/economic requisites of another enterprise. These instruments are used in both private contracts and public contracts and, in the latter case, are aimed at expanding the pool of potential participants in tender procedures.

Our legal system also envisages contractual categories that provide for a collaboration between the employer and contractor. Reference is made to the cost-plus-fee contract, pursuant to which the parties collaborate in identifying subcontractors and agree upon the choices related to the definition of costs of the project, using an open-book method which allows the employer to have free access to the contractor’s accounting books.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

Traditionally, in the Italian legal system, construction contracts are executed in either the “all-inclusive” form or the “by unit of measure” form.

The all-inclusive contract provides that the contractor undertakes the obligation to complete the work upon payment of a fixed price, which is therefore not subject to changes and price revisions. This type of contract is advantageous in the event that, at the time of signing of the contract, the technical-economic elements of the project are clearly defined.

In the “by unit of measure” contract, the price is calculated on the basis of quantities actually constructed and fixed prices of each work. Therefore, the “by unit of measure” contract provides for greater flexibility, reducing the risk of reservations and complaints by the contractor during the execution phase with regard to timing, variations, or possible greater costs.

There are alternative contractual forms that ensure greater flexibility and interaction between the parties, such as with cost-plus-fee contracts. In this case, the price is subdivided between direct costs, indirect costs, fees and general expenses. At the signing of the contract, only the fee (and possibly the general expenses) is agreed upon. Therefore, the employer undertakes the risk of the total cost of the project, but takes part in monitoring such costs during the execution phase (open book accounting) and the selection of bids from subcontractors.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

Contracts involving public works must satisfy the requirements provided under the public law legal framework set forth in the new Legislative Decree 36/2023. The form of contract is provided by the contracting authority as part of the tender documentation. Therefore, the contract has pre-established, non-negotiable contents, since its terms and conditions must comply with the provisions of the public law legal framework.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

The necessary requirements for entering into a contract that is binding between the parties are indicated in art. 1325 of the

Italian Civil Code, and are: (i) agreement between the parties; (ii) cause; (iii) subject matter; and (iv) written form, when required by law under penalty of nullity.

The Italian Civil Code sets forth a general legal framework on construction contracts in articles 1655 through 1677.

In the case of public contracts, the legal framework on the execution phase of the construction contract is set forth in Legislative Decree 36/2023 and, to the extent not provided under such decree, in Italian Civil Code.

1.6 In your jurisdiction please identify whether there is a concept of what is known as a “letter of intent”, in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

The letter of intent is a commonly used instrument during the negotiation phase of a contract. In particular, the letter of intent is used between the parties as an instrument in situations of urgency, when the need arises to quickly commence certain contractual performances, even though the contract has not yet been fully negotiated. Through a letter of intent, the parties document the progress in the negotiations and regulate their future evolution, in view of execution of the contract. The letter of intent may be more or less binding, depending upon the agreements reached between the parties. During the negotiation phase, the parties are under a duty to act in good faith pursuant to art. 1337 of the Italian Civil Code.

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer's liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors' all-risk insurance?

Contractors are required to enter into further insurance policies depending on the characteristics of the project. The contractor is required to enter into an insurance policy covering civil liability toward third parties for any damages that may be caused to third parties during the execution of the works; a civil liability policy covering workers against risks of accidents in the workplace; a “CAR, *construction all risks*” policy for risks to works under construction, for demolition and clearance expenses and for the pre-existing buildings in the area where the works are executed; an “all risk” policy covering all risks of machines and equipment used in the execution of the works; in some cases, a “ten-year indemnity policy” may also be required, covering risks of total or partial ruin of the works or risks deriving from serious construction defects, and damages deriving from the total and/or partial collapse.

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

The contractor is required to provide its workers with work and compensation conditions that are not less favourable than those provided under national and territorial collective employment contracts in force for the sector and the area in which the works

are carried out. A similar obligation applies to subcontractors. The Italian legal system provides for various worker protection provisions, aimed at limiting the risk of under-the-table work in the supply chain of enterprises involved in the performance of a contract.

The contractor is required to ensure regularity in the payment of salaries, social security and taxes.

Health and safety are governed by Legislative Decree 81/2008. In particular, Title IV of the decree deals with measures for health and safety and the prevention of accidents on building sites.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

Contractors must comply with the requirements provided under urban planning instruments, building regulations, sector-specific rules affecting the regulation of construction activities, including rules on anti-seismic matters, safety, fire prevention, hygiene and health, energy efficiency, protection against hydrogeological risk, environmental laws, provisions of the code on cultural heritage, and landscape. All public and private structures must be constructed in compliance with the Technical Rules on Constructions (Ministerial Decree of 17 January 2018), which define the principles for the design, building, testing and durability of constructions. With reference to fire prevention safety, the Technical Rules on Constructions provide for a specific legal framework on the strength/resistance and stability that the building must ensure in the event of fire.

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

The possibility of retaining sums while works are in progress is governed by the contractual terms and conditions and represents a protective instrument, in favour of the employer, that is included frequently in construction contracts (in addition to or in lieu of a performance bond). Normally, the employer applies to the price a retention in a percentage ranging between 5% and 10% as a guarantee securing the exact performance of the contractual obligations. Such retention is released upon the completion of the works or, in some cases, the parties agree that the employer shall retain the withholding until the expiry of the warranty period of two years from the handover of the works, as a guarantee against any defects, non-conformities or flaws.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor's performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

It is common for employers to require contractors to provide performance bonds to guarantee the contractor's proper performance of its contractual obligations and compensation for damages deriving from the possible breach of such obligations. The performance bond may be provided in the form of a bank

or insurance guarantee, providing for an amount guaranteed generally equal to 10% of the contract price. The bank guarantee is more onerous for the contractor, but more protective for the employer, since it is the only type to be effectively autonomous with respect to the guaranteed obligations and, therefore, may be enforced by the employer upon its simple first demand, without the need to prove the contractor's breach, and without the possibility for the guarantor or the contractor to raise objections (except in the event of fraudulent enforcement). Frequently, the employer makes a draft guarantee available to the contractor, and requests the latter to obtain a bond having conforming contents. The employer also often requests specific requisites for guarantors (rating levels). In the case of public contracts, the performance bond is governed by art. 117 of Legislative Decree 36/2023.

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

In the Italian legal system, there are no prohibitions on the possibility for the group parent company to provide company guarantees in favour of its subsidiaries. Such guarantees may be provided in various forms, and may be more or less binding (strong or weak letters of patronage, comfort letters). This is a very widespread option in construction contract practice, since company guarantees do not offer the employer the same protection that bank or insurance guarantees provide, where the party acting as guarantor is a third party having certain solvency requisites provided by law.

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

It is possible to contractually govern the transfer of ownership of the materials used in the performance of the contract. The type of terms and conditions may vary depending upon the specific needs of each contract and upon whether the materials are provided prevalently by the contractor (as commonly occurs) or provided prevalently by the employer (as sometimes occurs in the event of trusted suppliers of the employer or particularly delicate suppliers such as systems/plants). For example, the parties may provide that ownership of the materials is transferred to the employer at the time of delivery of the same to the building site.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

Under the Italian legal framework, the director of works is tasked with exercising a technical, accounting and administrative control over the performance of the contract. In the field

of public contracts, the director of works is a figure appointed by the employer, he receives the service instructions related to the evolution of the contract from the single project manager (*RUP*). Without prejudice to compliance with such service instructions, the director of works operates autonomously and issues service orders to the contractor on technical and economic aspects concerning the management of the contract. In the area of private works, the director of works may also be selected by the contractor (even if this is less common in practice). The director of works' breach of his obligations exposes the latter to professional liability, with respect to which it is possible to activate the professional civil liability policy.

Other figures provide support to the employer in supervising the contract, including the project manager and the advisor and development manager.

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a "pay when paid" clause?

The Italian legal system does not prohibit this type of clause, which may, however, expose the contractor to a very high degree of risk (for example, in terms of timeframes for receiving payments) and therefore often gives rise to objections/disagreements during both the negotiation phase and the contract performance phase. In the event that parties intend to include a "pay when paid" clause in the contract, it is worthwhile to govern the related conditions in detail, in order to reduce the risk of claims by the contractor. In the event that the contract is subject to a special purpose loan, it is worthwhile to clearly govern the controls imposed under the loan agreement that could impact the construction contract and which the contractor is required to accept (for example, controls by a Project Monitor appointed by the lender).

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

Pursuant to art. 1382 of the Italian Civil Code, the parties may include a clause in the contract through which the parties agree that in the event of breach or delayed performance, the contractor is required to pay liquidated damages to the employer. The clause releases the employer from the need to prove damages.

The quantification of the liquidated damages is up to the parties in accordance with the principle of equity in relation to the obligations breached and contractual balance between the parties. Art. 126 of Legislative Decree 36/2023 for public contracts provides that the daily liquidated damages for delay in performance of contractual obligations must range between 0.3 and one per thousand, to be determined on the basis of the consequences stemming from the delay.

In the event that the quantification of the liquidated damages does not also include further damages, this circumstance must be expressed in the contract.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

Under art. 1661 of the Italian Civil Code, the employer can submit an order to the contractor for the execution of changes, provided that the following two limits are honoured: (i) the amount of the changes cannot exceed one-sixth of the total price; and (ii) the changes, even if in an amount lower than one-sixth, cannot entail considerable changes in the nature of the work or the quantities of the individual categories of works provided under the contract.

A contractor that executes the changes is entitled to compensation for the additional works executed.

In commercial practice, there has been a tendency to include in the contract derogations from art. 1661 of the Italian Civil Code.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

The contractor is under an obligation to execute all works provided under the contract and cannot refuse to execute them, except in cases of supervening impossibility governed by arts 1463 *et seq.* of the Italian Civil Code. Therefore, any unjustified refusal on the part of the contractor to execute the works, in whole or in part, constitutes a situation of contractual breach, which entitles the employer to activate the various contractual remedies, including that of executing or having third parties execute the works not executed by the contractor, at the latter's expense.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

Pursuant to art. 1374 of the Italian Civil Code, the contract obligates the parties not only with regard to what is expressed therein, but also with regard to all consequences deriving from the same by law or, in the absence of express provisions of law, according to custom and usage and principles of equity.

The parties are, in any case, entitled to derogate from provisions of law, provided that the derogation is express and does not concern mandatory provisions of law.

Without prejudice to the foregoing, the performance of contractual obligations must always be inspired by good faith, in accordance with the provisions of art. 1375 of the Italian Civil Code.

In addition, a construction contract is commonly recognized as a typical contract giving rise to an obligation of results, consisting in bringing the promised construction work to completion.

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

A contractor that fails to execute the works in accordance with the timeframes agreed with the employer is considered in breach

unless it proves that the delay was caused by an impossibility to perform deriving from a cause not attributable to the contractor.

However, if the cause of the damages is attributable in part to the contractor, the latter is not automatically entitled to request *tout court* an extension in timeframe or reimbursement of costs incurred due to delay.

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

The employer, under the penalty of forfeiture, must report to the contractor any non-conformities or defects in the works within 60 days of discovery. However, such report is not required when the contractor has acknowledged or concealed such non-conformities or defects. A legal action against the contractor due to non-conformities or defects is subject to a statute of limitations of two years from the day of handover of the works.

In the event that the contract concerns the construction of buildings, the contractor's liability for the total or partial collapse (or risk of collapse) of the building and serious defects in the same lasts 10 years from the completion of the works. However, the employer, under penalty of forfeiture, must report such circumstances within one year of discovery and take legal action against the contractor within the statute of limitations of one year from the report.

All other rights of the parties must be enforced in accordance with the ordinary statute of limitations of 10 years provided under art. 2935 of the Italian Civil Code, except in the specific case in which the special statutes of limitations provided under the Italian Civil Code apply.

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

In general, Italian courts consider reports of defects or non-conformities in the works submitted within the timeframes provided under the contract to be valid, even if such timeframes differ, by way of derogation, from the term of 60 days provided by law. The procedures for sending the report of defects or non-conformities in the work are usually provided directly under construction contracts. In any case, the law does not provide for a particular form for the report, even if, in the absence of specific provisions in the contract, it is advisable to send the report in writing. As for the substance of the report, the same must clearly state the intention to report the defects or non-conformities forming the subject matter of the report.

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

Under art. 1664, paragraph 2, of the Italian Civil Code, if over the course of the works, difficulties in execution arise due to geological or hydrological reasons or the like, that were not foreseen by the parties, which render the contractor's performance considerably more onerous, the latter is entitled to fair compensation. Such provision of law may be derogated by the parties on the basis of the specific characteristics of the works.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

In the absence of specific contractual provisions on *ius superveniens*, when a supervening provision of law entails the need to execute changes, reference must be made to art. 1660 of the Italian Civil Code, pursuant to which the parties may reach an agreement in the event that the need for changes imposed by law were to arise. In the absence of an agreement, any additional compensation due to the contractor is determined in the context of legal proceedings.

The price of the change imposed by law is borne by the employer, but the parties may derogate from such rule under the contract.

If the amount of the changes imposed by law exceeds one-sixth of the total price, the contractor may withdraw from the contract and obtain a fair indemnity. In this case as well, it is possible to negotiate the contractor's waiver of the one-sixth limit and/or of the fair indemnity.

Lastly, it should be noted that in the event of execution of changes imposed by law, extensions may be granted in favour of the contractor, where the execution of such changes has prevented the terms originally provided under the contract from being honoured.

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

In general, the designer always retains the moral copyrights over the design, which are not transferrable to the employer in any way whatsoever.

The economic copyrights are transferable and waivable by the designer. In such regard, in contractual practice such economic rights are almost always transferred to the employer.

3.10 Is the contractor ever entitled to suspend works?

Under art. 1460 of the Italian Civil Code, each of the contracting parties can refuse to perform its obligation if the other fails to perform or fails to offer to perform its own obligation simultaneously. However, the execution cannot be refused if, taking into account the relevant circumstances, the refusal is contrary to principles of good faith.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party's grounds for termination must be set out (e.g. in a termination notice)?

Each party may request the termination of the contract in the event of serious breach by the other party. In general, the legal action for termination is preceded by the mailing of a formal written notice setting forth a demand for performance, pursuant to art. 1454 of the Italian Civil Code.

In addition, the parties may insert in the contract the so-called express termination clauses, through which it is possible to agree that the contract is terminated in the event that a given obligation is not performed in accordance with the methods established. In this case, the termination occurs when the interested party declares to the other its intention to avail itself of the express termination clause.

Lastly, under art. 1660 of the Italian Civil Code, the contractor may withdraw from the contract if the amount of the changes necessary exceeds one-sixth of the total price; likewise, the employer may withdraw from the contract if the changes necessary are significant.

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor's profit on the part of the works that remains unperformed as at termination?

Art. 1671 of the Italian Civil Code provides that the employer may withdraw at any time from the contract, provided that it holds the contractor harmless from and against expenses incurred, works executed and loss of profits.

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

Force majeure is considered by the case law as an impediment falling beyond the control of a party, that is not reasonably foreseeable at the time of execution of the contract, and is also inevitable and irremediable. It is a case of supervening impossibility of performance, governed by arts 1463 *et seq.* of the Italian Civil Code, which provide for the extinction of an obligation that has become impossible and, in cases of total supervening impossibility, the termination of the contract.

In the event that the contract becomes "economically disadvantageous" for one of the parties, it is not possible to claim *force majeure*. However, pursuant to art. 1467 of the Italian Civil Code, if the excessive onerousness is due to extraordinary and unforeseeable events, the disadvantaged party may request the termination of the contract. However, termination due to supervening excessive onerousness may be avoided if the other party makes the contractual relationship equitable.

3.14 Is there any legislation or court ruling that has been specifically enacted or handed down to provide relief to parties to a construction contract for delay, disruption and/or financial loss caused by the COVID-19 pandemic? If so, what remedies are available under such legislation/court ruling and are they subject to any conditions? Are there any other remedies (statutory or otherwise) that may be available to parties whose construction contracts have been affected by the COVID-19 pandemic?

The Decree Law "*Cura Italia*" provided for a number of facilitations in favour of contractors involved in the execution of works during the COVID-19 pandemic.

Art. 91 provided that compliance with the measures for the containment of COVID-19 is always evaluated for purposes of the exclusion of the contractor's liability, including with reference to applications of possible forfeitures or liquidated damages related to delayed performance or non-performance. Art. 103 paragraph 2-*ter* provided for an extension in works for a period equivalent to the period of the suspension due to the pandemic.

With reference to the economic effects of the pandemic on construction contracts, various laws have been enacted over the course of the last three years in order to ensure greater liquidity for enterprises. Lastly, art. 26 of the "*Decreto Aiuti*" is worth

noting. Such law, for public tender contracts, provided for the issuance of an extraordinary Works Progress Report (SAL) on the basis of the most updated price lists in order to offset the economic imbalance between the parties resulting from the greater costs of raw materials and energy products as a result of the pandemic and the conflict in Ukraine.

With reference to private tender contracts, the principle expressed by the Supreme Court in the summer of 2020 is worth noting. The Court confirmed the parties' obligation to renegotiate the contractual conditions, aligning the contract to circumstances that have changed due to supervening and unforeseeable circumstances.

3.15 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

The action for non-conformity or defects in the works pursuant to art. 1667 of the Italian Civil Code is only available to the employer.

However, the action provided under art. 1669 of the Italian Civil Code in the event of total or partial collapse (or risk of total or partial collapse) of a building, and serious defects in the same, since it is based on tort may be enforced in the 10 years following the completion of the works not only by the employer, but also by its successors and assigns.

3.16 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

In practice, there are often direct agreements between the contractor and the financing party of the real estate development project. Pursuant to such agreements, the following, for example, may be provided for any more or less broad right to ensure that the lender maintains control over timeframes and costs of the works.

In practice, so-called “*collateral*” forms of guarantee are often used to safeguard the employer against the contractor. Take, for example, the following bank or insurance guarantees:

- guarantee on the advance for the recovery of possible advances paid by the employer;
- performance bond for the possible breach by the contractor of the obligations undertaken under the contract; and
- warranty bond for possible defects or non-conformities in the works.

3.17 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

In the Italian legal system, there exist three types of set-off: (i) legal set-off, which is allowed only between monetary debts that are equally liquid and payable; (ii) judicial set-off, which is declared by the judge if the debt claimed for set-off is not due but may be rendered due/liquid readily and easily; and (iii) voluntary set-off, which must be governed in the contract and which allows for making the set-off even in the absence of due or payable debts.

In general, under construction contracts, the employer is permitted to proceed with “voluntary” set-off between the price and the liquidated damages/penalties or other amounts due by the contractor.

3.18 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

In the performance of the construction contract, each party must act in accordance with fairness and good faith. The breach of good faith, if it occurs during the performance of the contract, gives rise to contractual liability. However, it cannot be excluded in advance that a given conduct may give rise to extra-contractual liability. According to the case law, under certain conditions, contractual and extra-contractual liability actions may be cumulative.

3.19 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

The criteria for interpretation of the contract established under the Italian Civil Code fall into two categories:

- Arts 1362-1365 of the Italian Civil Code provide for subjective interpretation criteria, aimed at seeking out the common intent of the parties.
- Arts 1366-1370 of the Italian Civil Code set forth the criteria for objective interpretation, which may be activated only on a residual basis; they are inspired by the concept of good faith or other criteria that are, in any case, not related to the mutual intent of the parties.

Where, despite the application of the two types of criteria described above, the contract remains unclear, it must be interpreted so as to achieve a fair balancing of interests of the parties.

3.20 Are there any terms which, if included in a construction contract, would be unenforceable?

Contractual clauses, under the penalty of nullity, may not be contrary to mandatory provisions of law. Such provisions of law include, for example, art. 1229 of the Italian Civil Code, which imposes the nullity of clauses that exclude or limit the liability of the debtor on account of wilful misconduct or gross negligence or breach of obligations deriving from rules of public order. In these cases, the clause that is null and void is replaced, automatically by law, by the mandatory provisions breached.

Another category worthy of discussion is that of so-called vexatious clauses included in contracts prepared by only one party through general terms of contract or standard forms. Such clauses are unenforceable only if they are not specifically signed for acceptance by the other party. Vexatious clauses are those listed in art. 1341 paragraph 2 of the Italian Civil Code.

3.21 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

The case law is unwavering in holding that the designer is required to fulfil an obligation of result, consisting in the

possibility of completing the project from a construction standpoint. In light of the consideration that the designer is under an obligation of result, art. 2226 of the Italian Civil Code applies, pursuant to which the employer must report the defects in the work within eight days of discovery and take action within the statute of limitations of one year. It should be noted that in the context of mandates granted to designers/architects, the professional is always required to take out a civil professional liability policy which, for more complex projects, is generally requested in “single project” form.

3.22 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

Art. 1669 of the Italian Civil Code provides for 10-year liability of the builder toward the employer and its successors and assigns if, over the course of 10 years from the completion of the building or other structure designed to last over the long term, due to a defect in the ground soil or defect in the construction, the structure collapse in whole or in part, or presents a clear risk of collapse or serious defects.

Pursuant to well-settled case law, the contractor’s ten-year liability is extra-contractual in nature and is based on the breach of the general rule of general duty of care. The *ratio legis* of the provision lies in reasons of public order and, in particular, the interest in the preservation and proper functioning of buildings.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

Disputes may be resolved through claims brought before courts of law or through the activation of alternative proceedings. Under the Italian legal system, there is no court specialised in construction and, therefore, disputes related to construction contracts are submitted for review by an ordinary judge. In consideration of the highly technical nature of the subject matter and the lengthy timeframes of ordinary court proceedings parties often prefer to use alternative forms of dispute resolution.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

Under the Italian legal system, there exist several instruments aimed at facilitating the resolution of disputes during the execution phase of construction contracts. These instruments feature the presence of an impartial third body, appointed by the parties starting from the commencement of the contract and which follows the entire evolution of the same and therefore has full knowledge of the entire process (unlike a judge or arbitral tribunal which becomes involved only the moment in which a dispute is commenced).

In the area of public contracts, a noteworthy entity is the technical consultative body (arts 215-219 of Legislative Decree 36/2023).

In the case of private contracts, mechanisms similar to those used in public contracts may be envisaged or alternatively the parties may provide for submitting any disputes during the

performance phase to an independent, third-party arbitrator, selected from among persons who are expert in the area and possess the necessary professional qualifications.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

Arbitration clauses are often used in construction contracts and allow for the submission of the dispute to the exclusive jurisdiction of an arbitral body, which may take the form of an individual arbitrator or a tribunal. The parties may opt for a formal arbitration, in which the arbitrator’s award has the same effectiveness as a judgment and may be enforceable. Alternatively, where the parties do not intend to vest an arbitrator with powers equivalent to those of a judge, they may opt for informal arbitration, in which the award does not have the enforceability of a judgment, but settles a dispute on the basis of a contractual agreement between the parties. In arbitration, it is essential to ensure compliance with principles of impartiality and independence of the arbitrators and bilateral participation of the parties. Arbitration allows for a decision to be reached within certain timeframes which are shorter than those of ordinary court proceedings.

4.4 Where the contract provides for international arbitration, do your jurisdiction’s courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

Under the Italian legal system, a foreign arbitration award is not enforceable in the absence of the procedure for recognition and enforcement provided under art. 839 of the Italian Civil Procedure Code. This rule was adopted in implementation of the New York Convention of 1958, ratified in Italy through Law 62/1968 and provides for an appeal to the President of the court of appeal in order to obtain the recognition of the foreign award. Recognition may be denied if: (i) the subject matter of the dispute may not be resolved through arbitration; or (ii) the recognition or enforcement of the judgment is contrary to public order.

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

The Italian legal system provides for three levels of jurisdiction: courts of first instance, courts of appeal and the Supreme Court. Proceedings of first instance are presided over by local courts, which have broad jurisdiction over civil law matters. The average duration of proceedings of first instance is about three years. The judgment issued by the court of first instance may be appealed by the parties before the court of appeal. The latter may re-examine the merits of the dispute, but the parties may not introduce new claims or new evidence. Appellate proceedings tend to last, on average, two years. The judgment issued by the court of appeal may be appealed by the parties through an appeal to the Supreme Court, only on legal grounds. Legal proceedings at the Supreme Court level tend to last, on average, one year.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

The enforceability of foreign court judgments is recognised in the Italian legal system without the need for resorting to a specific procedure, provided that the requirements set forth under Law 218/1995 are met. Within the European Union, mutual recognition of judgments is governed by EU Regulation 1215/2012 (Brussels Regulation I *bis*), which establishes the principle of automatic recognition, extending to all judicial decisions on civil and commercial matters the abolition of *exequatur*. In order to facilitate the circulation of such decisions, if a judgment is recognised as enforceable in the Member State of origin, such judgment will also be enforceable in the other Member States without the need for any declaration of enforceability.



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Matteo Rinaldi has been collaborating with the Bertacco Recla & Partners since 2019.

He handles public and private contracts, particularly focusing on works, services and supplies contracts in real estate development transactions. He also assists the clients in drafting and negotiating legal documents for the enhancement of real estate projects (for example sale and purchase agreements or lease agreements) and provides legal assistance concerning relations with contractual counterparts.

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Based in Milan, Bertacco Recla & Partners is a boutique law firm known for its considerable expertise and knowledge gained in all areas of administrative law, yet with a proven track record in construction, town planning, public and private procurements. The firm provides legal assistance to leading national and international construction businesses, investment funds and real estate companies, in drafting and negotiating procurement contracts for works, services, and supplies in real estate development projects.

Thanks to the construction department, clients also benefit from the same level of quality throughout the contract and subcontract negotiation as well as the execution stages, receiving the best possible support during this very delicate phase of the transaction.

The solid expertise in the real estate sector, a sound competence in town planning procedures and in private procurement contracts makes Bertacco Recla & Partners leader in the Italian market, also in managing processes for enhancing, developing and redeveloping urban areas and real estate complexes. In order to assist the clients in every phase of their business,

the Firm also provide legal advice in all matters of corporate and commercial law, providing support both in the most complex corporate transactions and during ordinary business activities.

Furthermore, Bertacco Recla & Partners assists clients in all civil and administrative litigation before judicial authorities throughout Italy, as well as in arbitration.

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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (*NB* For ease of reference throughout the chapter, we refer to “construction contracts” as an abbreviation for construction and engineering contracts.)

In Japan, construction contracts and design contracts are typically executed separately, as design contracts usually include supervisory services to ensure that the construction is in compliance with the drawings and specifications. Please see questions 1.3 and 1.4 below for further discussion on the standard forms. In practice, design, construction work, and supervisory services are often conducted by one contractor, but even in these cases, the above types of standard form are used.

A form of design-and-build contract is also used (please see question 1.3 below for the standard form), but the design and construction parts are, in fact, divided. This is because the construction part will not be effective unless the parties agree on the schedule, construction price, supervisory fee, and other conditions after the design is completed, so that parties can choose not to proceed with the construction part in accordance with the design-and-build contract.

As for a management contracting arrangement, this is rarely used in Japan. It is more common for the employer to place an order for all of the work with one main construction contractor who, in turn, orders work from several sub-contractors who will perform portions of the work. The employer is not usually involved in sub-contracting such work. Some employers also enter into a construction/project management contract with a third-party service provider who manages the progress of construction work and/or the overall project.

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

There are six types of template collaborative contract published by the Ministry of Land, Infrastructure, Transport and Tourism (MLIT). A large number of collaborative construction contracts are based on these templates, depending on the type of construction work.

The MLIT's templates categorise joint ventures into three types: (i) a specific construction joint venture, formed to carry out large-scale and challenging construction projects by combining the expertise of several contractors; (ii) an ordinary construction joint venture, mainly formed by small to medium-sized contractors for continuous collaboration, to enhance their business management and construction capacity; and (iii) a regional maintenance construction joint venture, formed by multiple contractors to continuously carry out construction work indispensable for the maintenance of regional areas.

Each of these types of joint venture has two forms: the Type A (*kou gata*) joint venture; and the Type B (*otsu gata*) joint venture. The Type A (*kou gata*) joint venture is used when the contractors agree to contribute funds, personnel, equipment and other factors, and divide compensation, based on an agreed ratio. The Type B (*otsu gata*) joint venture is used when the contractors divide the scope of work, and each contractor is responsible for completing its scope of work and receiving compensation for that work. In both types, the contractors owe a joint obligation to the employer to complete all of the construction work. All joint ventures are considered partnerships under the Civil Code.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

There are some standard forms related to construction in Japan. The features of each form are as follows:

- (i) the “General Conditions of Construction Contract” (*minkan (nanakai) rengoukyoutei kouji ukeoi keiyaku yakkan*)

published by the General Conditions of Construction Contract Committee (which is a group of seven associations and organisations) (“Seven Associations GCCC”) is the form of construction-only contract used most commonly by private employers and contractors;

- (ii) the “General Conditions of Design and Supervisory Services Contract” (*yonkai rengou kyoutei kenchiku sekkei kann-ritou gyomuitaku keiyaku yakkan*) issued by the Research Society for General Conditions of Design and Supervisory Services Contract (which is an industry organisation consisting of four associations and organisations) (“Four Associations GCDS”) is the form of design and supervisory services-only contract used most commonly by private employers, designers and supervisors;
- (iii) the “General Conditions of Design/Build Contract”, issued by the Japan Federation of Construction Contractors, is a form of design-and-build contract (please see question 1.1 above for its framework); and
- (iv) in some cases of domestic power plant construction, the “Model Form for Domestic Plant Construction Work”, issued by the Engineering Advancement Association of Japan, is used. However, a customised engineering, procurement and construction contract is often adopted for renewable energy projects.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

The “General Conditions of Public Construction Standard Contract” (*konkyou kouji hyoujyun ukeoi keiyaku yakkan*) is typically used as a standard form for projects involving public works. Aside from government agencies and local governments, private electric power companies, railway companies, and other companies that regularly order construction work also use this form. However, in the case of public-private joint projects procuring project finance, such as public-private partnerships (“PPPs”), private finance initiatives (“PFIs”) and concession projects, customised construction contracts are used rather than the above standard contract.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

Under the Civil Code, an offer and acceptance create a legally binding contract. However, the Construction Business Act requires that parties to a construction contract agree on certain important matters (such as scope of work, contract price, commencement and completion dates for the construction work, payment method, mechanisms for changes in conditions, delay interest and penalty for breach of contract, and dispute resolution method) in writing on paper or by certain electronic means.

In practice, construction contracts are formed either by: (i) the execution of a contract between an employer and a contractor; or (ii) the submission by an employer of a written order, which is accepted in writing by a contractor.

Also, if the construction work falls into the category of “subject construction work” (*taisyou kensetsu kouji*) under article 9 of the Construction Material Recycling Act, the following

matters must be agreed in writing on paper, or by certain electronic means, and exchanged between the parties to the construction contract:

- (i) the demolition method of the building; and
- (ii) the cost for the demolition of the building.

1.6 In your jurisdiction please identify whether there is a concept of what is known as a “letter of intent”, in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

There is a letter of intent (“LOI”) concept in Japan, and an LOI is submitted in some cases, such as government-related requests for proposal, which can be either legally binding or non-legally binding, depending on the parties’ intention or negotiation. Also, a basic agreement is sometimes executed between an employer and contractors. The main purpose of an LOI and basic agreement is to agree on a rough statement of work and construction price so that both parties can start preparing plans for the project, schedule, cost, and materials. The parties will subsequently negotiate and make a detailed agreement based on the LOI or basic agreement.

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer’s liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors’ all-risk insurance?

Companies, including employers and contractors, are required by statute to obtain labour insurance and social insurance for their employees. There is no statutory insurance specifically required for contractors to carry out construction work, or design and supervisory services.

Contractors usually purchase and maintain fire insurance or contractors’ all-risk insurance for the executed portion of the construction work, materials and/or building equipment delivered to the construction site.

Also, contractors purchase guarantee insurance for liability for non-conformity and non-performance of obligations when they construct new residences, to address the requirement under the Act on the Assurance of Performance of Specified Housing Defect Warranty.

Regarding design and supervisory services contracts, if the designers and supervisors are from an architectural firm, the founders of the architectural firm have a duty to make efforts to purchase and maintain business insurance that covers losses in connection with their design and supervisory services.

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

(a) Labour

Except for foreign workers illegally working in Japan, there is no statutory requirement regarding the legal status of those working on site. However, contractors are required to comply with the Labour Standard Act.

(b) Tax

- (i) For construction contracts, the stamp duty is between JPY 200 and JPY 600,000 per original contract, depending on the contract price.
- (ii) Real estate acquisition tax is imposed on persons acquiring land or buildings, except for certain cases of acquiring newly constructed buildings.
- (iii) Registration and licence tax is imposed upon the registration of the ownership of land or buildings to perfect the transfer or acquisition of title. Fixed asset tax is imposed on owners of real estate.

(c) Health and Safety

Although it is not necessary to stipulate this in any contract, all companies (not just contractors) must comply with labour laws, which require employers to protect their employees' interests in terms of health and safety. For example, the Industrial Safety and Health Act requires companies, including construction companies, to: (i) provide a system for safety and health management by appointing a general safety-and-health manager to manage overall safety and health operations; (ii) take necessary measures to prevent employees from facing dangerous circumstances; (iii) educate workers in safety or health matters; and (iv) have workers undergo medical check-ups and endeavour to provide employees with access to medical advice.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

In relation to building construction, contractors are legally required to undergo a building certification, completion inspection, mid-term inspection (for certain types of construction), fire station inspection, and public health centre inspection under the Building Standards Act, Fire Service Act, and Medical Care Act, to confirm if the building conforms to these acts. In addition, each local government enacts its own ordinances to impose additional regulations on the construction of buildings, reflecting the character of the area.

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

- (a) In principle, unless otherwise agreed under the construction contract, the delivery of the construction work by the contractor and payment of the construction price by the employer must be performed concurrently. Thus, employers are legally permitted to retain the full construction fee/purchase price until the full completion and delivery of the works. Under the Seven Associations GCCC, as a general rule, the employer must pay the full or any unpaid portion of the construction fee/purchase price at the same time as the delivery of the completed works.
- (b) Although it is legally permissible, parties do not usually agree to the retention of the construction fee until the lapse of the defects liability period. It is common for the defects liability period to commence at the same time as the delivery of completed works, and full or final payment of the construction fee/purchase price is usually made at that time.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor's performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

Performance bonds may be, but are rarely, used except for public works, where the government requires that the contractor provide a guarantee for the performance of certain construction work or other obligations. The terms and conditions of the performance bonds are determined by the government office in charge of the project, and it is usually difficult to negotiate for any change.

In cases where they are required by the government, performance bonds are typically in the form of a demand guarantee under the Uniform Rules for Demand Guarantees, published by the International Chamber of Commerce.

Private companies prefer to choose financially stable contractors, or require contractors to form a joint venture to strengthen their credibility, rather than request performance bonds.

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

It is permissible but not common for employers to require a parent company guarantee, except for public works led by the government, for the same reason as stated in question 1.11. The terms and conditions of any such guarantees are determined by the government office in charge of the project, when required.

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

If the goods and supplies are deemed to be movables separate from real estate, they belong to the supplier. Therefore, contractors can retain or remove the goods and supplies when they are suppliers, but cannot when employers provide those goods and supplies. On the other hand, if the goods and supplies are attached to and difficult to separate from real estate, the goods and supplies become a part of such real estate. In this case, contractors can claim to retain the entire real estate, including the attached goods and supplies until they are paid, unless otherwise agreed.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

It is common for the designer of the building also to provide supervisory services for construction work. Under the Architect

Act, only licensed architects are permitted to provide a certain type of supervisory services for construction work. Supervisors have a contractual obligation to perform the supervisory services with the due care of a prudent manager, and they must act for the benefit of the employer. If the supervisor breaches its duty of the due care of a prudent manager, then the supervisor is required to compensate the employer for losses or damages arising from the breach.

On the other hand, usually, there is no contractual relationship between the supervisor and the construction contractor; hence, the construction contractor cannot claim for loss and damage against the supervisor directly. In principle, the construction contractor may claim for loss and damage in accordance with the construction contract; then, the employer may claim for compensation against the supervisor.

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a “pay when paid” clause?

As a general rule, the payment timing is determined by the parties. Thus, it is possible to have a “pay when paid” clause. However, general contractors must pay sub-contractors within a certain period of time in order to comply with the Construction Business Act (e.g., within one month after the general contractor receives payment from the employer or a higher-tier contractor or, in certain cases, within 50 days after the completion of work and the sub-contractors’ request for payment).

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

Parties are free to provide for the payment of liquidated damages, including cases of late completion, and can agree to an amount of compensation that is unrelated to any expected financial loss by, for example, making arrangements for the payment of a certain rate of the construction price as a penalty. In limited situations, such as a case when payment of liquidated damages is unreasonably expensive (e.g., liquidated damages of 0.33% per day/120.45% per year were deemed to be unreasonably high under a Japanese court precedent), then against public policy (Article 90 of the Civil Code), courts may revise an agreed rate or amount of liquidated damages.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

Generally, the employer has the right to make changes to the works to be performed under the construction contract (“change

order”). However, change orders are usually subject to the right of the contractor to demand an adjustment of the construction price and extension of the construction period, and contractors usually claim for compensation for loss or damage suffered due to the change order. The scope of the employer’s right to a change order and the contractor’s right to demand a price and period adjustment depend on the case, and these points tend to be intensely negotiated between the employer and the contractor.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

Construction contracts rarely allow the contractor to omit any construction work. If the contractor omits any work without the employer’s consent, the employer could bring a claim against the contractor and/or cancel all or part of the construction contract as a breach thereof, and may have a third-party contractor complete the remaining work.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

A contractor is obligated to complete and deliver the work to the employer in accordance with the construction contract. If the work delivered to the employer does not conform to the construction contract with respect to the kind or quality of the work, under the Civil Code, the employer may: (i) rectify the non-conformity by repairing or substituting the work; (ii) demand a reduction of the construction price; (iii) demand compensation for loss or damage; or (iv) terminate the construction contract. The statutory liability of the contractor for the foregoing is known as “Non-Conformity Liability”. In practice, this Non-Conformity Liability is usually also stipulated in the construction contract.

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

As a general rule, under the Civil Code, if a delay occurs and the contractor and employer are concurrently at fault, the contractor has no right to an extension of time, or to claim for expenses due to the delay. However, in many construction contracts, including under the Seven Associations GCCC, if construction is delayed for a reasonable cause, the contractor may claim for the necessary extension of time and adjustment of the construction price.

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

The statute of limitations under the Civil Code provides that, as a general rule, a claim shall be extinguished by prescription if the creditor does not exercise the right within: (i) five years from the creditor’s knowledge of the cause of action; or (ii) 10 years from the time the cause of action arose.

In addition, Article 637 of the Civil Code provides a special time limit for Non-Conformity Liability: the employer must

notify the contractor of the non-conformity within one year from discovery; otherwise, the employer cannot require the contractor to cure the non-conformity. This period is usually extended in construction contracts (please see question 3.6 below). Furthermore, the Law Concerning the Promotion of Securing Housing Quality stipulates that contractors and sellers of new residences are liable for defects in the main structural components of a residence for 10 years after delivery (please see question 3.22 below).

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

It is common to provide for a time limit and a procedure for claims for Non-Conformity Liability in the construction contract. For example, the employer is usually allowed to make a claim against the contractor within two years after the delivery of the work by giving written notice to the contractor that clearly and expressly states the intention of the employer to pursue a claim for Non-Conformity Liability, together with the specific details of the non-conformity and the basis for calculating the amount of damages.

Notwithstanding the above, regarding the non-conformity of equipment, interior finishing or decoration, furniture, or other similar items, the construction contract usually provides that the employer may not claim against the contractor unless the employer requires the contractor to cure the non-conformity immediately after inspection upon the delivery; furthermore, the employer is allowed to claim for any non-conformity which could not be discovered with due care upon inspection within one year after the delivery. Such provisions supersede Article 637 of the Civil Code. The Japanese courts generally uphold such provisions, unless there are special circumstances, such as a violation of public policy.

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

Construction contracts usually provide that the employer must secure the construction site, and the contractor usually has the right to demand an adjustment of the construction price and extension of the construction period if unforeseen ground conditions affect its work. Given this practice, in principle, the employer bears the risk of unforeseen ground conditions that are not attributable to any party.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

Usually, there is no clear provision in a construction contract as to who should bear the risk of a change in law, and this is a matter of interpretation of the construction contract. In this regard, if the construction contract allows the contractor to request necessary extensions or necessary adjustments to the work or the construction price without any particular restrictions, the risk of a change in law is allocated to the employer. On the other hand, if the reasons to allow necessary extensions and necessary adjustments of the work or the construction price are limited and exclude change in law, then the risk of a change in law is allocated to the contractor.

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

The designer usually insists on owning the intellectual property; for example, the Four Associations GCDS provides that the intellectual property relating to the design of the property belongs to the designer. In practice, however, intellectual property relating to the design of the property belongs to the employer or the designer on a case-by-case basis depending on the negotiations between the employer and the designer.

On the other hand, intellectual property relating to the operation of the property is usually vested in the person who operates the property, unless otherwise provided in the relevant contract.

3.10 Is the contractor ever entitled to suspend works?

The contractor usually has the right to suspend work under certain grounds, such as delay in payment under the construction contract by the employer or *force majeure* that prevents the contractor from performing the work.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party's grounds for termination must be set out (e.g. in a termination notice)?

Construction contracts usually grant the right to terminate, either with notice (e.g., any party may terminate the contract, provided that such party has required the breaching party to cure the breach within a reasonable period), or without notice (e.g., any party may terminate the contract immediately for certain grounds). The procedure for termination is also set out in the construction contract (including any requirement for a termination notice).

The typical grounds for termination of the contract with notice from the employer to the contractor include:

- (i) the contractor failing to commence the work;
- (ii) the work being materially behind the construction schedule; or
- (iii) the contractor's breach of the contract.

Likewise, the employer's breach of contract is a typical ground for termination of the contract with notice to the employer from the contractor.

In addition, the grounds for termination of the contract by the employer without notice to the contractor include:

- (i) if it is clear that the contractor will be unable to complete the work;
- (ii) if the contractor's licence is revoked or becomes invalid;
- (iii) if the contractor breaches the construction contract and the breach is not cured within a certain reasonable period of time;
- (iv) if bankruptcy proceedings are commenced against the contractor; or
- (v) violation of "anti-social forces" clauses.

Similarly, the following events are usually specified in construction contracts as grounds for termination of the contract by the contractor without notice to the employer:

- (i) suspension of payment by the employer;
- (ii) bankruptcy proceedings being commenced against the employer; or
- (iii) the violation of "anti-social forces" clauses.

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor's profit on the part of the works that remains unperformed as at termination?

Construction contracts usually provide that the employer may terminate the construction contract at any time and for any reason, provided that the employer compensates the contractor for any loss or damage arising out of, or in connection with, such termination. The scope of the compensable loss or damage depends on the details of the contract as well as specific circumstances, but if the contractor succeeds in proving to the court that the contract price for the unperformed work should be paid, the contractor will be entitled to be compensated for such loss or damage.

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

Japan has a concept of *force majeure*, but its scope is usually limited to natural disasters and other natural or artificial causes for which neither party is responsible. It would be unusual for a contract to provide that there is *force majeure* merely because the contract has become uneconomic. In the Japanese market, the risk of *force majeure* is usually allocated to the employer under the construction contract – i.e., loss or damage to the work due to *force majeure* would entitle the contractor to the necessary extension of time and necessary adjustment of the contract price.

3.14 Is there any legislation or court ruling that has been specifically enacted or handed down to provide relief to parties to a construction contract for delay, disruption and/or financial loss caused by the COVID-19 pandemic? If so, what remedies are available under such legislation/court ruling and are they subject to any conditions? Are there any other remedies (statutory or otherwise) that may be available to parties whose construction contracts have been affected by the COVID-19 pandemic?

In Japan, there is no specific legislation or court ruling regarding construction contracts that addresses delay, disruption and/or financial loss due to the COVID-19 pandemic. However, the MLIT has notified employers and contractors that if the work is suspended due to the inability to secure engineers or measures to prevent the spread of infection, or due to the inability to procure materials and equipment because of the COVID-19 pandemic, the employer and contractor should deal with the situation appropriately as it is not attributable to the contractor, though this is not a legally binding order.

3.15 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

In general, only the employer, who is a party to the construction contract, has the right to claim against the contractor under the construction contract, and the right to claim under the construction contract does not automatically transfer with the transfer of the building. However, in practice, when the employer (including its subsequent building owner) (“transferor”) transfers the

building to a transferee, and the transferor has a right to claim against the contractor under the construction contract, the transferor will usually transfer its contractual rights to the transferee, including the right to claim against the contractor. This allows the subsequent building owner to make a claim against the contractor directly under the original construction contract.

3.16 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

For real estate transactions, the use of direct agreements or collateral warranties is not common in practice. Interested parties other than the employer (e.g., lenders of the employer in a construction loan project) may include covenants in their contracts with the employer that would allow such interested parties to indirectly control the construction contract.

On the other hand, in project finance practice, it is common for lenders to enter into direct agreements with the relevant main parties, including the construction contractor, to enhance the lenders' security. These direct agreements usually provide that: (i) the contractor cannot amend the construction contract without the prior consent of the lender; (ii) the lender has a right to cure the breach of the employer (i.e., borrower) if the employer fails to perform its obligations under the construction contract; and (iii) the contractor must cooperate with the lender if the lender requires the creation or enforcement of a security interest.

3.17 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

In general, P1 can set off the sums owed to P2 against the sums owed by P2 to P1, unless P1 acquires the sums owed to P2 after an attachment has been made on the sums owed by P2 to P1.

3.18 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

Under Japanese law, the nature of the contractor's obligation under a construction contract is to complete the work and deliver it to the employer in accordance with said construction contract. In practice, however, since the construction contract may include non-construction obligations, such as reporting obligations and consultation obligations, the construction contract may impose a duty of care on the contractor, in addition to the other contractual obligations and liabilities of the contractor.

3.19 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

The general principle of contract interpretation adopted by courts is that ambiguous language must be interpreted objectively, taking into account: (i) other provisions of the contract; (ii) market practice for that type of contract; (iii) the background and discussions prior to the execution of the contract; and (iv) the economic/social purposes that the parties to the contract want to achieve.

3.20 Are there any terms which, if included in a construction contract, would be unenforceable?

For commercial construction contracts, there are no typical terms that would be unenforceable. If specific terms are considered offensive to public order, such terms are unenforceable on an *ad hoc* basis due to the principle of public policy.

3.21 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

In general, the designer is liable to the employer under the design contract, regardless of whether the design contract is included in the construction contract or executed independently, for two types of obligations: (i) general default liability arising from the designer's breach of the design contract; and (ii) Non-Conformity Liability. The designer may request certain limitations (e.g., a capped amount and/or time period) with respect to general default liability, but whether the employer will agree to this depends on the employer. On the other hand, for Non-Conformity Liability, the usual limitation is that the employer can make a claim within two years from the delivery of the work (please see question 3.6 above).

3.22 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

Although there is no concept in Japan that precisely corresponds to decennial liability, the Law Concerning the Promotion of Securing Housing Quality stipulates that contractors and sellers of new residences are liable for defects in the main structural components of a residence for 10 years after delivery thereof. This statutory liability is imposed only on contractors and sellers of new residences for the purpose of improving the quality of residences.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

In Japan, parties to a construction dispute usually attempt to resolve disputes by settlement; however, if it is difficult for them to reach a settlement, the parties then: (i) apply for alternative dispute resolution ("ADR"), including mediation proceedings before the court; or (ii) file a lawsuit with the court. In addition, even after filing a lawsuit, some disputes are referred to mediation at the discretion of the judge. According to the report on expediting trials issued by the Japanese courts in July 2021 (the "Japanese Court Report"), approximately 40% of disputes filed with the courts are resolved through judicial settlement.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

There are two ADR institutions that typically resolve construction disputes: (i) the Committee for Adjustment of Construction Work Disputes, for resolving disputes concerning construction contracts (Article 25 of the Construction Business Act); and (ii)

the Designated Housing Dispute Resolution Body (Chapter 6, Section 1 of the Housing Quality Assurance Act), for resolving disputes concerning contracts for the construction or sale of residences that are covered by a performance evaluation report, issued pursuant to the Housing Quality Assurance Act.

In general, either party to a dispute may apply to the competent ADR institution for dispute resolution, and the ADR institution has the authority to conduct mediation, conciliation or arbitration procedures, which are closed to the public.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

In practice, construction contracts do not have arbitration clauses where the parties agree to resolve disputes only by arbitration and specify which arbitration institutions and arbitration rules to follow; instead, construction contracts generally provide that the parties may submit disputes to arbitration if a separate "Arbitration Agreement" is executed by the parties. "Arbitration Agreement" means an agreement to refer the resolution of the dispute to one or more arbitrators, and to accept any arbitration award (Article 2, paragraph 1 of the Arbitration Act). Once the arbitration agreement is in place, the parties may no longer file an action in court for the resolution of the dispute (Article 14, paragraph 1 of the Arbitration Act).

4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

Japan is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), and Article 45, paragraph 1 of the Arbitration Act provides that an arbitral award (regardless of whether the place of arbitration is Japan or not) will have the same effect as a final and binding judgment, save for certain grounds (e.g., the arbitral award is contrary to public policy in Japan).

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

In Japan, court litigation is one of the typical dispute resolution mechanisms for construction contracts. When a lawsuit is filed, the court clarifies the issues through the complaint, answer and brief, etc., and examines evidence regarding disputed facts. Since construction-related litigation is complex and requires a high level of expertise, dispute resolution procedures, expert witnesses, or expert opinions may be utilised. The parties may appeal the judgment of the court of first instance and seek a further decision of the court by filing an appeal, and in some cases the parties may also appeal the decision of the court of second instance by filing a final appeal.

According to the Japanese Court Report, construction-related litigation is among the longest types of litigation, requiring, on average, around 20 months or more of trial time in district courts due to the specialised expertise required and extreme difficulty of resolving the issues involved. The Japanese Court Report also indicates a high rate of appeals in construction-related litigation.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

Article 118 of the Code of Civil Procedure provides that a final and binding judgment rendered by a foreign court is valid only if all of the following requirements are satisfied:

- (i) the jurisdiction of the foreign court is recognised pursuant to laws and regulations, conventions, or treaties;

- (ii) the losing defendant has been served (excluding service by publication or any other service similar thereto) with the requisite summons or order for the commencement of litigation, or has appeared without being so served;
- (iii) the contents of the judgment and the litigation proceedings are not contrary to public policy in Japan; and
- (iv) there is a guarantee of reciprocity.

The judgment of a foreign court may, in principle, be enforced by a Japanese court as long as the above requirements are satisfied (Articles 22 and 24 of the Civil Execution Act).



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Mori Hamada & Matsumoto's construction practice extends from traditional construction transactions to complex ones involving fund structures with a special-purpose vehicle or a trust, including investment structures for overseas investors, backed by significant experience of real estate transactions. The team's work in this practice primarily includes the following: acquisition of land for construction; advising on construction-related agreements; structuring and fund formation for construction projects; and financing for construction. Recent highlights include advising an US-based data centre developer on the formation of a joint venture for hyperscale data centres, advising on hotel construction and conversion projects in Okinawa, Kyoto and Niseko, and advising on many other construction projects, including Urban Redevelopment Projects.

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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (NB For ease of reference throughout the chapter, we refer to “construction contracts” as an abbreviation for construction and engineering contracts.)

Malaysia has various standard forms of contract that allow those operating in the construction industry to select the types of construction and procurement method for their project. Where the employer is the Government of Malaysia, there are five Public Works Department (“**PWD**”) Standard Forms, namely:

- (i) where a bill of quantities is part of the contract, PWD Form 203A (Rev. 1/2010);
- (ii) where drawings and specifications are part of the contract, PWD Form 203 (Rev. 2007);
- (iii) in the case of a design and build contract, PWD Form DB (Rev. 2007);
- (iv) where a nominated sub-contractor is involved, PWD Form 203N (Rev. 2007); and
- (v) where a nominated supplier is involved, PWD Form 203P (Rev. 2007).

Several other professional organisations and bodies provide their standard forms of contract, such as the Institution of Engineers, Malaysia (“**IEM**”), which has forms for:

- (i) mechanical and electrical engineering works (IEM.ME 2012);
- (ii) civil engineering works (IEM.CE 2011); and
- (iii) a nominated sub-contract for engineering works (IEM.NSC 2017).

The Pertubuhan Akitek Malaysia (“**PAM**”) has two standard forms, namely the:

- (i) agreement and conditions of PAM Contract 2018 (With Quantities); and
- (ii) agreement and conditions of PAM Contract 2018 (Without Quantities).

The Construction Industry Development Board (“**CIDB**”) has its suite of standard form of contracts, namely, for:

- (i) building works (2000 Ed.);
- (ii) nominated sub-contractors (2002 Ed.);
- (iii) model terms of construction contract between contract and sub-contractor (2007 Ed.); and
- (iv) standard terms of construction contract for renovation and small projects (2015 Ed.).

Finally, the Asian International Arbitration Centre (“**AIAC**”) has five standard forms of contract catering for:

- (i) standard form of building contract (Main Contract);
- (ii) standard form of building contract (Sub-Contract);
- (iii) design and build (Main Contract);
- (iv) design and build (Sub-Contract); and
- (v) minor works.

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

These contracting methods are not commonly adopted in Malaysia.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

The most common standard forms of construction contract used in Malaysia are the PWD, PAM and IEM standard forms. International Federation of Consulting Engineers (“**FIDIC**”) standard forms are known to be used but infrequently.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

The suite of standard forms of construction contracts issued by the PWD are used on projects involving public works. The specific type of standard form to be adopted will necessarily depend on the procurement method(s) that the construction project is to apply.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

Malaysia, being a Commonwealth country, adopts the English common law principles, which have been adapted to local circumstances. Essentially, case law from other common law jurisdictions only has persuasive weight under Malaysian legal jurisprudence.

In the context of the Construction Industry Payment and Adjudication Act, 2012 (“**CIPAA**”), which is the Malaysian legislation governing construction adjudication, the construction contract

is required to be in writing. While CIPAA does not specify what is defined as “in writing”, the AIAC issued a circular (AIAC CIPAA Circular 03 dated 28th April 2014) as a guideline, which specified that a contract is in writing: (i) whether or not it is signed by the parties; (ii) if it is made by exchange of communications in writing; or (iii) if it is evidenced in writing. Further, it encompasses situations where: (i) the parties agree otherwise than in writing by reference to terms which are in writing; and (ii) the terms are other than in writing but recorded by one of the parties or third party, with the authority of the parties to the contract [see also *EA Technique (M) Sdn Bhd v Malaysia Marine and Heavy Engineering Sdn Bhd and another case* [2020] 11 MLJ 353].

1.6 In your jurisdiction please identify whether there is a concept of what is known as a “letter of intent”, in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

While there may be some instances where a “letter of intent” (“LOI”) or, as another example, a “memorandum of understanding” is used, this would be treated merely as an “agreement to agree”. That is to say, until a formal contract is signed, parties are not bound by the “intent” behind the LOI. However, where a party has executed some works in reliance on such LOI, it may then give rise to a potential claim of *quantum meruit*.

Notwithstanding, the Malaysian Courts have indicated that scrutiny of such an LOI is crucial to determining whether the parties merely “agreed to agree” or intended to be bound by such terms (see the Malaysian Federal Court’s decision in *Deutsche Bank (M) Bhd v MBF Holdings Bhd & Anor* [2015] 6 MLJ 310).

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer’s liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors’ all-risk insurance?

The provision for insurance is spelt out in the standard form of contracts, making contractors contractually obliged to obtain the necessary insurance, such as the contractors’ all-risk policy. It remains the employer’s prerogative to add any other such insurance policy that the contractor(s) is to obtain during the subsistence of the works. Further, the relevant parties are required to comply with the provisions of the *Workmen’s Compensation Act, 1952*, where applicable.

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

Registration of contractors with the CIDB is required. In respect of foreign workers, the relevant working permit is required, together with all other requirements stated in the by-laws or regulations.

The applicable tax regime in Malaysia for the construction industry is set by the *Sales & Service Tax Acts, 2018*, which impose tax at the rate of 6% on all sales or services rendered.

Construction industry players need to adhere to the health and safety provisions under the *Occupational Safety and Health Act, 1994* and the *Factories and Machinery Act, 1967*.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

The legislation and regulations in Malaysia governing building and fire safety are the *Street, Drainage and Building Act, 1974*; the *Uniform Building By-Laws, 1984*; and the *Fire Services Act, 1988*.

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

These are known as “retention sums” and the common practice in Malaysia is to retain 10% of the progress payment as the retention sum; this will be subject to a maximum total sum of 5% of the contract sum. This will then be released in two halves (“*moitiés*”), the first of which (2.5%) is released upon the issuance of the Certificate of Practical Completion; the second (2.5%) upon the issuance of the Certificate of Making Good Defects.

It is worth noting that the provision of a retention sum is contractual in nature. At one time, it was the legal position that retention sums were held on trust for the contractor. However, in the Malaysian Federal Court’s decision in *SK M&E Bersekut Sdn Bhd v Pembinaan Legenda Unggul Sdn Bhd (in creditors’ voluntary liquidation) and another appeal* [2019] 3 MLJ 281, it was determined that there could be no express trust over the retention sum unless there were express terms in the contract specifying as such. Further, where the employer is in insolvency, implying a trust would be contrary to the *pari passu* principle.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor’s performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

Provision for performance bonds (“PB”) in construction contracts in Malaysia is relatively common. Such PB are typically on-demand bonds; that is to say, irrespective of the reason, the bank or financial institution will release the PB upon a demand being made.

However, Malaysian legal jurisprudence has developed the concept of “unconscionability” whereby if a party is able to demonstrate that there was unconscionable conduct by the party calling upon the PB, then an injunction would be issued (*Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* [2012] 4 MLJ 1). Whether a particular conduct is deemed unconscionable or not is a fact sensitive exercise.

It is noted that there is a further distinction in this context between an injunction to restrain: (i) the guarantor from releasing the PB, if it can be shown that fraud has been perpetrated by the beneficiary; and (ii) the beneficiary from making a demand on the PB or receiving the proceeds of the PB (*Fadzly Enterprise Sdn Bhd v Small Medium Enterprise Development Bank Malaysia Bhd* [2017] MLJU 1551). It is in the latter scenario where

consideration of “unconscionable conduct” has been shown to merit the issuance of an injunction.

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

It is permissible for the parties to determine whether company (or in some cases director(s)), guarantees are to be provided. The terms of such guarantees are to be negotiated and agreed upon between the parties.

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

This is subject to the provision of such express clauses (i.e., a *Romalpa* clause, derived from *Aluminium Industrie Vaasen B.V. v Romalpa Aluminium* [1976] 1 WLR 676) in the contract, otherwise the common law principles would apply (see *Excel Champ Automobile Sdn Bhd v Bermaz Motor Trading Sdn Bhd & Anor* [2019] MJJU 304).

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

Typically, there would be a contract administrator appointed and this person may be the architect, engineer or even an employer’s representative. The scope of such contract administrator is to be gleaned from the contract itself.

The seminal case of *Sutcliffe v Thackrah and Ors* [1974] AC 727 has been adopted in Malaysian legal jurisprudence, with one of the recent decisions in *Pembinaan BLT Sdn Bhd v Nazarin (NBM) Sdn Bhd & Ors* [2021] MJJU 1254 requiring such contract administrator to be fair, and conduct matters in an unbiased manner. Even though the contract administrator is typically employed or paid by the employer, he must still be fair and will not escape liability (be it in contract or in tort) if he is found to be in dereliction of his duties (e.g., to fairly certify the works done by the contractor).

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a “pay when paid” clause?

Previously, parties were free to contract as they wanted; however, when it comes to conditional payment clauses (or “pay when paid” clauses), their application must be read in light of *section 35 of CIPAA 2012*, which prohibits such clauses.

In the High Court’s decision in *MN Global Venture Sdn Bhd v CB Bersatu Sdn Bhd* [2022] MJJU 998, it was determined that *section 35 CIPAA 2012* is not limited to construction adjudication proceedings under CIPAA, but is of general application.

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

The current position in Malaysia is stated in the Federal Court’s decision in *Cubic Electronics Sdn Bhd v Mars Telecommunications Sdn Bhd* [2018] MLJU 1935, which essentially held that there was no necessity to prove actual loss or damage. Instead, the Court took a “common sense” approach by taking into account the legitimate interest an innocent party might have, and the proportionality of clauses specifying damages, to determine what was a reasonable compensation.

Therefore, the parties are free to agree in advance what would be a reasonable fixed sum as the liquidated damages. The party seeking to enforce such a clause would have to prove that: (i) there was a breach of the contract; and (ii) the contract contained a clause specifying a sum to be paid upon the breach. The innocent party would then be entitled to receive the sum not exceeding the amount stated in the contract, whether or not actual loss or damage is proven. The defaulting party could challenge such sum by proving that the “would-be” sum is unreasonable.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

The limits and procedures for varying the works to be performed under the contract are to be determined by the terms of the contract. Typically, such variations include any changes, modifications, additions to or omissions from such works.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

The employer is entitled to omit any works from the contract, subject to the relevant adjustments made to the contract sum, with the contractor’s consent. Provided that the parties have agreed on the omission(s), the employer is free to perform such works on its own or through a third party.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

Generally, terms stipulating, for example, that works are to be carried out with “due diligence” and “fitness for purpose” may be implied into a construction contract. The Malaysian Federal Court’s decision in *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1999] 3 MJJ 151 sets out the guidelines according to which such terms can be implied into the contract.

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

The Malaysian position on this is similar to the English one, in that where concurrent delays are involved, it is for the Court or the arbitral tribunal to determine, firstly, the relevant scope of work involved and, thereafter, which event is relevant, coupled with the appropriate extension of time, notwithstanding the other concurrent delay (*Walter Lili and Co Limited v Giles Patrick Cyril McKay and Another* [2012] B.L.R. 503; see also *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1990) Con. L.R. 32).

Generally, where both the employer and contract are equally blameworthy, the contractor is entitled to an appropriate extension of time, but not to claim for the loss caused by the delay (*De Beers v Atos Origin IT Services UK Ltd* [2011] B.L.R. 274).

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

There are three main pieces of legislation for limitation applicable in Malaysia, namely the *Limitation Act, 1953* (applies to West Malaysia only); the *Limitation Ordinance, 1959* (Sarawak); and the *Limitation Ordinance, 1952* (Sabah). Generally, a six-year limitation period on contractual claims is prescribed.

For proceedings against public authorities (e.g. the Government), the *Public Authorities Protection Act, 1948* prescribes a 36-month limitation period calculated from the act, neglect or default complained of. Beyond the aforesaid periods, such a claim or proceeding would be statute-barred.

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

Clauses which seek to modify the time limits for commencing proceedings would be considered void.

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

Generally, the construction contracts specify that the contractor has satisfied itself of, among other aspects, the ground conditions at the project site. Accordingly, the contractor would bear all such associated risk.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

A change in the law that would materially affect the completion of the works, if it has an impact on the time taken, would generally entitle the contractor to the appropriate extension of time. As to whether monetary compensation would be payable, this would depend on the kind of changes to the law that were put into effect, and on the terms of the contract.

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

The copyrights to the design and operations of the property would typically vest with the party who commissioned the work, i.e. the employer (see the *Copyright Act, 1987*). However, the parties are free to regulate such rights contractually.

3.10 Is the contractor ever entitled to suspend works?

A contractor does not have the automatic right to suspend works, even if there was a prior breach by the employer, for example, in terms of defaulting in the payment terms, unless it has been expressly provided for in the contract.

For example, under the PAM standard form (*Clause 30.7 PAM [With Quantities]*), the contractor has the right to suspend work due to non-payment of payment certificates, provided the relevant notices have been reasonably issued. Such works could then be suspended until such time as the payment(s) is made.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party's grounds for termination must be set out (e.g. in a termination notice)?

Most construction contracts provide for the grounds on which termination could occur, and it is mandatory that the termination clause in the contract be strictly complied with, failure of which would render the termination unlawful, as held in the Malaysian Federal Court in *Catajaya Sdn Bhd v Shoppoint Sdn Bhd & Ors* [2021] MLJ 374.

Some of the common grounds include: (i) failure to deliver the site possession; (ii) failure of the contractor to start work; (iii) failure to proceed with the works regularly and diligently; (iv) any act of bankruptcy; (v) failure to comply with instructions; and (vi) abandonment of works.

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor's profit on the part of the works that remains unperformed as at termination?

It is not common for construction contracts in Malaysia to allow the employer to terminate the contract at any time and for any reason. As mentioned above, the termination procedure in the contract must be strictly complied with (i.e. a notice specifying default must be spelt out clearly, and the time provided to rectify the breach and losses (if any) must be notified).

Failure to do so would render the termination unlawful and, as a consequence, the usual damages following such unlawful termination would ensue.

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

The concept of *force majeure* or frustration does apply in Malaysia. Most, if not all, standard form construction contracts spell out

what circumstances would fall under *force majeure*. It is unlikely that a claim that the contract has no longer become economically feasible to complete would be considered *force majeure*.

Likewise, for the doctrine of frustration to apply, it needs to be shown that there was a change in circumstances (after the contract's formation) that rendered the contract legally or physically impossible to perform, or that the change is so significant that, if performed, the work would be different from that contracted for (see the Malaysian Federal Court's decision in *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 MLJ 293).

3.14 Is there any legislation or court ruling that has been specifically enacted or handed down to provide relief to parties to a construction contract for delay, disruption and/or financial loss caused by the COVID-19 pandemic? If so, what remedies are available under such legislation/court ruling and are they subject to any conditions? Are there any other remedies (statutory or otherwise) that may be available to parties whose construction contracts have been affected by the COVID-19 pandemic?

Malaysia enacted the *Temporary Measures for Reducing the Impact of Coronavirus Disease Act, 2020* ("COVID-19 Act") to provide certain relief due to the effects of the COVID-19 pandemic.

The operative period for relief was between 18th March 2020 and 1st June 2021. It sought, among other things, to provide an extension of time during the affected period and to prevent the imposition of liquidated damages between 18th March 2020 and 31st August 2020.

It must be shown that the contractual obligation was affected due to the COVID-19 measures, which mainly consisted of the "movement control order", initiated by the Government of Malaysia, which restricted the movement of all citizens and businesses, unless they were considered to be essential services. The temporary reliefs were in the form of a temporary suspension of certain rights, particularly the payment terms.

At the same time, the COVID-19 Act provided for mediation in the event of any disputes that arose.

3.15 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

Third parties cannot claim, as of right, any contractual rights where they are not party to the contract. Notwithstanding, such third parties may potentially pursue claims in tort.

3.16 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

This is not common in Malaysia. In the case of "direct payment", the usual scenario is where the employer makes direct payment to the nominated sub-contractor or suppliers. This is usually done with the consent or knowledge of the contractor.

3.17 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

"Set-off" is recognised in Malaysia (see the Malaysian Court of Appeal's decision in *Bukit Cerakab Development Sdn Bhd v L'grande Development Sdn Bhd* [2008] 3 MLJ 547). It is typically provided for in the standard form construction contracts, with the requirements being spelt out. The quantification of such set-off is to be done in a *bona fide* way, although whether such amounts are allowed would depend on the trial or arbitration that ensues.

3.18 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

Generally, a contractual and tortious duty can co-exist. However, the Courts are reluctant to impose or imply a tortious duty where the parties have extensive or voluminous terms in the contract that governs the obligations and rights of the parties.

3.19 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

The general approach to contractual interpretation was restated in the Malaysian Federal Court's decision in *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464 where, essentially, the meaning of the term is what would be conveyed to a "reasonable person" or "reasonable addressee", having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed.

This approach is taken largely from the decision in *Attorney General of Belize and others v Belize Telecom Ltd and another* [2009] UKPC 10 in that: (i) the Courts have no power to improve upon the instrument whose meaning they are called upon to construe; (ii) they cannot introduce terms to make it fairer or more reasonable; and (iii) the meaning is not necessarily or always what the authors or parties to the document had intended.

The *contra proferentem* rule would similarly apply against the party who drafted the ambiguous terms, i.e. it would be read against said party.

3.20 Are there any terms which, if included in a construction contract, would be unenforceable?

In this regard, the provisions of sections 24, 25, 26, 28, 29, 30 and 31 of the *Contracts Act, 1950* have to be considered, and non-compliance with those provisions would render such a term unenforceable.

3.21 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

The ordinary test is that the designer must show the ordinary skill and care expected of an ordinary competent designer, unless there was some prior express and specialised representation(s) of

skills that the designer had made. It must also be shown that the design is fit for its purposes.

It is uncommon for a designer to give an absolute guarantee in respect of the design works.

3.22 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

This is not common in Malaysia. The most comparable scenario is in relation to latent defects. Where latent defects are concerned, the contractor's obligation is not limited to the defects liability period. Notwithstanding, the nature of the latent defects has to be determined and would have an impact on the contractor's obligation to rectify such defects.

On this issue, it is worth noting that *section 6A of the Limitation Act, 1953* prescribed a three-year period from the discovery of latent defects to commence legal proceedings for the recovery of damages; otherwise, such claims would be statute-barred. Further, no action will be taken where the occurrence of the defect and the discovery exceeds 15 years. In other words, if A purchased a house from B in 2000, and in 2017 discovered cracks in the house, at which stage an expert report determined that the cracks occurred in 2001, then A could no longer commence an action against B given that the time lapse is more than 15 years.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

Construction contracts typically contain an arbitration clause or agreement. Some arbitration clauses or agreements provide for a multi-tier resolution process. This may include submitting the issue or difference to the Supervising Officer (the "S.O."), as provided for under the PWD standard form of contract (NB this is similar to a Contract Administrator). The S.O. would then have a period of time to make a determination, and after the provided period, regardless of whether a determination was made, the dissatisfied party may refer such dispute or difference to arbitration.

The importance of mediation for construction disputes cannot be overemphasised and for the Malaysian Courts, it is strongly encouraged that the parties undergo mediation. However, at this juncture, mediation is purely voluntary and unless there are changes in the rules of the Court, disputing parties would have few incentives to use mediation effectively.

In bespoke construction contracts and in the absence of an arbitration clause or agreement, where disputes or differences arise, a Court action would typically be commenced.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

Malaysia has legislated its adjudication process under CIPAA, which came into force on 15th April 2014. CIPAA provides for a construction adjudication framework to enable payment issues faced by contractors or sub-contractors to be resolved. It is provided under CIPAA that all administration of adjudication matters is handled by the AIAC; this includes the registration of the adjudication and the appointment of adjudicators (NB the training and empanelment of adjudicators under CIPAA are equally under the purview of the AIAC).

CIPAA has short statutory timelines from the registration of the adjudication with the AIAC to the appointment of the

adjudicator, delivery of the adjudication papers (or "pleadings") and delivery of the adjudication decision (in total, 95 working days). Once the adjudication decision is obtained and in the event of non-compliance, the winner may enforce the adjudication decision at the High Court and the adjudication decision will be treated as if it were a judgment of the Court. This opens up execution or winding-up options for the recovery of such sums.

However, it should be noted that CIPAA proceedings are temporary in nature and a dissatisfied party is afforded the opportunity to revisit the matters that have been adjudicated, be it through arbitration or through Court proceedings.

As for other forms of dispute resolution mechanism of this nature, such as a dispute adjudication board or dispute review board, these are dependent on the underlying contract. Notwithstanding, in the High Court's decision of *Tenaga Nasional Berhad v Sinohydro Corporation Limited & Anor* [2020] MLJU 2199, the presence of a multi-tier arbitration clause and the non-compliance of any pre-condition to arbitration would not bar the Court from granting a stay pending arbitration. It was observed therein that the consequence (of non-compliance of any pre-conditions) was on the appointed arbitrator's jurisdiction.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

Except for bespoke construction contracts, the standard forms of construction contracts in Malaysia prescribe arbitration as the dispute resolution mechanism. Standard form construction contracts such as the PWD Form require the contractor to seek the determination of the S.O. before resorting to arbitration. Nevertheless, this is not a bar for the contractor to commence arbitration.

Typically, such construction contracts specify the AIAC as the administrator of the arbitration and the AIAC is the designated authority specified under the *Arbitration Act, 2005*. The AIAC Rules, which essentially follow the UNCITRAL Model Law, set forth the steps and documents required for, among other things, the initiation of the arbitral proceedings, the registration of the arbitration and the appointment of the arbitral tribunal (in the absence of an agreement by the parties).

Once the arbitral tribunal is appointed, it will set forth the agenda for the arbitral proceedings up to the issuance of the arbitral award.

4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

Malaysia is a signatory of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("*New York Convention*"), which recognises and enforces international arbitration awards.

The grounds for refusing recognition or enforcement of an arbitral award are set out in *section 39 of the Arbitration Act, 2005*.

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

Court actions in Malaysia are initiated through either: (i) a Writ; or (ii) an Originating Summons (NB winding-up matters are commenced through a Petition). The lower Courts are

classified as Magistrates' Courts (the monetary cap for claims is RM100,000) and the Sessions Court (the monetary threshold for claims is RM100,001 and the cap is RM1,000,000). Claims in excess of RM1,000,000 must be filed at the High Court.

Malaysia has the distinction of having: (i) two distinct High Courts, namely the High Court in Malaya and the High Court in Sabah and Sarawak; and (ii) three separate Bars. This distinctiveness requires parties intending to file legal action to determine the location of the construction project (which typically will determine the High Court at which the action would be filed), and this will have a bearing on the choice of advocates and solicitors that would handle the matter.

Parties are generally afforded two levels of appeal. Legal proceedings at first instance generally take up to nine months from commencement to a final decision.

An appeal from the lower Courts lies with the High Court, and will typically take approximately six months for disposal. A final appeal to the Court of Appeal for a matter originating from the lower Court will require leave if the value of the subject matter is less than RM250,000. An appeal from the High Court is made to the Court of Appeal, and takes approximately six to eight months for disposal. An appeal to the Federal Court requires leave; such leave is rarely granted and is contingent

on the applicant showing that an element of public interest is involved. The timeline for the disposal of an appeal at the Federal Court is approximately 12 months or more.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

Malaysia has enacted the *Reciprocal Enforcement of Judgments Act, 1958*. This enables the participating jurisdictions to recognise the judgments made in the Malaysian Courts and *vice versa*, requiring only the registration of such judgments at the High Court.

The participating jurisdictions at the moment are Brunei, Hong Kong, India, New Zealand, Singapore, Sri Lanka and the United Kingdom.

For other jurisdictions, the affected party would need to commence fresh legal proceedings in Malaysia to seek the appropriate reliefs or remedies.



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C. H. Tay & Partners is a boutique law firm located in Kuala Lumpur, Malaysia. It focuses on three primary areas: construction, engineering and infrastructure dispute resolution; taxation law; and corporate & commercial litigation. C. H. Tay & Partners has also expanded its range of services to include real estate and banking matters.

The firm's main branch is located in Kuching, Sarawak and caters to clients from East Malaysia.

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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (NB For ease of reference throughout the chapter, we refer to “construction contracts” as an abbreviation for construction and engineering contracts.)

In Mozambique, there is no standard type of construction contract. However, it is important to point out that that the applicable law and the form of the contract will depend on whether it is a public contract (executed between a private entity and the State and/or a public entity) or a private contract (executed between private parties).

When a construction contract is executed with a public entity, the Regulation for Contracting Public Works, Supply of Goods and Provision of Services to the State, Decree no. 79/2022, of 30 December (the “Regulation for Contracting Public Works”) establishes the key features that any such contract is required to have.

On the other hand, pursuant to Mozambican civil and commercial legislation, in private contracts, the parties are free to agree on their terms and conditions, if there is no violation of the law. Common types of construction contracts are lump-sum, unit price, design-build contracts.

In addition, international forms of construction contracts are used for major projects such as FIDIC (Fédération Internationale de Ingénieurs-Conseils), NEC (New Engineering Contract) and also JBCC (Joint Building Contracts Committee) which are commonly used in the South African construction industry.

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

There is no collaborative contracting in Mozambique (at least none designated as such). In Mozambique, cooperation between contractors may be achieved either through a consortium or under a joint-venture agreements.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

Please refer to question 1.1 above.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

As mentioned in question 1.1 above, the Regulation for Contracting Public Works establishes the key features that such contracts are required to have. Commonly, the public tender includes a draft of the contract, which is a model contract approved by authorities, with the necessary adjustments to suit the subject matter of the tendering procedure.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

In private law, and in accordance with the Mozambican Civil Code, a contract is formed when the will of two parties converge. It is necessary for the parties to consent of the parties and to have capacity to contract. It is also necessary to state the object of the contract, which is determined or remains to be determined, and this object must be legal. However, most construction contracts (besides domestic construction works) are put in writing.

In public law, formalities are stricter since a tendering process (as a rule a public tender) must be launched by the contracting authority. The interested parties have to submit a proposal and follow several formalities and stages in accordance with the law. The contract will then be awarded to the party which best meets the requirements of quality and price as specified in the tender documents. The execution of a written contract is mandatory.

Mozambican law also provides for other extraordinary procedures to award public works, with less stricter formalities, but in all of them it is mandatory to have an awarding statement and a written contract.

1.6 In your jurisdiction please identify whether there is a concept of what is known as a “letter of intent”, in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

In Mozambican law, the concept of “letter of intent” is well-known and commonly used. However, unlike common law, Mozambican law regulates “pre-contractual obligations”. As a

result, the parties are bound to act in good faith even during the pre-negotiation of a contract. For this reason, although letters of intent may also be non-binding, such circumstance does not release the parties from liability to the other party for any loss or damage caused during contract formation if bad faith is proven. The existence of a letter of intent may constitute evidence in any litigation over loss or damage suffered during contract formation.

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer's liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors' all-risk insurance?

It is mandatory for all contractors to take out a third-party liability insurance policy. Depending on the object of the contract, the parties can agree on different kinds of insurance that they consider necessary to perform the corresponding contract. It is also mandatory for any employer of workers (whether the employer or the contractor) to take out work accident insurance.

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

There is no statutory requirement that it has to be stipulated directly in the construction contract. The statutory requirements that the parties must comply with are:

- Mozambican labour law and social security obligations.
- Mozambican law as regards foreign employees and in particular local content limitations.
- Mozambican laws and other statutes, such as the General Regulation of Urban Buildings, environmental law, concerning, *inter alia*, building permits, land use and environmental protection.
- Mozambican laws concerning reporting to the tax authorities.
- Mozambican laws concerning the work environment and other safety requirements.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

The most relevant law as regards fire safety standards is the General Regulation of Urban Buildings (Legislative Act 1976 as amended from time to time). It is also important to consider Law 7/2021 of 30 December, which approves the legal framework for fire protection, but which requires further developments to be approved by Council of Ministers. Further to that, there are several Instructions by Municipalities and National Public Rescue Service (SENSAP) on the matter that must be followed.

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

The employer is allowed to retain part of any amounts payable to the contractor, both in private and public construction contracts.

In the case of public contracts, the Regulation for Contracting Public Works, any employer that unilaterally terminates the contract has the right to retain and use the credits resulting from the contract, to compensate any losses caused to the contractor, up to the limit of the same.

In private construction contracts, the parties are free to agree as civil law provides for no restrictions and expressly foresees retention right. Commonly, contracts contain provisions allowing the retention of 5% to 10% of the amounts due.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor's performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

In public contracts, the Regulation for Contracting Public Works provides for three types of guarantees: (i) provisional; (ii) definitive; and (iii) advance payment. The definitive guarantee is provided after the award of the contract and before the signing of the contract. Its purpose is to ensure the proper and punctual fulfilment of the obligations arising from it and may not exceed 10% of the value of the contractor's proposal. Upon completion of the work, the contractor must submit a guarantee of five percent of the value of the work to cover defects during the works guarantee period.

The following are accepted: (i) bank guarantee; (ii) proof of deposit or bank transfer; (iii) certified cheque; (iv) public debt securities; (v) insurance-guarantee; and (vi) the contracting authority may also define other type of guarantee to be provided.

In private construction contracts, there is no legal limitation. Performance bonds are usually provided by the contractor in an amount between 5% and 15% of the contract price.

The execution of performance bonds may certainly be subject to interim injunctions, which will be granted if the following legal requirements are met: (i) serious probability of the existence of the right claimed; (ii) well-founded fear that someone else, before the suit is filed or while it is pending, will cause serious injury to that right, that is difficult to repair; (iii) the damage resulting from the injunction does not exceed the damage it is intended to avoid; and (iv) the non-existence of a specific injunction to protect the same right.

In the case of on demand performance bonds, however, the granting of interim injunctions is very unlikely, considering the nature of this type of bond. In Mozambique, to be effective it should be a first demand bank guarantee, allowing an immediate request for payment which financing entities (banks or insurance companies).

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

For public contracts in Mozambique, there are restrictions on the nature of the guarantees. However, provided it is compliant with the Regulation for Contracting Public Works, a parent company could be allowed to provide for the guarantee if it is made clear that there is no assignment.

In private construction contracts, there are no limitations, and it is very common and also allows joint and several liability. As such there are additional guarantees for the employer.

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

If the employer does not comply with its payment obligations under the construction contract, the contractor is entitled to exercise a right of retention over the works, under article 754 of the Mozambican Civil Code. The right of retention consists of an *in rem* guarantee which prevails over mortgages, even if filed in advance.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

Engineer is the name used in FIDIC contracts and it is not commonly used in other Mozambican construction contracts. In Mozambique, construction contracts are, as a general rule, supervised by a third party, who is commonly referred to as an inspector (Article 1209 of the Mozambican Civil Code). The inspector acts as a guardian of the proper performance of the contract. The inspector is responsible for monitoring and verifying exact compliance with the project, its alterations, and the work plan. The inspector is also responsible for checking on the payments due to the contractor.

In public works, it is mandatory to have a third party to act as an independent inspector (Article 175 of the Regulation for Contracting Public Works).

In performing its role, the inspector must act with impartiality, notwithstanding the fact that it was hired and is paid by the employer. In fact, the very nature of the inspector's work requires it to act impartially, because the inspector is the guarantor of the proper performance of the contract. Due to its nature, the duty of impartiality is absolute, except when extraordinary circumstances, such as *force majeure*, require a subjective assessment.

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a "pay when paid" clause?

The "pay when paid" clause is commonly used as a payment condition for subcontractors, meaning that subcontractors will only be paid if the employer pays the contractor.

The "pay when paid" clause is not contrary to the provisions of Articles 280 and 281 of the Civil Code (if it is not limited to the application of the contractual object itself, the clause may be applied), provided it does not offend the law, is not legally impossible, indeterminable and does not offend public order or good customs. The clause is also in line with the provisions of Article 121(1), read together with Article 883(1), which allows the parties to determine the form for payment of the price.

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

Under Article 810 of the Mozambican Civil Code, the parties may agree in advance on a fixed amount that will be paid by the contractor to the employer in case of delay or breach of contract (which may be a fine in case of delay in completion of the works). The clause is referred to as a *penalty clause*.

It is important to note that by establishing such clause in a contract, as a rule, the consequence is to prevent the party that established that penalty clause from demanding compensation for any losses above the amount agreed (Article 811 of the Civil Code). As such, if the actual losses are greater than the penalty agreed in advance, the injured party may not demand compensation for the remainder. However, this is not absolute, since the parties may (if they expressly agree) provide that, although they are setting a specific amount in the penalty clause, if the actual losses are greater, this will not prevent the payment of the remaining amount.

In public works, the contracting authority may set a fixed amount to be paid in the event of breach of contract (for example, delay in the completion of the work), as set out in Article 191 of the Regulation for Contracting Public Works.

Regarding restrictions in public procurement, article 191.1 of the Regulation for Contracting Public Works establishes that a daily fine of 0.5% and 1% of the value of the awarded contract may be applied until the end of the contract or its termination. Hence, it may not exceed the legal limit.

Under Article 812 of the Civil Code, the courts may reduce the amount agreed as damages, if it is proven to be manifestly excessive.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

Pursuant to the Regulation for Contracting Public Works, the contractor is obliged to accept, under the same contractual conditions, any additions or suppressions that are made to works, goods or services, up to 25% of the initial value of the contract. Any variation exceeding these limits depends on authorisation by the Minister of Finance.

In addition, the employer is also entitled to demand the execution of additional works (not included in the contract), which the contractor may only refuse if they exceed 25% of the initial value of the contract or the contractor proves not to have the means to perform the extra work, the type of which was not originally part of the contract.

As regards private construction contracts, the Mozambican Civil Code stipulates the employer's right to vary the works if the variation does not exceed 20% of the contract price in value and does not entail a modification in the nature of the works.

If the works are subject to variation, the contractor is entitled to a price increase, linked to the related rise in expenses and work, and to an extension of the contractual deadline.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

Under the Regulation for Contracting Public Works Project omissions (and errors) of a project may occur. As such, after the works are assigned within the deadlines set in tender process, the contractor may claim the existence of such errors and omissions together with their costs. The employer will then have 30 days to decide on the claim and if the employer does not respond to the contractor, the claim is deemed to be accepted. Such errors or omissions in the project may also be identified during the execution of the works. If this happens, the contractor must immediately notify the employer. Both parties must seek to reach an agreement, failing which they may have recourse to independent arbitration to resolve any conflicts resulting from the interpretation and performance of the contract.

In private construction contracts and if not provided for in the contract, the parties may freely agree. Without prejudice to licensing and responsibilities for the execution of the works, any licensed contractor in Mozambique may be hired by the employer and will be able to execute the works.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

In the pre-contractual phase and during the performance of the contract, the parties are always bound by the principle of good faith. Furthermore, during the performance of the contract, the contractor is required, under the provisions of article 1208 of the Civil Code “to execute the works as agreed, without any defects that would exclude or reduce the value of the works or their fitness for their normal use or as provided for in the contract”.

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

There is no specific legal rule regarding concurrent delays. Any concurrent event has to be assessed on a case-by-case basis, based on the principle of “adequate cause” as provided for in article 563 of the Mozambican Civil Code which states that “*the obligation to compensate only exists in relation to damage that the injured party would probably not have suffered had it not been for the injury*”.

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

Unless otherwise agreed, the statutory limit for a public works contract is five years. During this period, the contractor must, at its own expense, maintain and repair any damage that seem to result from defective execution of the contract. When the five-year warranty period ends, a final inspection takes place for the purpose of final acceptance of the work by the employer.

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

If not stipulated in the contract, the time limits to bring a claim under a construction contract will be as soon as the breach is known, the obligation was due, or the defect became known. Common practice is that notices of breach/claims must be served in writing and properly grounded. Establishing contractual time limits to bring claims or waivers of such rights under construction contracts will not be considered valid before Courts if found unreasonable.

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

The risk of unforeseen ground conditions will be borne by the employer – public or private – unless the event is caused due to bad execution by the contractor.

However, in private construction contracts the parties may freely allocate the risk between them, so it is common for the employer to take on this risk.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

As a general rule, the risk in a public construction contract is borne by the public authority (employer), because it is considered that the public administration must ensure a certain protection against changes in law.

However, in private contracts, in the absence of a contractual clause, the contractor usually bears the risk. Nevertheless, it is important to note that pursuant to the Mozambican Civil Code (article 437) there is the possibility to apply the regime of the abnormal change of circumstances. This gives the contractor the right to terminate or modify the contract on an equitable basis, provided the change in law meets the following requirements: (i) occurrence of a change in the circumstances on which the parties based their decision to enter into the contract; (ii) the change must be abnormal, principally in the sense that it was unpredictable and extraordinary; (iii) existence of injury to one of the parties; (iv) the request for fulfilment of a contractual obligation seriously affecting principles of good faith; and (v) the risk of occurrence of the change in law not being covered by the risks inherent to the contract.

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

Architects and engineers who are responsible for the design of a property, specifically, usually own all related intellectual property.

Intellectual property rights may be assigned to the employer by their owner. However, the moral rights must remain the property of its author.

Moreover, architects legally have a moral right to prevent changes to the designed property. This means that employers may not, either during or after construction, introduce changes without prior consultation of the architect. In the absence of an agreement, the architect is entitled to repudiate ownership over

the designed work and the employer will be forbidden from using, in its own interest, the architects name in relation to the work.

3.10 Is the contractor ever entitled to suspend works?

The Regulation for Contracting Public Works specifically addresses suspension of works by the contractor, in full or in part, for a given period, when: (1) it is provided for in the work-plan; (2) it is authorised by the employer (contracting authority); (3) any amounts due for executed works, revisions and changes under terms of the contract are not paid; and (4) in the case of any other damaging fact imputable to the employer.

The contractor's right to suspend works is commonly provided for in private construction contracts and associated with breaches by employer. If not contractually regulated, the legal mechanism of "exception of non-performance" (article 428 of the Mozambican Civil Code) provides grounds for suspension of works when the employer fails to comply with payment obligations.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party's grounds for termination must be set out (e.g. in a termination notice)?

Under the Regulation for Contracting Public Works, public contracts may be terminated by: (i) full performance of the contract; (ii) agreement of the parties to terminate; or (iii) unilateral termination based on breach of contractual obligations, served in writing.

The employer of a public construction contract may unilaterally terminate for: (a) the contractor's breach of contractual clauses, specifications, projects or deadlines, including abandonment of the works; (b) delay for a period longer than 60 days in complying with contractual clauses, specifications, projects and execution deadlines, or for any shorter period established in the tender documents; (c) repeated defective compliance with contractual obligations; (d) systematic non-compliance by the contractor of the determinations of the authority designated to monitor and inspect the execution of the works; (e) changes in the legal structure of the contractor without the prior consent of the employer; (f) assignment of the contract or association (joint-venture, consortium, etc.) with another entity without prior consent of the employer; and (g) accrual by the contractor of fines up to 20% of the contract value, if another lower limit is not established in the contract.

The contractor of a public construction contract may unilaterally terminate: (a) for impossibility to access the area, place or object to execute the works within the contractual deadlines, or impossibility to access the sources of the materials specified in the contract or in the proposal, due to an act attributable to the employer (e.g., delay of 180 days in assigning the works); (b) for a delay of more than 60 days in payments, whether full or partial; (c) 60 days from receipt of the written order from the employer ordering the suspension of the execution of the works, for reasons not attributable to the contractor, except in case of *force majeure* or unforeseeable circumstances; and (d) for substantial changes in contracting circumstances, which hinder the execution of the contract and increase its charges and costs by more than 25% of the contract value.

The party that intends to unilaterally terminate the contract must give notice to the other party of its intention to terminate, specifying the cause and the grounds for the termination. The other party must, within 30 days, remedy the claims/breaches. If it does not do so, the claimant may terminate the contract.

Public contracts may also terminate automatically upon death or incapacity if the contractor is a natural person, or upon insolvency if it is a legal entity.

In private construction contracts, it is common for the parties to agree provisions conferring the right to immediate termination in certain events, such as: (i) abandonment; (ii) reaching of liquidated damages limits; (iii) reaching of limitation of liability caps; or (iv) failure to achieve provisional acceptance by a given date.

Civil law also grants the right to terminate a contract upon verification of a definitive breach of contract by one of the parties. A definitive breach occurs when: (i) the non-breaching party loses interest in the other party's performance, as a result of a delay; or (ii) if after performance is delayed, the breaching party does not resume compliance with its contractual obligations within a reasonable period granted by the non-breaching party.

Accordingly, the verification of definitive breach depends on the prior delivery of a notice granting a period to remedy the breach.

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor's profit on the part of the works that remains unperformed as at termination?

In public contracts, the Regulation for Contracting Public Works provides a right of suspension for indefinite period, which leads to termination in the interest of the employer. The termination entails the payment of fair compensation, which must correspond to the payments due and compensation for actual loss or damage suffered.

For private construction contracts, article 1229 of the Mozambican Civil Code stipulates a right of withdrawal. This right may be exercised at any time by the employer against the payment to the contractor of compensation for all expenses and works done, and for the profit it could derive from the execution of the works.

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

The concept of *force majeure* is well known in Mozambican jurisdiction.

In the Regulation for Contracting Public Works, the responsibility of the contractor for any defect or delay in the execution of the contract ceases when the non-compliance results from *force majeure*. In addition, any loss or damage caused by *force majeure* or any other event not attributable to the contractor will be borne by the employer (unless it refers to risks that are to be borne by the contractor). The contractor is entitled to be paid for all executed works. The inspector of the works plays an important role in *force majeure* events since it will have to check the executed works and the contractor's claims relating the costs of remedying any loss or damage.

In private construction contracts, the *force majeure* clause is commonly included as freely determined by parties.

For a contract which has become uneconomic, it is better to argue an abnormal change of circumstances, giving the contractor the right to terminate or modify the contract on an equitable basis (please see question 3.8 above) – article 217 of Regulation for Contracting Public Works and article 437 of Mozambican Civil Code.

3.14 Is there any legislation or court ruling that has been specifically enacted or handed down to provide relief to parties to a construction contract for delay, disruption and/or financial loss caused by the COVID-19 pandemic? If so, what remedies are available under such legislation/ court ruling and are they subject to any conditions? Are there any other remedies (statutory or otherwise) that may be available to parties whose construction contracts have been affected by the COVID-19 pandemic?

There was no legislation enacted specifically to provide relief to parties for delays, interruptions and/or financial losses caused by the COVID-19 pandemic. Nor are we aware of any judgments with such content. However, this does not necessarily mean that the interests of the parties were prejudiced.

Construction contracts can provide that extraordinary situations may be considered to justify the suspension, modification or termination of the contract. In this context, as it was an unforeseeable event beyond the control of the parties, the COVID-19 pandemic was considered for this purpose. For this contractual stipulation to be considered, it was necessary to assess the terms in which this event seriously affected the performance of the construction contract. Therefore, if the existence of a *force majeure* event was determined on a case-by-case basis, the construction contract could be suspended, extended, or terminated, depending on the gravity of the situation. This results from the application of articles 117(1), 187(6), 197(13), 212, 213, 240 and 290 of the Regulations for Contracting Public Works, Supply of Goods and Provision of Services of the State, approved by Decree No. 5/2016 of 8 March, in force during the period of COVID-19. These provisions are also applicable to private works contracts, by force of articles 437 (*termination or modification of the contract due to change of circumstances*) and 1227 (*impossibility of carrying out the works*), which orders the application of article 790 (*objective impossibility to comply*), all of Mozambican Civil Code.

3.15 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

Only parties to a contract are entitled under it. Therefore, as a rule, only the signatories may benefit, unless expressly agreed otherwise.

However, the Mozambican Civil Code establishes that, for five years from the handover of the works (buildings), the contractor remains responsible towards the employer for defects in the grounds or construction, modifications, or repairs and for serious defects or danger of collapse. As such, within this period, a subsequent owner would be able to make a claim against its seller who, in turn, could make a claim against the previous owner, down the line to employer who would then be able to claim against the contractor. The tight one-year period to submit a claim after the defect becomes known is very important.

3.16 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

In Mozambique, the use of direct agreements and collateral warranties is common, especially in major projects and project

finance. This is mostly common in oil and gas projects and mining and energy projects, thus executed between the employer, the contractor, and the financing entities of the projects.

3.17 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

The Mozambican Civil Code allows a set off between sums owed and sums due, which is known as debt compensation. Article 847 of Civil Code provides that set off may be effected by simple notice to the other party, provided the credit to be set off is judicially enforceable and both obligations have as their object fungible things of the same kind and quality, such as money. The limitations are provided for in article 853 of Civil Code.

3.18 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

Parties are subject to a duty of care. They are also bound to act in good faith towards all contracting parties. This is a core principle from which several ancillary obligations can be drawn. As construction contracts are usually performed over a long period, they require a duty of care, considering the parties are professionals performing a valid contract. They also require a relationship of trust between employer and contractor, and additional duties relating to disclosure of information, security and care of the works, and advice, among other things.

3.19 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

The Regulation for Contracting Public Works provides that any dispute arising out of the construction contract regarding its interpretation (or its execution) will be settled by court proceedings or arbitration.

Furthermore, Article 236 of the Mozambican Civil Code stipulates rules of interpretation intended to determine the will of the parties.

Construction contracts often include hierarchy and interpretation clauses, providing priority between contractual documents, or stipulating that the supervisor, if designated, has the power to decide the interpretation to be given to a certain clause until the conflict is definitively resolved by judicial courts or arbitration.

3.20 Are there any terms which, if included in a construction contract, would be unenforceable?

Terms and clauses which are contrary to the law or public order, or which offend good morals, are null and void, as stipulated in articles 280 and 281 of the Mozambican Civil Code.

This main principle is then reflected in Mozambican legislation. Some examples are: (i) limitations of liability, i.e., the complete exclusion of liability for breach; or (ii) the total exclusion of guarantee periods.

3.21 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

If the designer is appointed by the employer, the designer is subject to contractual liability. Thus, designers will be liable for errors and omissions contained in the projects/plans prepared by them. Therefore, it is usual for employers to contractually stipulate indemnification obligations, which in any case are due by law.

3.22 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

The concept of decennial liability does not exist in Mozambique.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

In Mozambique, there are no specific courts that deal solely with construction contract disputes. Generally, these disputes are litigated in the common courts, or through arbitration, mediation, conciliation, or through dispute boards.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

There is no adjudication process in Mozambique. However, the parties are free to choose conciliation and/or mediation as an interim form of dispute resolution. References are also made to dispute boards for a decision or recommendation when a dispute arises from the contract or from the performance of the works that cannot be resolved amicably by the parties.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

In Mozambique, arbitration clauses are very common in public and private construction contracts, with both following the standards of the UNCITRAL Model Law of 1986. The arbitration proceedings are made up of introductory, instruction (e.g.,

evidence-gathering), judgment, and final decision phases. Arbitration decisions may not be appealed as to the merits of the case.

4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

In Mozambique, there are no legal limitations on the recognition and enforcement of international arbitral awards for private and public construction contracts. However, there is an exception for cases under the ICSID Convention 1965. In these cases, for the awards to be binding and enforceable, they must be reviewed and confirmed by the Supreme Court in accordance with the resolution of recognition and enforcement of foreign arbitral awards (New York Convention 1958). The awards must also comply with the specific rules of Mozambique, for the purposes of analysis of purely formal aspects and also relating to the international public order of Mozambique when one of the parties to the proceedings is Mozambican.

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

In Mozambique, court cases take at least three/four years to reach a judgment at first instance. After that, the losing party may file an ordinary appeal unless the value of the dispute is less than the minimum required by law. After the decision, the losing party can appeal once on matters of fact and twice on matters of law to the immediately higher court.

It may take more than 10 years from the first decision to the last judicial appeal.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

For the judgment of a foreign court to be enforced in Mozambique, it is subject to revision and confirmation as indicated in question 4.4 above, unless there is some international treaty or special legal provision exempting awards made in any state from this procedure.



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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (NB For ease of reference throughout the chapter, we refer to “construction contracts” as an abbreviation for construction and engineering contracts.)

Private construction works are regulated in the main by the Civil Code, which provides for a considerably flexible legal regime and allows the adoption of a significant range of contract types. Although the Civil Code does stipulate some mandatory rules applicable to construction works, most of the rules are of a subsidiary nature. Therefore, the range of construction contract types which may be adopted in Portugal is very wide, and includes international standard types such as EPC contracts, design-only contracts, design & built contracts, EPCM contracts, BOOT contracts, including any variations to these.

Because the performance of construction activity is a regulated one, even when there is a main managing contractor, and all the construction work is performed by subcontractors, both the main contractor and the subcontractors must hold the applicable legal qualification.

Public construction works are regulated by the Public Procurement Code, which is less flexible and more detailed. It stipulates a set of rules which must be strictly complied with and does not allow significant deviation from the legal framework.

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

Most construction contractual models currently used in Portugal tend to be of a non-collaborative nature, where the parties specifically focus on allocation of risk, definition of price, payment terms and warranties, and the stipulation of each party’s obligations, seeking to ensure both during negotiation

of the contract and when conflicts arise, the best possible position for each. Therefore, no standard forms for collaborative contracts are found in use.

There has been some evolution in the private sector towards contracts increasingly centred on a joint allocation and management of the risk, and on defining conflict-prevention rules. In the public sector, collaborative contracting is more difficult to achieve due to the mandatory nature of most applicable rules.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

Construction contracts in the private sector are mostly tailor-made. Whenever standard forms are adopted, FIDIC models are the most used, although frequently subject to adjustments. In the public sector, the tender documents, which include the applicable legal clauses, reproduce, to a large extent, the mandatory and subsidiary legal rules.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

In public works, there are no standard forms of construction contracts. In addition, in public works, the design phase and construction phase must be tendered and contracted separately. Design-build contracts may only exist in specific cases exclusively regulated in the law.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

A legally binding contract depends on both parties reaching a valid meeting of wills.

Concerning private works contracts, if the price is higher than €20,000, its validity depends on the existence of a written contract which includes reference to: a) identification of the

parties; b) contractor's permit; c) scope of works; and e) deadline. Any breach of these requirements will nullify the contract. However, this may not be argued by the contractor.

In the case of public works contracts, there are detailed procedures which must be complied with during the tender phase. These include specific documents which must be part of the contractual documents, and which vary with the type of public procurement procedure.

1.6 In your jurisdiction please identify whether there is a concept of what is known as a "letter of intent", in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

The "letter of intent" is commonly used in Portugal. However, unlike the common law, Portuguese law regulates "pre-contractual obligations". This requires parties to act in good faith even during negotiation of a contract. Although letters of intent may also be non-binding, this circumstance does not free the parties from being liable to the other for any loss or damage caused during contract formation if bad faith is proven.

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer's liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors' all-risk insurance?

Any employer of employees is obliged to take out a work-accident insurance policy. Motor insurance is also mandatory.

Construction works insurance is not mandatory. However, it is common for construction contracts to impose an obligation on the contractor to take out civil liability insurance and of one of the parties (more often the contractor) to take out a contractor's all-risk insurance.

Any technicians responsible for the coordination, drafting and signature of construction projects, supervision of construction works, and project management must take out a civil extra-contractual liability insurance.

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

Regarding labour, the most important provision is the stipulation, in article 551 of the Portuguese Labour Code, of joint liability between employer, contractor, their respective directors and managers, and any companies in a reciprocal shareholding, control or group relationship with any of them. This joint liability covers the responsibility for complying with applicable labour laws and for labour law infractions committed by subcontractors executing the construction contract.

There are no specific tax rules for construction employees.

Concerning health and safety, Decree-Law 273/2003 stipulates several rules applicable to construction contracts so to ensure safety of construction industry workers. In certain cases, these rules include the mandatory existence of a health and safety plan and the obligation for a safety coordinator to be designated by employer.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

There are statutory requirements in relation to fire safety, applicable both during performance of the works and in relation to the works themselves. The most important applicable legislation on fire safety of buildings is Decree-Law 220/2008. This Decree-Law, complemented by Ordinance 1532/2008, sets out several rules intended to reduce the probability of occurrence of fires in buildings, to make evacuation and rescue easier, and to ensure efficient assistance.

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

During the performance of the works and during the defect's liability period, the employer is allowed to retain part of any amounts payable to the contractor. However, strictly in the case of public contracts, the Public Procurement Code limits retentions to 10% of the value of any payments due.

For private contracts, the Civil Code does not place any limit on retentions. Construction contracts usually contain provisions allowing retention, either *in lieu* of, or in parallel with, bank guarantees. The market standard for such retentions varies according to the scope of works. For example, they are different in a contract for construction civil works or for a renewable energy project.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor's performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

It is common for a performance bond, typically a bank guarantee on first demand, to be given by the contractor to the employer instead of, or in addition to, any retention amount (see question 1.10). In public contracts, the Public Procurement Code limits the value of the performance bond to 5% of the contract price or 10% when the price in the contractor's proposal is considered abnormally low. In private contracts, there is no limitation, and the market standards vary depending on the scope of the works.

The execution of performance bonds may be subject to interim injunctions, which will be granted if the following legal requirements are met: (i) serious probability of existence of the right; (ii) well-founded fear that someone else, before the suit is filed or while it is pending, will cause serious injury to that right, that is difficult to repair; (iii) the damage resulting from the injunction does not exceed the damage it intendeds to avoid; and (iv) non-existence of a specific injunction to protect the same right. In the case of on-demand performance bonds, however, the granting of interim injunctions is unlikely, considering the nature of this type of bond. One of the very limited cases in which the guarantor may withhold payment is when the request for payment is blatantly abusive, such as in the case of fraud.

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

Request for issuance of parent company guarantees by the contractor is common. This allows for the creation of a joint-liability system between contractor and its parent company, providing a further layer of security to the employer.

These guarantees may also take the form of a simple “comfort letter” issued by the parent company.

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

The Civil Code provides that, when the ground or surface area is the property of the employer, the building under construction is its own property, even if materials are supplied by the contractor. These will become the property of the employer as they are incorporated into the construction works. However, the construction contract may derogate from this rule and make different provisions.

In any case, if the employer does not comply with its payment obligations under the contract, contractor is entitled to retain the works (article 754 of the Civil Code). The right of retention consists of an *in rem* guarantee which prevails over mortgages, even if registered in advance.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

Supervision of the execution of construction contracts is common and may also, in certain cases, be mandatory, for example, in some works subject to construction licensing or “prior notice” to the municipality, under Decree-Law 555/99. In these cases, a supervision director needs to be appointed and must ensure that the works are executed in accordance with the project, in a safe manner, and that all laws are complied with during construction. The persons who may perform the role of supervision director are defined in Annex II of Decree-Law 31/2009: architects, engineers, or technical agents, with experience and professional background varying with the value and type of the works to be supervised.

A supervisor is frequently hired by the employer and acts mainly on its behalf. Therefore, this supervisor plays a more partial role than the engineer under FIDIC contracts. Considering that the supervisor (and the supervision director) is hired by the employer, through the execution of a contract, any non-compliance may constitute a breach under it. Apart from this consequence, article 16 of Decree-Law 31/2009 sets out a list of duties of any supervision director. Any non-compliance with these duties may constitute an administrative offence, entailing the application of fines in an amount ranging from €500.00 to €8,350.40.

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a “pay when paid” clause?

In the case of public contracts, the Public Procurement Code does not provide for the possibility of making payments to the contractor conditional on prior payment to the employer by third parties.

In private construction contracts, the insertion of such a provision is very uncommon, mainly due to the contractors’ opposition to this possibility, but Portuguese law does not create an obstacle to such stipulation. Such clause can, however, be found in subcontracts, with a provision that the contractor will pay the subcontractor only when the former is paid by the employer.

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

The parties are free to agree on penalty clauses. According to doctrine, these may be liquidated damages clauses in the sense of a pre-estimate of losses, or strictly compulsory clauses not necessarily related to the occurrence of actual loss or damage.

Both types of clauses may be inserted in construction contracts and their amounts may be subject to judicial control, under article 812 of the Civil Code. This prevents the execution of excessively burdensome clauses by allowing the court to reduce their amount according to equitable principles, especially those which may offend public order or morality.

Furthermore, article 811(2) of the Civil Code defines that, unless otherwise agreed, the stipulation of a liquidated damages clause prevents the non-breaching party from claiming compensation for any exceeding damage.

Regarding compulsory penalty clauses, considering that they constitute a “plus” to any legal or contractual instruments of reaction to a breach, they may be executed irrespective of the actual existence of loss or damage.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

Concerning private contracts, the Civil Code stipulates employer’s right to vary the works if variation does not exceed 20% of the contract price and does not entail changes in the nature of the works. Contractor is entitled to a price increase, linked to the related increase in expenses and work, and to a contractual deadline extension.

In public contracts, articles 311 *et seq.* of the Public Procurement Code stipulate the employer’s right to modify the contract for “public interest reasons arising from new needs or from a reappraisal of existing circumstances”. No variation may entail

a change to the overall nature of the contract. Strictly for variations justified by public interest reasons, these limits also apply: (i) they may not represent a substantial modification of the contract; nor (ii) represent a means of preventing, restricting or distorting competition. In addition, articles 370 *et seq.* allow the employer to demand the execution of additional works, if the type or quantity of such work is not provided for in the contract and their execution is necessary to complete the works. Their performance may only be refused under very strict conditions.

If the construction contract is modified by the public employer, the contractor will be entitled to a financial rebalancing of the contract.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

In private contracts, a variation may be a reduction of the works to be performed. In this case, the contractor is entitled to payment of the full contract price, less any amounts which, because of the reduction of works, it saves in expenses or acquires through its activity (e.g., profits from doing other works, only allowed due to the reduction). It is common to stipulate different rules in the contract, similar to those applicable to public works, as explained.

In public contracts, the Public Procurement Code allows the employer to impose the reduction of works. However, if the value of all works executed by the contractor is more than 20% less than the agreed contract price, contractor is entitled (article 381) to compensation of 10% of the value of the omitted works.

During the performance of the contract, although debatable, it is understood that the employer cannot hire third parties to execute the suppressed works, unless the contract provides so.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

There are main guidelines the Contractor must follow during the performance of construction works: (i) execution in accordance with the agreed terms; and (ii) without default (e.g., defects) which excludes or reduces their value or aptitude for the ordinary or contractually defined use. Performance of the contract must occur in strict compliance with a good faith principle.

Regardless, nothing forbids the parties from agreeing on more intense fitness-for-purpose obligations. This is common in design-and-build contracts and in works where final performance ratios are relevant, such as in renewable energy projects or construction works where the contractor will, after completion, take on operation and maintenance.

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

There are no specific rules regulating concurrent delays.

Nevertheless, the question must be analysed case by case, considering any causal link between employer's fault and contractor's fault and the specific damage to be compensated, considering that Portuguese law is based on the principal of "adequate cause". Article 563 of the Civil Code states that "*obligation to compensate only exists in relation to damage that the injured party would probably not have suffered had it not been for the injury*".

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

The ordinary limitation period for contractual liability is 20 years. Regarding buildings intended for long-term use, there is a period of five years during which the contractor remains liable for any damage caused to the employer or future buyers in case of collapse or defects in construction works. This period runs from the handover of the building to the employer. During this period, certain rules and deadlines must be complied with by the injured party concerning the communication of defects, as the Civil Code imposes tight limitation periods to exercise the right to eliminate defects. Additionally, when the employer is a non-professional entity in construction, this period increases to 10 years (Decree-Law 84/2021).

For public contracts, article 397 of the Public Procurement Code sets warranty periods, depending on the type of defect identified: (i) 10 years for structural construction elements; (ii) five years for non-structural construction elements; and (iii) three years for equipment assigned to the works, but independent from it.

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

The Civil Code (articles 298 and 330) allows the contract to set deadlines to present claims, and this is upheld by national courts. As explained in question 3.5, claims concerning the defect liability period are subject to procedural rules and deadlines regarding the communication of defects. Parties often stipulate contractual deadlines and procedural rules for claims. Although both are upheld in court, breach of the latter does not necessarily entail expiry of the right.

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

In public contracts, the responsibility for unforeseen ground conditions is mandatorily borne by the employer. The Public Procurement Code, complemented by Ordinance 701-H/2008, stipulates that even in design-build projects, the employer must give the contractor the results of any geotechnical or geological ground tests.

However, there is no rule on this for private works. Therefore, the parties may freely allocate the risk between them. It is common for the employer to assume this risk.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

In general, parties are free to regulate the consequences of a change in law affecting performance of the contract.

If not regulated, contractor bears the risk. However, it is possible to apply the abnormal change of circumstances rules in article 437 of the Civil Code, provided the change in law meets the requirements of the article: (i) occurrence of a change in the circumstances the parties based their decision to enter

the contract; (ii) change being abnormal, principally in that it was unpredictable and extraordinary; (iii) existence of injury to a party; (iv) the request for fulfilment of a contractual obligation seriously affecting principles of good faith; and (v) the risk of occurrence not being covered by the risks inherent to the contract.

Specifically, regarding public contracts, article 314 of the Public Procurement Code allows for the interpretation (supported by case law) that a change in law, as a “*fait du prince*” act, entitles the contractor to request a financial rebalancing of the contract.

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

Typically, any background intellectual property rights remain in the ownership of the author. In works for hire, the economic rights over the intellectual property of the elements (design) specifically prepared for the project may be (and often are) originally attributed to the employer or are subject to the issuance of a use and reproduction licence in favour of the employer. The moral rights must remain with the author and cannot be assigned.

3.10 Is the contractor ever entitled to suspend works?

A right to suspend works for lack of payment of the contract price during a certain period and/or in a certain amount is frequently inserted in construction contracts. The legal mechanism of the “exception of non-performance” (article 428 of the Civil Code) may also, subject to certain legal requirements, ground the suspension of the works in case of breach of contractual obligations by the employer, namely when it fails to comply with payment obligations.

Differently, public works contracts have a definition of the contractor’s right to suspend works in articles 297 and 366 of the Public Procurement Code. It may be exercised when there is: (i) an impossibility to perform the works due to a delay in hand-over by the employer of means or goods needed to perform the works; (ii) a lack of safety conditions in performing the works; or (iii) a breach of the payment obligations by the employer, provided at least one month has passed since the due date. In any case, procedural mechanisms and rules apply.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party’s grounds for termination must be set out (e.g. in a termination notice)?

The rule is that the right to terminate a contract depends on there being a definitive breach by one of the parties. Simple delay in compliance is not enough to justify termination. A definitive breach occurs when: (i) the non-breaching party objectively loses interest in the other party’s performance due to delay; or (ii) if after performance is delayed, the breaching party does not resume compliance with its contractual obligations within a reasonable period granted by the non-breaching party in a notice delivered.

However, the parties often agree on provisions conferring the right to immediate termination upon certain events, such as: (i) abandonment; (ii) reaching of delay liquidated damages caps; or (iii) reaching of limitation of liability caps.

In public works contracts, the Public Procurement Code clearly defines (articles 332 *et seq.*) when either the employer or the

contractor can terminate. However, except in exceptional cases provided by law, for termination by the contractor to be effective, it must be exercised by judicial means or through arbitration.

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor’s profit on the part of the works that remains unperformed as at termination?

In public contracts, article 334 of the Public Procurement Code provides the right of termination for public interest reasons. This must be duly justified and requires payment of fair compensation, which must correspond to the actual damage suffered and loss of profit, less any benefit resulting from bringing forward expected earnings.

For private contracts, article 1229 of the Civil Code stipulates a right of withdrawal from the works. This can be exercised at any time against the payment to the contractor of compensation for all expenses and works done, and for the profit it could derive from the execution of the works. Frequently, parties agree different consequences of withdrawal.

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

The concept is well known in Portugal, but it is not specifically regulated by law. It is often regulated in detail in private works contracts.

In any case, the purpose of the *force majeure* principle may be achieved by applying other legally established mechanisms, such as: (i) “temporary impossibility” (article 792 of the Civil Code), which provides the debtor is not responsible for a delay in case of temporary impossibility not attributable to it; or (ii) the regime of abnormal change of circumstances, described in question 3.8.

3.14 Is there any legislation or court ruling that has been specifically enacted or handed down to provide relief to parties to a construction contract for delay, disruption and/or financial loss caused by the COVID-19 pandemic? If so, what remedies are available under such legislation/court ruling and are they subject to any conditions? Are there any other remedies (statutory or otherwise) that may be available to parties whose construction contracts have been affected by the COVID-19 pandemic?

The most significant legislation issued in response to COVID-19 in construction contracts is Decree-Law 36/2022, solely applicable to public contracts. It regulates contractors’ right to request an extraordinary revision of contract prices, in the exceptional context of the increase in the prices due to the pandemic, energy crisis and Ukraine war, subject to certain conditions and procedural rules.

Accordingly, if the contractor can demonstrate that: (i) one material, type of labour or support equipment represents at least 3% of the contract price; and (ii) its cost has suffered at least a 20% increase in the last year, it can request the extraordinary price revision of the whole contract price provided the remaining legal requirements are met.

3.15 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

Under article 1225 of the Portuguese Civil Code (and article 24 of Decree-Law 84/2021, in this case only applicable when the employer is not a professional in construction), any future buyer of a building benefits from the five-year defects warranty legally provided by the contractor.

3.16 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

The use of direct agreements and collateral warranties is widespread, especially in project finance. This type of direct agreement is more commonly made between the employer, the contractor and the financing entities of the project.

3.17 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

Article 847 of the Civil Code allows for a set-off between sums owed and sums due. This mechanism is called “compensation” and may be done by simple notice to the other party, provided the credit to be set off is judicially enforceable and both obligations have as their object fungible things of the same kind and quality, such as money. It is very common to contractually provide for a set-off right on behalf of the employer in cases of liquidated damages and penalties.

3.18 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

Portugal has no common law-style duty of care. However, the parties are bound to act in good faith towards each other. This core principle in Portuguese law gives rise to several ancillary obligations. Specifically, regarding construction contracts, whose performance usually occurs over a long period and requires a relationship of trust between employer and contractor, certain duties of good faith may bind the parties in relation to provision of information, security and care of the works, and advice, among others.

3.19 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

Article 236 of the Civil Code stipulates rules of interpretation of declarations, stating that declarations (such as those in a contract) have the meaning that an ordinary addressee, placed in the position of the actual addressee, may deduce from the declarant's behaviour.

Regardless, construction contracts usually include prevalence and interpretation clauses defining the priority between contractual documents, in case of conflict.

3.20 Are there any terms which, if included in a construction contract, would be unenforceable?

As a rule, clauses contrary to the law or public order, or that offend good morals, are null (articles 280/281 of the Civil Code).

This main principle is then reflected in several other provisions in Portuguese legislation. Examples of types of clauses which, in result, are unenforceable, are: (i) the complete exclusion of liability for breach; or (ii) the total elimination of warranty periods.

3.21 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

Design services are provided under a service provision contract, to which the Portuguese civil liability principles fully apply. Therefore, a breach of a contract generates the obligation to compensate the other party (for damage and loss of profit), provided the legal criteria for contractual civil are met.

It is not common for employers to exercise their right to compensation against design professionals in court/arbitration lawsuits, except in cases of gross negligent. However, employers do expect designers to correct their mistakes at no extra costs.

Parties can include a limitation of liability clause in a design contract, provided that the liability for breach is not fully excluded.

In public contracts, under article 378 of the Public Procurement Code liability of designers is limited to three times the value of the fees charged.

3.22 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

The concept of decennial liability does not exist. There are, however, statutory liability periods, as described in question 3.5.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

In general, disputes are still mostly resolved through informal negotiations between the parties, with the possibility for final resolution by the civil or administrative courts.

In recent years there has been a significant increase in the stipulation of arbitration clauses and submission of conflicts to arbitration tribunals, which are now the rule in international contracts.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

Adjudication processes are not the rule in Portugal, although the use of alternative interim dispute resolution mechanisms such as mandatory meetings between boards and expert determinations on technical matters is increasing.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

Including arbitration clauses in construction contracts is currently not the rule in Portugal, although interest in arbitration, as an alternative conflict resolution mechanism, is rising significantly. This is mostly seen in more significant contracts (in terms of price), where international practices are more easily introduced. These contracts usually include arbitration clauses that give the power to decide conflicts to entities such as the International Chamber of Commerce or the Commercial Arbitration Centre of the Portuguese Chamber of Commerce and Industry. The parties to a construction contract can agree also to submit a conflict to arbitration once it arises, but this is less likely.

The Public Procurement Code allows disputes regarding public contracts to be resolved by alternative dispute resolution mechanisms, such as arbitration. However, in conflicts with a value above €500,000, there is the possibility of appeal to the administrative courts, with no suspensive effects.

4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

Portugal joined the New York Convention of 1958 in 1994 and, in general, it is a very favourable jurisdiction for the recognition of international decisions, as there are no significant obstacles to their enforcement, apart from the required prior process of recognition of foreign decisions. This includes the need for confirmation, by the competent court of appeal (intermediate superior court), in civil disputes, and by the competent central administrative court, in public disputes, of any foreign decision.

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

Generally, court proceedings are characterised by the existence of a pleading phase, followed by an adversarial phase, where pleadings are discussed and evidence is produced. Decisions by civil courts of first instance are, generally, subject to appeal, while a subsequent right of appeal to the Supreme Court of Justice may exist in certain restricted cases.

The same applies to public disputes, where there is possibility of appeal from the administrative courts to the central administrative courts and, in certain cases, to the Supreme Administrative Court.

It usually takes two to three years for civil court first instance decisions and one year for decisions by the intermediate and supreme courts. Administrative courts face a wait of around five years at first instance courts and, at least, two years in higher instances.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

As described in question 4.4, a judgment of a foreign court may be upheld and enforced in Portugal, with a prior mandatory process of recognition.

In the case of decisions issued by courts of EU Member States, EU Regulation 1215/2012 of 12 December 2012 stipulates that any such decision is effective in all Member States, without the need for any national recognition process.



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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (NB For ease of reference throughout the chapter, we refer to “construction contracts” as an abbreviation for construction and engineering contracts.)

Singapore predominantly uses lump-sum contracts. As many domestic projects are for building works, these are mostly tendered on a ‘build-only’ model, followed by ‘design-and-build’ models where specialist experience is more critical.

‘Design-only’ contracts are rare and are typically undertaken by consultants. If a contractor carries out design work, this is typically under a design-and-build arrangement.

Management contracting is rare, as there is limited familiarity with this model in Singapore. It is not preferred, as the risk remains primarily with the employer even if it may reduce the price. Most employers would prefer to engage a single main contractor who tenders for the whole works and selects its sub-contractors, with the employer retaining the option to nominate sub-contractors (for example, where specific sub-contractors with specialist experience are desired).

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

This is rare in Singapore, but is being increasingly encouraged by the Singapore Government as part of its latest Built Environment Industry Transformation Map released in September 2022. The Building Construction Authority (“BCA”) has published Option Modules on Collaborative Contracting, to be used together with the Public Sector Standard Conditions of Contract (“PSSCOC”), with projects such as the Punggol Digital District having adopted this procurement model. These implement an ‘early warning/notice’ system as well as the Singapore Infrastructure Dispute-Management Protocol

2018, and set out, *inter alia*, a new incentive scheme linked to key performance indicators.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

The most commonly used standard forms of contract in Singapore are the Singapore Institute of Architects (“SIA”), Real Estate Developers’ Association of Singapore (“REDAS”) and PSSCOC standard form contracts.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

Yes, the PSSCOC is typically used for public works, although some government bodies have developed their own standard forms.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

Singapore follows the ‘offer and acceptance’ model of contract formation adopted in common law countries. Consideration is rarely an issue in construction contracts, but the parties’ intention to create legal relations may be disputed in the context of letters of intent (“LOIs”), when parties are ultimately unable to agree on the formal contract or where a decision is made to pull the plug on a project before executing the formal contract.

There are no mandatory legal requirements that need to be reflected in a construction contract for validity.

However, failure to have a written contract may result in the statutory adjudication provisions in the Building and Construction Industry Security of Payment Act 2004 (“SOP Act”) becoming inapplicable (Section 4(1) provides that the SOP Act only applies to contracts in writing, albeit with a fairly expansive definition of ‘in writing’). In addition, failure to provide for the various matters addressed by the SOP Act often results in draconian ‘default’ provisions being imposed by statute (for example, reducing the time period allowed for an employer to respond to a payment claim).

1.6 In your jurisdiction please identify whether there is a concept of what is known as a “letter of intent”, in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

Yes, the concept exists but the treatment of LOIs falls under the ‘offer and acceptance’ rubric which applies to contracts generally. They may be binding or non-binding depending on the intentions of the parties and the stage at which the LOI is issued – for example, an LOI may be intended to:

- provide ‘comfort’ to the contractor’s bankers without any binding commitment on either party;
- make provision for payment and other matters relating to a limited scope of work but not otherwise (typically for ‘early’ or ‘preparatory’ works to expedite the works while negotiating the formal contract); or
- commit the parties to a binding contract for the whole works, to be superseded when a subsequent contract agreement is negotiated (typically at a late stage, operating as more of a ‘letter of award’ rather than as a strict LOI).

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer’s liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors’ all-risk insurance?

Generally speaking, the following types of insurance are required by statute and/or typically purchased for a construction project:

- medical insurance for Work Permit holders;
- work injury compensation insurance;
- contractors’ all-risk insurance;
- public liability insurance; and/or
- professional indemnity insurance (where design work is part of the contractor’s scope).

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

Yes, for example:

Labour

- The Ministry of Manpower (“**MOM**”) imposes restrictions on source countries, age and maximum period of employment for foreign workers, in addition to quotas on certain types of foreign workers (the ‘man-year entitlements’ system is part of this, but will be dismantled from 1 January 2024 onwards), in addition to requiring a security bond and medical insurance for such workers.
- The BCA also imposes requirements on Class 1 General Builders to deploy a minimum number of skilled construction personnel for large projects valued at more than S\$20 million as part of their licence conditions.

Tax

- Companies are required to report employee earnings and, in the case of foreign employees, may be required to withhold tax on payments/salaries due to them.

Health and safety

- There are a number of health and safety requirements imposed by statute, including obligations to maintain work injury compensation insurance for workers and to ensure a safe workplace under the Work Injury Compensation Act 2019 and the Workplace Safety and Health Act 2006 respectively. Specific areas may be addressed by other legislation or regulations, such as the Workplace Safety and Health (Work At Heights) Regulations 2013 and the Hazardous Waste (Control of Export, Import and Transit) Act 1997.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

Yes. The Fire Safety Act 1993 and the Fire Code apply to construction contracts. In particular, they impose requirements as to fire safety that could apply not only to construction sites generally but also to temporary buildings used for construction (such as warehouses, site offices and temporary workers’ quarters).

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

Yes. Such an arrangement is quite common under the Singapore standard forms – for example, under the SIA Building Contract 2016 (Without Quantities) (“**SIA Conditions**”), a stipulated percentage of ‘retention monies’ is withheld against every progress payment up to a specified limit, with 50% of these monies released upon substantial completion, and the remainder after the defects liability period is over and the final accounts have been drawn up.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor’s performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

Yes, it is common for projects of a significant value to require performance bonds issued by a financial institution – or in some cases, e.g. the PSSCOC, even a cash deposit – to guarantee performance by the contractor.

Such bonds must typically be provided in an ‘on-demand’ format which does not require proof of default.

Calls on such bonds may be restrained by injunction on the basis of fraud or unconscionability, although parties may contract out of the unconscionability grounds. The threshold for granting such injunctive relief is high, as the Singapore courts lean in favour of upholding such contractual arrangements, particularly as the performance bond is considered separate and distinct from the construction contract.

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

Yes, it is permissible to require a parent company guarantee in order to guarantee performance. However, this is required mainly

for higher-value projects where there is doubt as to whether the contracting entity has sufficient means to perform its contractual obligations and/or meet any claims relating to non-performance – for example, where a major foreign contractor uses a local subsidiary company to design and construct an oil refinery. There are no restrictions on the nature of such guarantees.

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

Yes, this is possible, but not common. Most construction contracts will include vesting clauses expressly providing for property to pass from the main contractor to the employer until the works are completed and all defects have been made good, along with provisions requiring the main contractor to ensure that similar provisions are incorporated into all its subcontracts.

This is subject to the contractor's statutory right to exercise a lien over unfixed and unpaid goods where the employer has not paid amounts awarded in adjudication, under Section 25 of the SOP Act.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

Yes, it is common. Typically, the contract administrator/supervisor is engaged by the employer and acts both as agent for the employer in some matters and certifier/neutral third party in others. When acting as a certifier/neutral third party, he is required to exercise these functions in good faith and to the best of his uninfluenced professional judgment.

A contractor's recourse is generally against the employer rather than the certifier, in that the contractor will seek to reopen the certificate/decision in litigation or arbitration. Generally, the certifier does not owe duties in contract or tort to the contractor. Most forms also provide for certificates to have temporary finality such that they are enforceable by summary judgment, and the certifier's breach of this duty may result in the certificate being tainted and invalidated.

The employer is similarly not barred from reopening the decisions of the certifier in arbitration, although he also has the option of proceeding against the certifier for negligence or breach of contract, given that he is in a contractual relationship with the certifier.

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a "pay when paid" clause?

The SOP Act applies to all construction contracts apart from those which are specifically excluded (for example, contracts for construction work or goods/services for projects carried out outside Singapore – see Section 4(2)(b)(ii) of the SOP Act). Under the SOP Act, such 'pay when paid' clauses are unenforceable.

Whilst the SOP Act renders unenforceable 'pay when paid' arrangements, it does not absolve a party of its payment obligations owed to the other.

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

Parties are permitted to agree on liquidated damages for delay to completion. The main restriction is that the sum should not offend the rule against penalties and should be a genuine pre-estimate of loss likely to be suffered by the employer for delay, following traditional *Dunlop* principles. Clauses requiring the contractor to pay a sum that is wholly unrelated to the amount of financial loss likely to be suffered by the employer are unlikely to be enforceable.

If a clause offends the rule against penalties, it will be struck down. The courts will not revise the agreed rate of liquidated damages and there has been no reported decision stipulating otherwise. The employer is left to prove his loss in general damages once the liquidated damages clause is struck down.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

Most construction contracts will provide for an express power on the part of the employer to vary the works to be performed under the contract, whether by himself or through someone specifically authorised under the contract to do so (often the contract administrator).

While the scope of what can be considered a variation is quite wide, there are limits on this power. It is difficult to prescribe a 'bright line' to determine what a variation is, but examples of the limitations of such a clause include situations where the works are so different from what was originally contemplated that it cannot properly be considered to have been within the definition of 'variation' in the contract, and therefore fall outside the contract.

If the contract does not contain a power permitting the employer to instruct variations, he cannot validly do so within the contract or compel the contractor to comply with the variation instruction.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

Yes, variation provisions in the Singapore standard forms typically cover omissions of work as variations (for example, see Clause 12(2)(a)(ii) of the SIA Conditions and Clause 19.1(b) of the PSSCOC (Construction Works) 2020). However, where the purpose of the variation is to omit work from the contract and award it to another contractor at a cheaper price, this will not be

permitted – the basis being that the contractor has both the duty and the right to carry out the work he tendered for.

The variation provisions must be exercised *bona fide* for the purpose of the works, and this likely extends to prohibiting the employer from omitting work for the purpose of doing it himself.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

A construction contract is a contract like any other and is capable of having terms implied into it – these can span a very wide gamut. This would include the implied duty on both parties to cooperate, in the sense that they should do all that is necessary for the carrying out of the contract.

In the specific context of employer delay, this is embodied in the ‘prevention principle’: the employer is under a duty not to do anything which would impede, hinder or prevent the contractor from completing by the contractual completion date, failing which the contractual time for completion may be set ‘at large’.

Other important terms include the warranties implied into contracts for work and materials, that the materials used will be of good quality and that the materials are reasonably fit for their purpose.

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

There are few judicial pronouncements on the proper treatment of concurrent delay in Singapore.

That said, it is likely that Singapore will follow the *Malmaison* approach adopted in the UK where, in cases of true concurrent delay, the contractor is entitled to an extension of time but not to costs arising from the concurrent delay.

The alternative to the *Malmaison* approach is that of apportioning the delay between the event entitling the contractor to an extension of time and employer delay, which has been adopted in the Scottish courts (but rejected in the UK).

The Singapore standard forms of contract currently make no provision for the treatment of concurrent delay.

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

Generally speaking, the Limitation Act provides for a period of six years from when the cause of action first accrued for claims in contract or tort. For some claims, an alternative period of three years after obtaining the requisite knowledge to bring a claim for ‘latent’ damage (broadly, damage that was not discovered when the cause of action accrued) may apply.

Depending on what the claim in question is, the time when the clock starts running for the purposes of limitation can vary significantly.

Limitation periods can be extended in a number of ways (for example, see Section 5(7) of the COVID-19 Act, but note that the prescribed period ended on 28 February 2022).

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

Parties should comply with contractual provisions imposing time limits for bringing a claim and/or requiring notice to be given in writing/in a particular form to ensure that there are no difficulties faced in bringing such claims.

This is because Singapore courts have upheld such requirements – for example, in one case, a claim for extension of time was dismissed on the basis that the plaintiff had not complied with a clause requiring written notice to the contract administrator as a condition precedent to an extension of time.

The Singapore courts have in fact held that the contractor’s non-compliance with such notice requirements will not prevent the employer from claiming liquidated damages even where the employer may have caused the delays, approving *Multiplex* and rejecting *Gaymark*.

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

Singapore construction contracts invariably impose a duty on the contractor to inspect and satisfy itself of the form and nature of the site, including subsoil conditions, before tendering. However, some types of contract may entitle the contractor to additional loss & expense where adverse conditions could not be foreseen despite such due diligence.

In private sector contracts, the risk of unforeseen ground conditions or ‘adverse subsoil conditions’ is typically placed on the contractor. The major private sector standard forms (being the SIA and REDAS forms) grant no entitlement to loss & expense arising from such conditions.

The situation is different for public sector contracts using the PSSCOC, which include express provisions permitting claims for extensions of time and loss & expense associated with unforeseeable adverse physical conditions. The rationale for including such a provision is generally thought to be that shifting subsoil risk permits the employer to benefit from lower bid prices.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

There is no clear Singapore authority on this issue. The Singapore standard forms do not address whether changes in the applicable laws entitle a contractor to claim additional payment. This is unlike the International Federation of Consulting Engineers (“**FIDIC**”) standard form contracts, which generally allow for adjustments to the contract price on account of such changes.

That said, the Singapore standard forms generally provide for the contractor’s entitlement to extensions of time for compliance with applicable laws. They also impose broad obligations requiring the contractor to comply with applicable laws and/or permitting variation claims where variations are necessitated to comply with changes in law (except for the REDAS forms).

In the absence of any express statutory or contractual provisions granting an entitlement to additional payment on account

of such compliance, to the extent such loss cannot be included as part of a valid variation to the scope of work, the position is likely to be that the loss lies where it falls.

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

It is quite common for consultant/construction contracts in Singapore to provide that intellectual property in the design typically remains with the design consultant/design and build contractor, although the employer will be granted a licence to use the design for the works.

3.10 Is the contractor ever entitled to suspend works?

In the absence of an express contractual or statutory right, the contractor is not entitled to suspend work under Singapore law. For example, there is a statutory right to suspend work under Section 26 of the SOP Act where the claimant has not been paid amounts awarded in adjudication.

Some of the Singapore forms permit suspension where certificates have not been issued by the contract administrator (for example, see Clause 33(4) of the SIA Conditions).

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party's grounds for termination must be set out (e.g. in a termination notice)?

Apart from termination rights at common law, most contracts will provide for the employer's right to terminate in situations involving abandonment of the project, failure to commence or proceed with the works with due diligence or expedition, insolvency, corruption and/or failure to comply with a notice to correct breaches under the contract. Some forms also provide for 'no fault' termination, also known as 'termination for convenience'.

Courts typically take the view that the termination remedy is a draconian one and therefore require strict compliance with any contractual requirements. While there is some leeway afforded where a party did not comply with a trivial requirement, provisions designed to protect the other party by ensuring it was aware of the invoking of the termination remedy are invariably considered to be critical and mandatory to comply with, for a valid termination.

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor's profit on the part of the works that remains unperformed as at termination?

Yes, 'termination for convenience' clauses are common in standard form contracts for both private and public sector projects. Such 'no fault' termination invariably requires the employer to pay the contractor for loss and damage arising out of the termination; including, in particular, loss of profits on the uncompleted parts of the works, except for the PSSCOC which stipulates a fixed 15% *in lieu* of unliquidated loss of profits and other costs, loss and expenses.

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

Singapore recognises the doctrine of frustration, but not *force majeure* as known in civil law jurisdictions. Frustration automatically brings the contract to an end and discharges both parties from further performance, whereas *force majeure* is typically considered only in the context of *force majeure* clauses setting out the parties' contractual agreement on how to resolve outstanding obligations upon specific events occurring (typically of a nature that would otherwise justify a finding of frustration if not specifically provided for in a contract).

It would be unlikely for a court to find that a contract was frustrated merely because the contract has become uneconomic or less profitable to perform – the impact of the frustrating event must be such as to fundamentally or radically alter the parties' obligations in the contract, so that it can no longer be properly said to be the same contract.

3.14 Is there any legislation or court ruling that has been specifically enacted or handed down to provide relief to parties to a construction contract for delay, disruption and/or financial loss caused by the COVID-19 pandemic? If so, what remedies are available under such legislation/court ruling and are they subject to any conditions? Are there any other remedies (statutory or otherwise) that may be available to parties whose construction contracts have been affected by the COVID-19 pandemic?

The COVID-19 Act contains various provisions affording relief for parties to construction or supply contracts. However, much of the COVID-19 Act is no longer relevant due to the expiry of the prescribed period on 28 February 2022 (for example, the *moratorium* on taking enforcement action under Section 5 has now expired).

Nonetheless, reliefs provided for in some parts of the COVID-19 Act remain applicable, such as Parts 8A and 8B on automatic extensions of time and cost-sharing between the employer and contractor, respectively.

In addition, parties may still be able to seek relief under the *force majeure* provisions of their construction contracts, depending on the specific wording of the contracts in question, and there is some suggestion in the caselaw that COVID-19-related matters could qualify for such relief.

Parties in public sector projects may also have benefited from government policies providing for *ex gratia* grants of extensions of time ("EOTs"), co-sharing of prolongation costs caused by COVID-19, and advance payments.

3.15 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

Generally speaking, the rule of privity of contract provides that a non-party to the contract cannot rely on or claim to be entitled to benefits under a contract. The rule is subject to a number of exceptions:

- The Contracts (Rights of Third Parties) Act 2001 permits non-parties to enforce terms of a contract if the contract

expressly provides for the non-party to do so or purports to confer a benefit on that non-party. However, parties typically contract out of the application of this Act.

- In the specific case of claims for defects, the issue may be circumvented by having the original employer claim on behalf of the subsequent buyer who has suffered the actual loss/damage from the defective work, where it was within contemplation that ownership of the building might be transferred to the subsequent buyer after the contract had been entered into and before the contractor's breach occurred.

3.16 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

There is a preference for a single point of legal responsibility in Singapore, with the effect that employers generally prefer to deal with a single large main contractor and have the main contractor procure and provide collateral warranties from its subcontractors for various parts of the works.

Direct agreements are less common and tend to be used where the employer is itself a fairly sophisticated player in the industry, or for cases of specialist or boutique subcontractors with a direct relationship with the employer. In the former case, such arrangements might be implemented under a construction management or management contracting procurement model.

3.17 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

Construction contracts typically provide for the employer to have the right to set off claims or amounts owed by the contractor against payments due to the contractor under the construction contract, with no equivalent right granted to the contractor.

Apart from contractual stipulations, parties may seek to avail themselves of legal and equitable set-off rights in general, subject to any express contractual stipulation to the contrary – for example, a provision requiring payments to be made without deduction or set-off.

In the case where a party becomes insolvent, insolvency set-off may also be available.

3.18 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

Yes, such duties can be owed pursuant to an express contractual clause. For example, there could be a stipulation that the contractor will complete the works with due care and diligence. Such duties can also be owed in tort, typically in the context of defects in negligence cases – the content of which can be informed by a duty imposed by statute.

Extra-contractual duties of care can exist concurrently with contractual duties of care, except to the extent that such a duty is limited or excluded by the contract.

3.19 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

Ambiguity is resolved through principles similar to those that apply to contracts generally. While the subject is too broad to be properly summarised here, extrinsic evidence can be considered as an aid to interpretation, and various presumptions and canons of construction may be employed by the courts to discern the meaning of the contractual clauses in question.

In the particular case of construction contracts, a well-drafted contract will often include a hierarchy or precedence clause, providing for the order of priority in interpretation between documents. The aim of such clauses is to provide a framework for addressing inconsistencies and ambiguities in the contract, and would generally be given effect to, where necessary, to resolve a clear and irreconcilable discrepancy (although courts would generally be slow to resort to such a clause).

3.20 Are there any terms which, if included in a construction contract, would be unenforceable?

Yes, terms may be rendered unenforceable for a variety of reasons. Examples include:

- 'pay when paid' clauses (where the SOP Act applies);
- clauses which infringe on the rule against penalties;
- limitation or exclusion clauses which are unreasonable (as contemplated in the Unfair Contract Terms Act 1977); and
- provisions which purport to restrict or contract out of stipulations in the SOP Act.

3.21 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

Such contracts typically include detailed provisions addressing the various duties and aspects of liability which could result from defective design. In particular, these could include duties to exercise reasonable skill, care and diligence, contractual warranties that the design would meet certain requirements or specifications, as well as fitness for purpose obligations, both general and specific.

The content and ambit of such contractual duties and obligations is largely a matter for negotiation although, in practice, designers will often seek to exclude obligations which are in the nature of 'absolute' guarantees.

3.22 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

No, the concept of decennial liability does not apply in Singapore.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

Construction disputes arising out of a contract are generally resolved in arbitration, as all the standard forms of contract

in Singapore provide for arbitration. Disputes arising out of a tortious claim (for example, for defects or negligence) or in connection with ‘enforcement’ of certificates are typically resolved in court litigation.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

Yes, under the SOP Act. The SOP Act operates in tandem with the contractual machinery and broadly provides for a ‘rough and ready’ means of resolving payment disputes, such rough-and-ready justice being in the interests of promoting cashflow to downstream contractors and subcontractors.

Broadly, contractors are permitted to serve payment claims for progress payments at least once a month, with employers being required to provide certain formal responses to payment claims – failure to provide reasons for withholding or deducting any amount from the claimed amount in these responses within the stipulated timelines may result in the employer being barred from relying on such reasons in adjudication. Contractors dissatisfied with the amount the employer proposes to pay are given the right to commence adjudication proceedings with a view to speedy resolution of any disputes over payment.

Amounts awarded by an adjudicator can be enforced by way of court proceedings or by certain statutory self-help remedies (such as the right to suspend work or exercise a lien over unfixed goods and materials). However, an adjudicator’s determination will only be binding until the dispute in question is finally determined in dispute resolution proceedings or settled by agreement of the parties.

Parties are not permitted to contract out of the provisions of the SOP Act.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

Yes, construction contracts in Singapore, such as the SIA and PSSCOC standard form contracts, do provide for arbitration as the method of dispute resolution.

In Singapore, arbitration is consent-based, meaning that there must be an agreement between the parties to refer disputes to arbitration (whether *ad hoc* or by incorporation of an appropriate arbitration clause). Procedures in arbitration do not need to follow court procedural rules and norms, although international guidelines by arbitral institutions and other bodies are often used as guidelines by tribunals.

Court proceedings brought in breach of an agreement to refer disputes to arbitration can be stayed on application to the Singapore courts unless the agreement is null, void or inoperative (international arbitration) or there is sufficient reason not to refer the disputes to arbitration (domestic arbitration). The general approach of the Singapore courts is otherwise non-interventionist, with minimal interference in the process, consistent with global norms for arbitration.

Arbitration clauses may also provide for the use of institutional arbitration rules (which apply a more detailed procedural framework) as well as an arbitral institution to administer the arbitration. Each of the prevailing standard forms does so to different degrees, although the PSSCOC is a notable exception insofar as it does not designate any specific arbitral rules.

4.4 Where the contract provides for international arbitration, do your jurisdiction’s courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

Yes. Singapore is a signatory to the New York Convention 1958 and has generally aligned its laws with the Model Law. As such, recognition and enforcement of arbitral awards made in another Convention country is relatively straightforward (entailing an almost administrative process of authentication of an award and applying for leave to enforce), whereas arbitral awards made in a non-Convention country can still be enforced at common law and/or under Section 46(3) of the Arbitration Act 2001.

Recognition and enforcement of arbitral awards may be refused on the same grounds as set out in Article V of the New York Convention 1958.

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

Court proceedings are typically commenced by issuing and serving an originating process on the defendant(s). Once served, the parties proceed to exchange pleadings sequentially, followed by a case conference where the Court takes an active role in giving directions for the conduct of the matter and/or the trial, such as the filing of affidavits of evidence-in-chief by factual/expert witnesses *in lieu* of oral examination (this saves court time) or specialised processes for examination of expert witnesses. The matter then proceeds to trial, with witnesses being subject to cross-examination.

In the midst of this, parties will, as far as possible, be directed to make all interlocutory applications in a ‘single application pending trial’, including for summary judgment or discovery/disclosure of documents.

Timelines very much depend on the nature and complexity of the dispute, the availability of the courts, counsel and witnesses, as well as any special need for urgency which may be present in any given case. It is therefore not possible to set down any specific timeline which would apply to such court processes, except to say that a decision can be obtained in many cases within one to two years, although the Rules of Court 2021 are aimed at speeding up the court process.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

Generally speaking, foreign court judgments may be recognised and enforced in Singapore. Enforcement is typically more straightforward where the judgment is from a jurisdiction that is party to a reciprocal enforcement convention ratified by Singapore, and implemented in legislation – for example, the Reciprocal Enforcement of Commonwealth Judgments Act 1921, the Reciprocal Enforcement of Foreign Judgments Act 1959 and the Choice of Court Agreements Act 2016.



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Drew & Napier LLC has been providing exceptional legal service since 1889 and is one of the largest full-service law firms in Singapore. The firm has three senior counsel. It is pre-eminent in dispute resolution, international arbitration, competition and antitrust, corporate insolvency and restructuring, intellectual property (patents and trade marks), tax, and telecommunications, media and technology, and has market-leading practices in mergers and acquisitions, banking and finance, and capital markets. Drew & Napier has represented Singapore's leaders, top government agencies and foreign governments in landmark, high-profile cases. It is also appointed by Fortune 500 companies, multinational corporations, and local organisations. The firm is experienced in international disputes before the Singapore International Commercial Court and covers the full range of commercial litigation matters, including building and construction, constitutional law, debt recovery, defamation, fraud, and white-collar crime.

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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (NB For ease of reference throughout the chapter, we refer to “construction contracts” as an abbreviation for construction and engineering contracts.)

Depending on the contractors’ scope of work, FIDIC classifies construction contracts into three types: turnkey/EPC; design-build; and construction. However, in Taiwan, the line between turnkey/EPC and design-build is rather blurry. The Government Procurement Act (“GPA”), the law governing government procurement projects in Taiwan, defines turnkey as a type of construction contract where the contractor is responsible for detailed design and on-site performance. This broad definition covers both turnkey/EPC and design-build.

PCM is also widely used in Taiwan, especially in large-scale construction projects. In the projects, construction consulting firms are hired to help the employers manage and oversee their contractors’ performance.

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

Collaborative contracting is not adopted in Taiwan. In construction projects, employers sign contracts with their consultants and contractors individually. If the contractors would like to subcontract their work, they must enter into separate contracts with their subcontractors.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

In Taiwan, construction projects usually come from the government. Where the government is the employer, contract templates created by the Public Construction Commission (“PCC”), the agency administering government procurement matters in Taiwan, are used. FIDIC contracts, despite their global currency, are seldom used by the employers in Taiwan.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

As indicated in our answer to question 1.3, contract templates created by the PCC are typically used in public procurement projects. The templates are meant for procurement of conventional construction services, PCM services, technical services, and post-disaster design and reconstruction services. Besides the PCC, the authorities responsible for infrastructure projects and local governments also have their own contract templates.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

Under Taiwan’s Civil Code, a contract is formed and binds the parties as long as the parties agree on the major terms of the contract. The agreement does not have to be in writing; oral agreement is also recognised. For construction contracts, the major terms include scope of work and payment. As long as the employer and its contractor agree on the principal terms, orally or in writing, the construction contract will be deemed formed and legally binding.

1.6 In your jurisdiction please identify whether there is a concept of what is known as a “letter of intent”, in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

Letters of intent are not common in construction projects. Employers in Taiwan, mostly government agencies, are required to follow the mandatory bidding process, and letters of intent are not required by the process. Once the winning bidder is determined, the employer will sign a formal contract with the bidder directly.

However, in some projects, the contractors will enter into letters of intent with their subcontractors to demonstrate both parties’ willingness to cooperate. They are mostly non-binding.

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer's liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors' all-risk insurance?

Labour insurance is required by law, but construction insurance is not. While every contractor is obligated to procure labour insurance for all its workers, it is free to negotiate what construction insurance to purchase with its employer. The most common type of insurance in the construction industry is commercial general liability policy, and where necessary, the employer can require additional insurance policies from its contractor. Also, most construction contracts prescribe the major terms of the policies, such as what is insured, the scope of coverage and the maximum deductible, to ensure any property loss, or personal injury or damage during construction will be properly covered.

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

Under Taiwan law, a contractor has to procure labour and national health insurances for its workers. If the contractor subcontracts its work to a subcontractor, the subcontractor is also subject to the same legal requirement. As the employers, both the contractor and the subcontractor are required to deduct income tax from their workers' pay checks. The law governing occupational health and safety also requires that contractors/subcontractors take necessary precautions to prevent their workers from any on-site dangers. These legal requirements are standard provisions in most construction contracts in Taiwan, and will still bind the contractors/subcontractors even if not prescribed in the contracts.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

Building and fire safety regulations in Taiwan are designed to regulate the work products built by contractors, not the construction process. Usually, the construction process is subject to regulations governing construction sites and occupational safety. In most construction contract templates, contractors are required to comply with these regulations to ensure the safety of the construction sites and the workers.

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

Yes, the employer is entitled to keep part of the construction payment due to the contractor, usually 5% of every monthly payment, as a retention; as long as this right is explicitly specified

in the contract. Usually, the retention is released to the contractor when the contractor's work is accepted by the employer.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor's performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

Performance bonds are used in almost all construction projects in Taiwan, especially those awarded by the government. Performance bonds typically provide for payment on demand. Although a provisional injunction from the court can undercut an employer's right to call the bond, an application for a provisional injunction is seldom granted.

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

Corporate guarantees are rarely used in Taiwan. As indicated, most construction projects come from the public sector, where the government agencies are the employers. They prefer bank guarantees over corporate guarantees, even if the guarantees are issued by established companies.

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

Goods and supplies used in the works usually belong to the employer under the contract. The contractor may claim title rights of the goods and supplies if: (1) the contract is silent on the distribution of the title rights; and (2) the goods and supplies have not become an integral part of the works.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

Yes, in a government procurement project the employer would usually hire a third party, usually an engineer or engineering company, to supervise the contractor's performance of the contract. As the third party is hired by the employer, it is not obligated to act impartially between the contractor and the employer; rather, its conduct will be deemed the employer's. If the third party breaches the contract, the contractor can claim any remedy that applies if the employer breaches the contract.

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a “pay when paid” clause?

The “pay when paid” clause is not prohibited by law, but it is not typically used in contracts between the employers and their contractors because construction payments usually come from the employers. However, many contractors will put the clause into the contracts with their subcontractors to keep their cash flow in check.

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

Yes, the parties to a construction contract are free to agree on a fixed amount of liquidated damages due to the employer when the contractor breaches the contract. The amount can be a percentage of the total contract price or the price for the work constituting the breach. But the agreement is subject to certain legal restrictions. First, the fixed amount cannot be used to cap any liability caused by intentional acts or gross negligence. Also, the court has discretion to cut the amount if it finds the amount disproportionately higher than the employer’s actual loss.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

Yes, the employer is entitled to vary the works to be performed under the contract as long as the change is not significant. The law does not specify what constitutes significant change, but Article 22 of the GPA does forbid any contractual changes that would increase the contract price by more than 50%.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

Contractors must not omit work from the contract, but the employer can cancel part or all of the work under the contract. If the cancellation constitutes termination for convenience, the contractor can claim damages against the employer.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

General legal principles, such as duty to act in good faith, and/or common industry practices, are sometimes cited to interpret

vague or conflicting terms in a construction contract. What legal principle or common practice is applied varies from case to case.

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

There is no statutory solution for delay by two concurrent events. In most cases, the contractor facing such a delay will be granted an extension of time. How long the construction term will be extended hinges on: (1) which event happened first; and (2) the percentage of responsibility to be borne by the contractor. In addition to extension of time, a few employers will reimburse the contractors for their time-related costs during extension.

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

There are numerous types of claims that may arise from a construction contract, and different claims are subject to different statutes of limitations. A contractor’s payment claim against the employer is subject to a two-year time limit, which starts to run when the work is accepted. While there are different types of damages, a contractor’s claim for damages enjoys a one-year or 15-year time limit, which starts when the cause of the damages manifests itself. As for the employer’s defect claims, they are time-barred one year after the defects are identified.

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

Courts in Taiwan seldom dismiss a contractual claim merely because the claim was filed in defiance of the time limits or the notification requirements in the contract. The reason for this is that under the Civil Code, no statute of limitations may be extended or abbreviated by agreements or any other legal acts.

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

Under Taiwan’s construction contracts, the risk of unforeseeable ground conditions is usually borne by employers. Some turnkey contracts may shift the risk to the contractors, but they can often be covered by construction insurance policies, in whole or partially.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

Nearly all construction contracts in Taiwan allocate the risk of legal changes to the employers. Where the law is changed to make completion of the work more difficult or impossible, the contractors are entitled to demand more construction time and/or payments, or to terminate the contracts.

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

In construction projects where the government agencies are the employers, the intellectual property right for the work performed by the contractors is usually assigned to the employers through mutual agreement. Allowing the contractors to enjoy the intellectual property right is rather rare.

3.10 Is the contractor ever entitled to suspend works?

No, the contractor has no right to suspend works under the contract. Under the Civil Code, the contractor's handover or completion of the works is a condition to payments from the employer, unless the employer's finances deteriorate after the signing of the contract.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party's grounds for termination must be set out (e.g. in a termination notice)?

Under the Civil Code, an employer is free to terminate the construction contract any time before the work is completed, but it must compensate the contractor for any damage sustained from the termination. Also, if the work in a construction contract relies heavily on the contractor's skills, the contract should be deemed terminated when the contractor is deceased or no longer able to perform the work.

In construction contracts, one party is usually entitled to terminate the contracts when the counterparty is in material breach. Where the contracts are awarded by the government agencies, the contractors usually have the right to terminate the contracts if their work has been suspended for six months or more.

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor's profit on the part of the works that remains unperformed as at termination?

Most construction contracts entitle employers to terminate the contracts for convenience. Where the contracts are terminated for causes unattributable to the contractors, under Article 511 of the Civil Code, the employers should compensate the contractors for their damage. The damage includes the costs and expected profit. However, most contracts exclude the interests the contractors are likely to gain for any work not yet performed at the time the contracts are terminated.

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

Yes, the concept of *force majeure* is recognised in Taiwan's construction contracts. In most cases, it is the contractors that will be affected by *force majeure* events. When an event of this kind occurs, a contractor is usually entitled to extensions of time and cost reimbursements.

Contracts that have subsequently ceased to be financially viable cannot be grounds for a *force majeure* claim. However, the contractors may cite the doctrine of change of circumstances in the Civil Code to demand that the contract be terminated or the terms of the contracts be revised.

3.14 Is there any legislation or court ruling that has been specifically enacted or handed down to provide relief to parties to a construction contract for delay, disruption and/or financial loss caused by the COVID-19 pandemic? If so, what remedies are available under such legislation/court ruling and are they subject to any conditions? Are there any other remedies (statutory or otherwise) that may be available to parties whose construction contracts have been affected by the COVID-19 pandemic?

On May 25, 2021, the PCC issued a directive urging all procuring entities to help their contractors overcome construction delays or disruptions caused by COVID-19. On June 18, 2021, the PCC followed with a set of guidelines, encouraging procuring entities to extend the construction period by at least half the time Taiwan's nationwide level 3 COVID-19 alert was in effect, and reimburse their contractors for time-related costs incurred during the extended construction period. However, the guidelines apply to only public procurement projects, and compliance is voluntary. Other than the guidelines, there is no legislation or court rulings yet specifically addressing the issues arising from the pandemic.

3.15 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

No, a contract binds only the parties to it, and only the parties can claim rights derived from the contract. A third party is not entitled to any of the contractual rights, unless the contract specifies otherwise or a party to the contract transfers its right to the third party.

3.16 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

In Taiwan's construction projects, direct agreements are commonly used, but collateral warranties are not.

3.17 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

An employer is allowed to deduct the sum its contractor owes to it from the payment due to the contractor. However, in reality, most employers make deductions of this kind cautiously because the deductions may interrupt the contractors' cash flow, which is essential for the performance of the contracts.

3.18 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

Yes, parties to construction contracts owe a duty of care to each other. The law does not specify what standard of care a contractor should adhere to, but the prevailing court view is a contractor, being a professional, should exercise a higher level of care in performing the contract.

The duty of care is to decide which party should be held accountable for contractual breaches. A contractor will be held accountable if it fails to satisfy its duty of care and therefore breaches the contract. As to what liability the breaching contractor should bear, it depends on what the contract says.

3.19 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

In interpreting ambiguous terms in a contract, Article 98 of the Civil Code prioritises the parties' real intent over the literal meaning of the terms. According to the prevailing court views, the purpose and context of the contract, and earlier drafts of the terms, shall be considered to understand the parties' real intent.

3.20 Are there any terms which, if included in a construction contract, would be unenforceable?

Any terms that violate statutory restrictions or bans, social order or morality will be deemed null and void. For example, a clause to shorten or waive the statute of limitations, or eliminate in advance liability caused by intentional acts or gross negligence will be seen invalid and unenforceable.

3.21 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

The designer's obligation and the extent of his liability are solely determined by the contract, no matter what type of contract the designer enters into. The contract can set a limit on the designer's aggregate liability, but the limit becomes invalid if: (1) the liability is caused by the designer's intentional act or gross negligence; or (2) the liability is expressly excluded from the contractual limit.

3.22 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

A concept similar to decennial liability exists in Taiwan. Under the Civil Code, an employer has one year to inspect the work, after the work is completed or handed over to the employer. Where the work is construction on land or significant repair of construction, the inspection period is extended to five years. The inspection period can be further extended to five years and

10 years respectively if the contractor is found to have deliberately concealed the work defects from the employer.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

In Taiwan, construction disputes are usually resolved through: (1) amicable negotiation between the parties; (2) mediation by the PCC or the court; (3) litigation; or (4) arbitration with the parties' consent. If PCC mediation founders owing to the employer's rejection of the PCC's mediation proposal, Article 85-1 of the GPA entitles the contractor to apply for arbitration without the employer's consent.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

A dispute review board and a dispute adjudication board were once discussed but ultimately not adopted in Taiwan.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

No, arbitration clauses are rarely seen in Taiwan's construction contracts nowadays. If contractors would like to have their construction disputes arbitrated, they'll have to seek consent from their employers or subject the employers to mandatory arbitration under Article 85-1 of the GPA.

4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

Yes, international arbitration awards are recognised and enforceable in Taiwan, unless: (1) the recognition or enforcement of the awards would defy Taiwan's social order or morality; (2) the disputes arbitrated cannot be resolved by arbitration under Taiwan law; or (3) the countries where the awards are rendered or whose laws are applied do not recognise Taiwan's arbitration awards.

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

The court system in Taiwan can be divided into three levels: the district court, the high court and the Supreme Court. Any party who loses the district court trials is free to lodge an appeal to the high court, but only claims exceeding NT\$1.5 million can be brought to the Supreme Court. The trial time for each instance can last from less than a year to more than five years, depending on the complexity of the dispute. But overall it will take the court longer to adjudicate on construction disputes.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

Yes, foreign court decisions will be upheld and enforced in Taiwan unless: (1) the foreign courts had no jurisdiction to render the decisions; (2) the defendants losing the suits did not attend the hearings because of illegal service; (3) the reasoning of the decisions or the legal proceedings defy Taiwan's social order or morality; or (4) the foreign countries do not recognise Taiwan's court decisions.



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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (NB For ease of reference throughout the chapter, we refer to “construction contracts” as an abbreviation for construction and engineering contracts.)

With 50 separate states, public and private entities in the United States utilise a wide variety of contract types. Before the 1980s, there was a general preference for fixed-price design-bid-build contracts, based on an employer advertising a fully completed set of design documents. Time-and-materials arrangements have also long been used, especially where it is difficult to estimate a fixed price or when construction must begin before there is time to complete a design. In recent decades, however, statutory changes have facilitated a much-increased use of design-build contracting and its variations such as engineer-procure-construct (EPC) contracting. The evolving technologies used in construction have led to an increased use of design-build and “design assist” contracting in specialty trades. Although public-private partnerships (P3) and Integrated Project Delivery (IPD) have had a relatively slow start in the United States, their use seems to be increasing gradually. Nonetheless, many segments of the U.S. construction industry remain largely unfamiliar with those project delivery systems. On IPD, *see* Bruner & O’Connor on Constr. Law, §6.18.10 *et seq.* (2020).

There is no standard form of construction agreement in the United States. The contract forms provided by the International Federation of Consulting Engineers (FIDIC) are rarely if ever used. Federal public works projects are generally governed by the Federal Acquisition Regulation (FAR), a book containing numerous clauses mandated on various types of jobs. On local government projects and private construction, the A-201 General Conditions and other forms published by the American Institute of Architects (AIA) are probably the most widely used. Other well-known suites of contract forms are published by ConsensusDocs, the Engineers Joint Contract Documents Committee (EJCDC) and the Design-Build Institute of America (DBIA). All of these forms make an effort to achieve a degree of balance between the various parties that typically participate in a complex construction project, although that balance can easily be lost when the forms are heavily modified to favour the interests of a particular party.

In the U.S., construction management contracting is typically handled by a construction manager. Some of them (“at risk”) also hold direct agreements with trade contractors, while others (“not at risk”) merely act as advisors to an employer (usually referred to as the “owner” in the U.S.).

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

On design-build or P3 projects, contractors commonly partner with design firms, either through a joint venture agreement or conventional subcontracting. On large civil projects, it is also common for two or more general contractors to bid for the work together, either as a temporary alliance team or a formal joint venture entity. See, e.g., ConsensusDocs 298.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

See answer to question 1.1 above.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

The Federal Acquisition Regulation (FAR) is probably the most widely used standard form of contract for public works in the United States. Public works projects for the federal government must use FAR clauses. At the state level, many states have adopted procurement codes that establish how public works contracts are awarded, but leave the forms of the public works contracts up to the individual agency or municipality. Therefore, the form for public works contracts can vary widely within a state and between states.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

Although U.S. states are generally common law jurisdictions, some of them (e.g., California and Louisiana) have adopted civil

codes that include many principles applicable to construction law. Purchases of equipment and other goods are typically governed by the Uniform Commercial Code (UCC), which provides rules for sales, security interests, warranties and remedies when those terms are not otherwise specified by contract. Where a state lacks applicable case law on a particular subject, its courts often look to federal case law or to decisions in neighbouring states.

Under U.S. common law, a binding contract typically requires an offer, acceptance, and economic consideration. Consideration can be very minimal (including the mere exchange of reciprocal obligations). Most requests for proposals are written as invitations for tenders, so that they do not constitute offers in themselves. Employers typically treat the tenders as offers and try to reserve broad discretion in deciding which one (if any) to accept.

The individual states have various requirements as to which kinds of contract must be in writing to be valid (so-called “statutes of frauds”). Some terms can be implied from industry practice or from previous dealings between the parties. On some facts, acceptance may be inferred where an employer allows work to proceed without a signed agreement. However, if the evidence indicates no “meeting of the minds” with regard to essential contract terms, a binding contract is unlikely to exist. Even without a written agreement, a contractor may have an equitable right to payment if it performs work in good-faith reliance on what it reasonably understood as an employer’s offer to contract (e.g., implied contract, quasi-contract, *quantum meruit*, and equitable estoppel). Outside the FAR, applicable law generally does not mandate contract dispute-resolution language.

1.6 In your jurisdiction please identify whether there is a concept of what is known as a “letter of intent”, in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

Enforceability of agreements depends more on their substance than on their title. A “letter of intent” may be unenforceable if it is merely an agreement to agree. It is not uncommon, however, for parties to enter what they intend in a binding “memorandum of understanding” or “memorandum of agreement”, while leaving details for later negotiation. It is also common for employers to issue a limited notice to proceed or execute a limited-scope agreement that allows certain preliminary and/or long-lead activities to begin while the parties continue negotiating to price the balance of the planned project.

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer’s liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors’ all-risk insurance?

Applicable statutes generally require contractors to hold a licence in the state where work is done, and such licences usually mandate some level of insurance. There are many insurance products and insurance approaches available. Employers typically require contractors to provide coverage for general liability and excess liability, which covers at least personal injury, death and property damage. Applicable laws also typically require insurance for losses caused by automobiles and for workers’ compensation. Contracts for design services are likely to require professional

liability insurance. It is also common to require insurance against environmental pollution and coverage for completed operations. Employers often procure builder’s risk or all-risk insurance covering damage to the project as it is constructed. On some jobs, prime contractors may purchase insurance against defaults by lower-tier contractors.

To avoid the cost associated with multiple tiers of contractors procuring overlapping policies, it is common for large projects to have a single consolidated Contractor Controlled Insurance Program (CCIP) or Owner Controlled Insurance Program (OCIP).

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

- (a) In the U.S., labour relations between workers and employers are primarily governed by federal statutes and regulations, creating substantial uniformity between the states. The Immigration Reform and Control Act of 1986 prohibits the known hire of workers who lack legal status to work in the U.S. Other laws prohibit discrimination, such as Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. The federal government establishes minimum wage rates (by region), and sets rules for paying premiums for overtime labour. State statutes and union agreements often govern the benefits that must be paid to construction workers or to their labour unions.
- (b) In the U.S., most taxes are assessed either by the federal government or by the individual states. Contractors must usually withhold sums from worker compensation to assure payment of applicable taxes and employee benefits. State tax rates vary considerably. There is no federal sales tax or VAT, but most states charge sales and excise taxes that apply to many construction projects. The federal government charges income tax on individuals, as do most state governments. The federal government also charges a corporate income tax, although it was substantially reduced in 2018. The federal government also charges taxes to support Social Security (retirement), Medicare (medical care for seniors), and unemployment insurance.
- (c) Health and safety are heavily regulated, both at a federal and state level. The federal Occupational Safety and Health Act (OSHA) and its implementing regulations are probably the best known. Individual states have their own occupational safety laws, and the federal Jones Act has specific remedies for injuries occurring during work on a ship or barge.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

Each of the 50 states and the District of Columbia have adopted the International Building Code. The International Fire Code and the International Energy Conservation Code have also been widely adopted. However, each jurisdiction has the authority to make alterations to the codes as it deems appropriate. There are several websites that include a *compendium* of the codes for each state, including the one found at <https://www.buildingsguide.com/blog/resources-building-codes-state>.

Federal public works projects must comply with these local codes in addition to any special requirements imposed by the appropriate federal agency.

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

U.S. employers are generally entitled to withhold a portion of a contractor's price as security for final completion of a construction project. Such withheld retention must be authorized by contract, and it is typically in the range of 5% to 10% of the contract price. Many contracts provide that the percentage of retention declines after the work is at least 50% complete, and it is often possible for the contractor to obtain release of the retention balance by posting a special bond as substitute security for the employer. It is not common for retention to continue after final completion, e.g., as security for performance of post-completion warranty claims that have not yet arisen. For specialty contractors performing early stages of work (e.g., foundations, shoring, or ground improvement), it is common to provide for release of their retention when their work is done, rather than holding back money until a much later date when the rest of the project is completed.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor's performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

Performance bonds are commonly required on U.S. projects, and most contractors have established relationships with surety companies that provide bonding when necessary. Banks are not typically involved in providing performance bonds, and letters of credit are much less common as project security than in many other countries. U.S. employer agencies also typically require payment bonds (like the "Miller Act" bonds on federal contracts and the similar "little Miller Act" bonds on state contracts). Forms of bond are generally not prescribed by law, although some forms (like the ones published by the AIA) are widely used. Bonds, unlike letters of credit, do not generally promise payment on demand.

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

When the successful tenderer is a new joint venture entity or a specially formed project company, it is not unusual for the employer to require guarantees from individual joint-venture partners or from parent companies, and U.S. law does not substantially restrict the validity of such guarantees. On most projects, however, the employer relies on bonds and retention as the principal security for contractor performance. Parent guarantees are particularly likely on contracts (e.g., P3) with long-term project operating responsibilities.

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

If a commercial contract is silent as to the ownership of delivered materials and equipment, the contractor's ownership rights in those "goods" are likely to be governed by the Uniform Commercial Code, which includes a mechanism for establishing security interests in delivered products until the employer pays for them. On most commercial projects, however, contracts provide that title passes upon installation (or even earlier, when goods are delivered and paid for). Contracts often provide that employers may take over the materials purchased by a defaulting contractor as needed to complete the job. The contractor's right to payment is generally protected by statutory lien rights in the improved property, or by some form of payment bond.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

Many employers lack the in-house experience to manage a complex construction project with their own personnel. Therefore, they often hire a construction manager. On federal government contracts, a more experienced agency like the U.S. Army Corps of Engineers will often manage work for other agencies that have less experience. Construction managers typically do not owe a legal duty to act impartially between employer and contractor. Where an employer retains its architect to perform this role, however, the architect may be bound to act impartially by contract or by Rule 2.4 of the National Council of Architectural Registration Boards (or similar provisions in state codes of professional responsibility for architects). Contractors with claims are likely to have a remedy against the employer, but often not against the construction manager.

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a "pay when paid" clause?

Subcontracts often provide that the employer's prime contract payments are a "condition precedent" for lower-tier contractors getting paid ("pay if paid"), and it is also common to see clauses indicating that lower-tier contractors should wait to get paid until after the prime contractor is paid ("pay when paid"). The enforceability of "pay if paid" clauses was challenged successfully in California on the theory that it conflicted with statutory lien rights (*Wm. R. Clarke Corp. v. Safeco Ins. Co.*, 15 Cal. 4th 882, 938 P.2d 372, 64 Cal.Rptr.2d 578 (1997)). Many state courts have not yet specifically addressed this issue, but they are likely

to hold that a subcontractor may at least be required to wait for a reasonable time while the prime contractor pursues payment from the employer on the subcontractor's behalf.

In federal contracts, FAR 52.232.27 generally requires prime contractors to pass progress payments through to subcontractors within seven days after receiving money from the government. State governments generally have similar "prompt payment" statutes for public works projects.

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

Liquidated damages are widely used on U.S. projects to fix the price that a contractor will pay for unexcused delays in completing its work, especially where it will be difficult to forecast the employer's resulting financial damages. When foreseeable delay costs are unusually high (e.g., from high-revenue-producing facilities like power plants and casinos), a fixed limit on delay damages is often negotiated in order to attract fixed-price tenders. Employers will generally be unable to enforce liquidated damages that are held to be a penalty, i.e., that do not represent a reasonable forecast of fair compensation for anticipated delay-related costs. The reasonableness of liquidated damages is typically determined as of the time of contracting, rather than later when a breach occurs. Liquidated damages are usually not recoverable by an employer who has caused concurrent delays during the time period at issue.

Liquidated damages are also used to determine contractor liability for other types of breaches. On power plants, for example, liquidated damages are typically used to limit liability based on failure to achieve key performance guarantees, such as heat rate and overall power output.

When a prime contract fixes the amount(s) of monetary damages for delay or for some other breach, those damage rates typically preclude a separate claim for "actual" damages arising from the same breach.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

Almost every construction contract contains language giving the employer a right to increase or decrease the contractor's scope of work by issuing a written variation, normally called a "change order" in the U.S. Where the parties cannot agree on such a variation, employers often reserve a right to issue a unilateral directive to perform the variation. There are, however, normally some limits on this power. A variation that fundamentally changes the nature or scope of work may be treated as a "cardinal change", i.e., essentially a breach of contract by the employer. A major deletion may also be treated as a partial termination for convenience rather than a deductive change, which may affect the mechanism used to price the adjustment.

Variations must normally be exercised in good faith, and an employer may be constrained from inviting tenders on a broad scope of work and later using deductive changes to remove only the easiest or most profitable portions of the scope.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

Especially on power plants and other major infrastructure, it is common for employers to purchase and supply some of the major long-lead equipment, in part to expedite the schedule and also to avoid paying mark-ups to the installing contractor. In doing so, however, the employer may assume part of the liability for overall schedule coordination. The employer may hire a third party to perform omitted work, but some union agreements may restrict the employer's ability to use its own labour on site.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

In the U.S., every contract party owes an implied duty of good faith and fair dealing. As a corollary to this duty, parties are typically held to owe an implied duty that they will not hinder or delay each other.

An employer who provides plans and specifications for use in construction impliedly warrants that they are suitable for use, and employers are typically held responsible for errors and omissions in their contract documents unless the contractor assumes responsibility for reviewing and completing the design as a designer-builder (and even in that case the contractor may have a right to rely on the employer's partial design and/or site information).

Many courts have held that an employer owes an implied duty to disclose any non-public "superior knowledge" about the site or the project that a court finds should have been disclosed to the contractor.

When furnishing materials or equipment for a construction project, the seller typically owes implied duties that the goods will be of "merchantable" quality and that they will be reasonably fit for their intended purposes (see UCC §2-314, 315). Such implied warranties are, however, often disclaimed by contract.

State statutes may provide that home builders owe an implied duty that the resulting residences meet certain minimum standards of "habitability".

In construction service agreements, contractors are generally held to an implied duty that they will perform in a "good and workmanlike" manner. And in design contracts, architects and engineers may be held to an implied obligation to perform to the "prevailing standard" established for similar services in the area where the work is done.

In multi-prime contracts, employers may owe an implied duty to coordinate their various prime contracts, and prime contractors will probably be held to an implied duty to coordinate their various subcontractors and suppliers.

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

If the delays are truly concurrent and cannot be segregated, the most common approach is that neither party may recover

monetary delay damages from the other party during the period when both of them were independently causing delay. In some cases, however, courts and arbitrators will make an effort to apportion delay costs between the two parties.

If a party can show that it slowed parts of its work after realising that the job was already being delayed by the other party (so-called “pacing”), such proof may overcome a concurrent delay defence.

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

State laws typically include a “statute of repose”, setting the number of years in which a construction-related claim must accrue (i.e., the time in which the basis for claim must generally be discovered). After a claim has accrued, states have varying statutes of limitations that define the number of years in which the discovered claim must be filed (in court or arbitration).

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

Some construction contracts and agreements with insurers or sureties will specify shorter time limits for making claims than the periods allowed under state statutes. Many construction contracts specify that contractor claims must be asserted before accepting final payment from the employer. Courts are likely to uphold these shortened filing times as long as the contractor has a reasonable time to bring its claims.

Most jurisdictions apply a reasonable notice standard to the form and substance of notices without requiring strict compliance with formal notice requirements in the contract. A few states (including Washington), however, require strict compliance in both form and timing of contract notices.

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

Most private construction contracts and almost all public works contracts assign the risk of unforeseen subsurface conditions to the employer, partly because the employer normally has a better opportunity to study the ground, and because it benefits from overcoming an unexpected obstacle on its property. This is typically handled by a Differing Site Conditions clause (see, e.g., FAR 52.236-2). Such clauses typically allow compensation if a contractor encounters latent site conditions that differ materially from those indicated in the contract documents (“type 1”) or latent conditions of an unusual nature that would not normally be expected (“type 2”). Contractors must usually give prompt notice of such conditions and should take reasonable steps to mitigate their impacts. Contractor rights to claim “Differing Site Conditions” may be limited if the contractor is paid to conduct its own independent pre-bid investigation of subsurface conditions, or if a particular contractor had actual knowledge of the condition based on prior work at the site.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

The risk of unforeseen post-tender changes in laws, regulations or building codes is often allocated by contract. The AIA General Conditions typically assign responsibility to the employer, except for legal changes that were already known or foreseeable when tenders were submitted. This issue became a source of much dispute when various governments imposed major temporary restrictions on construction during the COVID-19 pandemic that began in 2020. Many agencies ultimately found a way to compensate contractors for such costs. More recently, substantial volatility in construction material pricing may also be linked to government policies, and many have argued that employers should reimburse resulting cost increases, especially on public works contracts.

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

Many contracts treat project-specific design as “work for hire” that belongs to the employer. Absent a contract clause to the contrary, an architect probably has copyright rights in its own plans, drawings and other design work product as stated in the Architectural Works Copyright Protection Act of 1990. In negotiated contracts, designers often retain ownership but grant a royalty-free perpetual licence to the employer and its successors for use on the project site.

3.10 Is the contractor ever entitled to suspend works?

Under U.S. common law, contractors generally have a right to suspend work based on an uncured material breach by the employer (e.g., failure to make progress payments). Such rights are, however, often restricted by contract and should be exercised only after giving written notice and fair opportunity to cure. On federal projects, a contractor must generally continue working unless the government contracting officer has ordered a cardinal change (i.e., a substantially different or larger scope than originally awarded). Contracts often require work to proceed despite a pending dispute, e.g., regarding compensation for an employer variation.

Other circumstances that may justify a contractor’s temporary suspension of work may include an employer’s failure to provide permits or site access, discovery of unforeseen hazardous materials in the ground that impede progress, the employer’s failure to make key required decisions (e.g., approving submittals), encountering unexpected archaeological remains, or other unanticipated *force majeure* events outside the contractor’s reasonable control.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party’s grounds for termination must be set out (e.g. in a termination notice)?

Employer-drafted contracts sometimes provide that contracts are automatically terminated if the contractor files for bankruptcy protection, although such rights are likely to be limited by federal law. Contracts typically authorise termination for default, however this is only if a party fails to cure a breach within a

specified time after receiving written notice from the other party. Underlying defaults most often include failure to: make required payments; prosecute work; correct defects; provide required bonds or insurance; and provide essential permits or site access.

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor's profit on the part of the works that remains unperformed as at termination?

U.S. construction contracts often allow employers and prime contractors to terminate lower-tier agreements “for convenience” at any time. Such rights must generally be reserved by contract because they do not arise under common law. Applicable clauses usually provide that a terminated contractor may not recover profit that would have been earned on the unperformed balance of the work.

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

The concept of *force majeure* is well known in U.S. construction contracting. Although some contracts allow compensation to a contractor whose progress is interrupted by such unexpected events, most contracts merely allow an uncompensated time extension. *Force majeure* events are typically defined to include only unforeseen events outside the control of both contract parties, and labour strikes may be excluded from this category if they arise from specific acts or omissions of the affected contractor (i.e., to be distinguished from national or regional strikes). The fact that a project becomes more difficult or costly due to the rising costs of labour or materials is not generally regarded as a *force majeure* condition, although courts may consider sudden and extreme price escalations as falling under this category. The inflationary spikes since 2021 have caused many contractors and suppliers to insist on a right to escalation price adjustments. Some employers argued that the COVID-19 pandemic was a *force majeure* event for resulting costs were not recoverable, but many employers offered compensation to keep their jobs going. This area of U.S. construction law is undergoing evolution as parties struggle to allocate the unexpected economic burdens imposed by the pandemic and subsequent inflation.

In some limited cases, performance may also be excused (i.e., effectively allowing its termination) on *force majeure* principles if the contractor can show that the specified work was frustrated by impossibility or commercial impracticability.

3.14 Is there any legislation or court ruling that has been specifically enacted or handed down to provide relief to parties to a construction contract for delay, disruption and/or financial loss caused by the COVID-19 pandemic? If so, what remedies are available under such legislation/court ruling and are they subject to any conditions? Are there any other remedies (statutory or otherwise) that may be available to parties whose construction contracts have been affected by the COVID-19 pandemic?

At the time of this writing, there is no legislation promising contract relief for costs arising from COVID-19. Most public construction projects were designated as “essential” and thereby allowed to continue during the pandemic, although subject to substantial health-related restrictions. The federal Paycheck

Protection Program effectively subsidised contractors and other companies to retain employees during the pandemic, but that programme ended on May 31, 2021.

To the extent that contractors experienced delays or inefficiencies due to changes to operating procedures (e.g., social distancing, added cleaning requirements, etc.), many were successful in negotiating compensation from owners who appreciated their continuing work. Contractors also justified compensation by pointing out that acceleration to overcome a COVID-related *force majeure* delay was reimbursable under their contracts.

3.15 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

Under U.S. common law, third parties may possess rights under agreements between two other parties if such rights were clearly intended. For example, a prime contractor may effectively require a subcontractor to indemnify the employer for third-party claims based on errors in the subcontractor's work. Warranties on special materials and on installed equipment are often set up to flow directly from the manufacturer or supplier to the end customer. Lenders and employers may require subcontracts to be assignable to them if the prime contractor defaults on its obligations. Residential developers generally require builders to make direct warranties to purchasers of new homes. Alternatively, residential purchasers may have rights against contractors based on tort law or state statutes.

3.16 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

Collateral warranty is not a familiar term in U.S. construction law, although many warranties from sub-tier parties run directly to employers, and contracts often provide that warranties may be assigned by the employer to a lender or successor project owner. Also, contractor indemnity clauses often protect both the employer and its engineer(s).

3.17 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

It is generally understood that a party's payment obligations on a particular contract may be set off against monetary obligations owed by the payee under the same contract (e.g., progress payments being withheld to pay costs of curing defective work). U.S. common law may also allow an employer to withhold payments based on sums owed by the payee on a separate project.

Common law rights of set-off may be limited by contract if not by law. For example, contracts commonly provide that the employer's progress payments should be treated as a “trust fund” in favour of persons providing labour or materials on the job, which is inconsistent with the idea of diverting the funds to pay one of the contractor's obligations on another job.

A prime contractor's power to withhold money from a subcontractor based on debts on another job may also be limited by an applicable “prompt payment” statute.

3.18 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

Obligations generally arise either by contract, in tort, or by statute. Duties not to injure others arise independently of contracts, although they may be limited by contract. With regard to implied obligations, see answer to question 3.3 above.

3.19 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

Following the principle of *contra proferentem*, U.S. courts often tend to construe ambiguous contract terms against the party who wrote them. Normally, an ambiguity only exists if it is reasonably susceptible to at least two alternative meanings. Once a clause is found to be ambiguous, courts in most states may consider evidence outside the written contract (“parol evidence”) to assist in its interpretation. For example, courts often look at the parties’ course of performance before a dispute arose, common understanding of certain terms in the construction industry, a desire to give meaning to every term, and a desire to avoid interpretations that result in an inequitable forfeiture by one party. Some states may also allow the use of parol evidence to help clarify (but not flatly contradict) a written contract even if it does not immediately seem ambiguous on the face of it.

Many construction contracts seek to minimise ambiguities by establishing an “order of precedence” that can be applied if various contract documents are found to be inconsistent. Some contracts also require the contractor to review the various documents and provide prompt written notice if and when conflicts or ambiguities are discovered.

3.20 Are there any terms which, if included in a construction contract, would be unenforceable?

As discussed elsewhere in these answers, a number of commercial terms are unenforceable or void in U.S. construction contracts. The unenforceability may result from a statute or from common law case decisions. The invalid clauses will vary from one state to another.

Terms that tend not to be enforced include: a) requirements to indemnify another party against its own fault; b) clauses requiring a waiver of fundamental rights guaranteed by constitutions or statutes; c) pre-construction waivers of statutory lien rights; d) liquidated delay damages set higher than the contractor’s reasonably anticipated damages; e) damages precluding one party from recovering any damages for delays or breaches by the other party; f) “pay if paid” clauses making a subcontractor’s payments absolutely conditional on corresponding payments from the employer to the prime contractor; and g) clauses that violate any other law or public policy.

3.21 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer’s obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

Although some design contracts attempt to require defect-free design, most designers will insist on applying the common law

standard under which claims of professional negligence require proof that the defendant violated the prevailing standard of professional care for comparable services. That prevailing standard clearly allows for some level of error or imperfection, and cases alleging professional negligence typically require evidence from a licensed professional who can explain how prevailing standards apply to the facts. Design contracts often specify that the designer will correct errors in design at its own cost, but most designers will not agree to an unqualified guarantee that their work is free of defects. Many design contracts also include an aggregate cap on monetary liability for breach of contract by the design professional.

3.22 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

U.S. law generally has no direct counterpart to “decennial liability” of the sort required in France and some other civil law countries. Approximately half of the states, however, have long statutes of repose that can create a risk of liability for latent defects discovered many years after substantial completion of a construction project (see, e.g., California Civil Code §895).

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

Under a federal government contract, disputes are ultimately subject to resolution in a federal court or agency board, without a jury. Under state, local or private contracts, disputes are ultimately subject to resolution in a court (often with a right to jury) unless the parties have agreed otherwise. Although some federal agency boards have significant experience in construction disputes, most courts have little such experience, and parties often agree by contract that complex disputes should be referred to mediation and ultimately to binding arbitration by a person with construction industry expertise.

Many contracts initially refer disputes to high-level executives of the parties before they may be submitted to a court or arbitration panel. Many large complex projects also establish a Dispute Review Board or Adjudicator who helps to resolve issues while the job is being performed. Non-binding mediation is also very commonly used to resolve complex construction disputes.

A number of companies provide mediation and arbitration services. Two of the largest providers are the American Arbitration Association (AAA) and JAMS, each of which publishes detailed rules for mediation and arbitration.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

In New York State, the Prompt Payment Act (N.Y. Gen. Bus. Law Art. 35-E) shares some features with the Construction Act in England and Wales, allowing an accelerated process similar to adjudication but only with respect to “undisputed invoices”. The U.S. has not otherwise adopted a process comparable to adjudication. On large complex projects, however, many contracts require submission of disputes to a Dispute Review Board (DRB), typically a panel of three individuals with substantial construction industry experience. Although DRB recommendations are usually subject to appeal, they resolve many issues and are often given considerable deference.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

Many of the most widely used construction contract forms provide for mediation, and ultimately for binding arbitration, as a means of resolving construction disputes, especially on private projects. Arbitration is generally not, however, an available remedy under federal contracts. Where an unpaid contractor or supplier seeks to enforce security rights against real property (e.g., under a statutory lien), that lien foreclosure action must generally be prosecuted in a court.

Arbitration is typically commenced when a claimant files a demand for arbitration with the administrative entity in charge of the process. The respondent may answer in detail (and may serve a counterclaim), and its failure to do so will generally be treated as a denial of the claims asserted. Responding parties may also assert cross-claims against third parties who have consented to arbitration. The arbitral administrator may assess filing fees based on published rates, and parties will generally be required to deposit sufficient additional funds to cover the expected charges of the arbitrator(s). Unlike international arbitration, domestic arbitrations in the U.S. generally allow at least a limited number of depositions, although pre-hearing discovery tends to be more limited in arbitrations than in courts.

Courts give considerable deference to arbitration. Arbitral awards are generally final and enforced in the U.S., although statutes allow very limited appeals in extraordinary cases (e.g., arbitrators who fail to disclose conflicts, going beyond the parties' contractual submission to arbitration, obvious partiality, or fundamental denial of due process).

4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

The United States is a signatory nation to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), and the U.S. complies with this agreement by enforcing arbitral agreements and awards issued in signatory countries. Consistent with Article V of the New York Convention, defences to enforcement of a foreign award include lack of due process, a conclusion that enforcement would be contrary to public policy, and other listed defences.

Chapter 2 of the Federal Arbitration Act provides terms under which courts of the United States enforce foreign arbitration awards, in accordance with the New York Convention.

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

Federal courts typically accept jurisdiction only for limited categories of civil cases (e.g., claims for damages over \$75,000 between

parties located in different states). State trial courts exercise broader jurisdiction, extending to all parties doing business within their borders. Parties in courts are often entitled to demand a jury, although many construction agreements waive jury rights.

Court actions typically begin by filing a written "complaint" identifying parties, key facts, and basic legal claims. Defendants are generally required to file a written "answer" to the complaint, and the answer may also assert one or more counter-claims. A responding party may also assert cross-claims against third parties who are subject to the court's jurisdiction.

After the parties' initial exchange of written positions, they are typically required to exchange relevant documents and produce witnesses for pre-hearing oral examination (depositions). Parties are also generally allowed to require opposing parties to answer a limited number of written questions (interrogatories). Discovery in a U.S. court is usually much more extensive than would normally be allowed in an international arbitration or litigation.

The delay between filing of a case and commencement of the hearing will vary significantly from one jurisdiction to another. Some courts have much heavier schedules than others, and a long backlog can delay the scheduling of a hearing. Larger cases with more witnesses and complex issues are likely to experience significantly longer delays in getting a trial date. The COVID-19 pandemic also magnified the delays inherent in the U.S. court system. Except during the pandemic, most court cases are set for a trial hearing between one and two years after a complaint is filed. Depending on the jurisdiction, it can then take several months or years to receive a decision, after which the losing party in a court generally has a right of appeal.

U.S. court rules allow for purely legal issues to be resolved prior to trial, under what is called a summary judgment motion.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

The United States has not signed any general agreement to enforce foreign court judgments that would be equivalent to enforcement of foreign arbitral awards under the New York Convention. The Federal Arbitration Act also contains no general requirement that U.S. courts must recognise a foreign court judgment. As under the New York Convention, principal concerns are assuring that the foreign proceeding allowed due process, and that its ultimate judgment does not violate U.S. public policy. However, U.S. courts are likely to give reasonable deference to judgments rendered by courts in other countries that have signed the New York Convention, and the U.S. has bilateral agreements with various countries that facilitate the enforcement of foreign judgments and awards.

Some individual states have their own bilateral agreements with other jurisdictions that facilitate enforcement of court judgments. The 1962 Uniform Foreign Money-Judgments Recognition Act has been adopted by 37 states, and the 2005 Uniform Foreign-Country Money Judgments Recognition Act has been adopted in 29 states and the District of Columbia.



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- International Academy of Construction Lawyers (fellow & treasurer).
- International Bar Association; International Construction Projects Committee: Co-Chair of Project Execution Subcommittee.
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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (*NB* For ease of reference throughout the chapter, we refer to “construction contracts” as an abbreviation for construction and engineering contracts.)

The standard types of construction contracts commonly used in Zimbabwe are regulated by the Construction Industry Federation of Zimbabwe. The Federation came up with the National Joint Committee Standards Contracts 2000, which is a set of subcontract forms governing projects and forming the standard basis for construction and engineering contracts. These contracts are informed by the *Fédération Internationale des Ingénieurs-Conseils* (FIDIC) (also known as the International Federation of Consulting Engineers and Designers) contracts, which are internationally recognised contracts for international construction projects. While locally the National Joint Committee Standards Contracts 2000 form the common standard, in practice, most projects have predominantly directly relied on the FIDIC contract forms. This is most likely because most large construction projects in the country are driven by international investments and therefore parties find it most convenient to rely directly on the FIDIC contract forms.

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

Collaborative contracting is a contracting model that is based on the realisation of mutual benefit for the project owner and the project participants, and therefore the model fosters co-operative working relationships. The collaborative contracts differ according to risk sharing and co-operation. This type of contracting is prevalent in Zimbabwe and the commonly used collaborative contracts are the FIDIC contract as regulated by the National Joint Practice Committee.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

It depends on the nature of the project; however, the most commonly used standard forms in Zimbabwe are the FIDICs contracts, as regulated by the National Joint Practice Committee through the Construction Industry Federation of Zimbabwe, as highlighted in question 1.1 above.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

Yes, the National Joint Committee Standards Contracts 2000's Building Contract Forms and the other subcontracts as well as the FIDIC contracts are used in projects involving public works.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

Zimbabwe's legal system is based on Roman Dutch Law; hence why construction contract law is mainly governed by the common law tenets which are common cause to all standard contracts, i.e., a valid contract must have fulfilled the following requirements: offer; acceptance; intention to be bound; capacity to contract; possibility of performance; and clear and unequivocal communication of intention by both parties. Legally, contracts can either be oral or written, but written contracts are the most encouraged as they make terms and conditions more ascertainable.

1.6 In your jurisdiction please identify whether there is a concept of what is known as a “letter of intent”, in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

The concept of a “letter of intent” is common in Zimbabwe. Parties create a situation in which they intend for a contract to

come into existence in the future, and such intention is recorded in writing and communicated as the letter of intent. Usually, the letter of intent does not create any obligations on the parties, but creates a basis for entering into non-disclosure agreements and the exchange of information on prospective projects.

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer's liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors' all-risk insurance?

It is commonplace to have insurance for construction work, and such insurance differs according to the parties it applies to. For construction employees, it is mandatory that they be registered under the National Social Security Accident Prevention and Workers Compensation scheme, which regulates Employers and ensures that they promote work safety as well as providing compensation to employees or their families who would have been injured or killed during the course of their construction employment.

In relation to the actual Construction contracts, the practice is that contractors and Employers obtain comprehensive insurance cover which protects and cover loss or damage in respect of construction works. Professional consultants may also obtain professional indemnity cover.

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

Statutory requirements are present in relation to construction contracts. In terms of labour, the standard labour laws would apply in relation to the employees and the collective bargaining agreements that govern and protect employees within the construction industry; including:

- the Labour Act [Chapter 28:01] and its applicable amendments
- Statutory Instrument 45 of 2013 (Also known as the principal collective bargaining agreement for the construction industry); and
- Statutory Instrument 112 of 2021 (A collective bargaining agreement which amends some parts of Statutory Instrument 45 of 2013). The collective bargaining agreements detail the benefits that are mandatory to employees for example, medical health benefits, safety and health benefits amongst others.

Self-employed personnel and sub-contractors are governed and protected by their contracts, which must outline the conditions of their contractual mandate by, for example, providing for hazard and risk management, payment terms and dispute resolution mechanisms.

Pertaining to tax, employees to construction contracts are liable to the payment of income tax as regulated by the Income Tax Act [Chapter 23:06] and PAYE (Pay as You Earn Tax).

Pertaining to health and safety, Statutory Instrument 45 of 2013 (Also known as the principal collective bargaining agreement for the construction industry) also provides for the regulation safety and health of employees in the construction industry and mandates every employer to establish a safety and health committee to assist in giving effect to the safety and health policy of the Construction Industry.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

Yes. The Fire Safety Order of 2005 requires Employers to ensure that there are suitable and sufficient assessment of risk to which people may be exposed to. Fire safety management is required as an ongoing process during construction and after construction. Some city bylaws, such as Statutory Instrument 119 of 2019, (*Harare (Fire) (Amendment) By-laws, 2019 (No. 8)*), also require that fire-fighting equipment installed during construction must be certified with the regulatory body of standards assurance called the Standards Association of Zimbabwe. Acts of law such as the Factories and Works Act [Chapter 14:08] and its General regulations provide for the conditions to be maintained on factory buildings and during construction works that safeguard against fire. The (*Public Health (Control of Tobacco) Regulations*) S.I 264/2002 prohibits smoking in closed spaces including building sites.

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

Yes, it is legally permitted to retain purchase price for works until substantial completion, or when the defects liability is complete. This is, however, subject to the provisions of the contract between the parties. The retention of the purchase rate or percentage of the whole purchase price must be expressly provided for in the contract between the parties. The payments are often referred to as progression payments. Upon achievement of substantial completion or final completion, the Employer withholds part of the payments to be made. Where there is a breach, the Employer will have the right to withhold the funds where their claim will be equal to or exceed the value of the retained purchase price.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor's performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

It is a common feature in construction contracts in Zimbabwe to be backed up by performance bonds provided for by financial institutions such as banks. In state projects, the procurement laws make it mandatory for certain projects to have such performance bonds and or some form of performance guarantees. The performance bonds give security to the Employer in the event of the Contractor failing to perform its obligations in respect of the contract. The security bonds will vary according to the type of construction project and the value of such projects, and are predominantly dependant on the provision of the contract between the parties.

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

Whilst there is no legal bar on mother companies giving guarantees for the performance of their subsidiary companies, such

guarantees are not common in Zimbabwe for the performance of subsidiary companies. Subsidiary companies often give direct guarantees to the Employer for the work they will perform in respect of the underlying construction contract. This is necessary to allow the Employer to directly sue and enforce their rights where there is breach in respect of the underlying contract. As a matter of practice, guarantees from financial institutions stand more preferred and less risky than holding company guarantees.

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

Yes. It is permissible for the Contractor to have retention of title of rights when they have not been paid. The common law principle of lien applies in the Zimbabwean jurisdiction, and a contractor has a right of retention (*jus retentionis*) which allows them to retain the property until duly compensated. However, where the goods supplied attach to the land, then the said goods may not be removed if they will cause permanent destruction to the goods; meaning that the contractor may only possess the building until such a time when all payment has been made. When payments for goods and supplies used in the works have been made, their right to title falls away and the goods and supplies used in the work become the property of the Employer.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

Yes. Construction contracts may be supervised on behalf of an Employer. Engineers may act as agents of the Employer, as the independent contractor of the Employer, or as an impartial certifier, depending on the contract between the parties. Where an engineer or third party acts as an agent of the Employer when the construction work is in progress, their role is to represent the interest of the Employer by supervising and administering the carrying out of the works. In such instances, the Engineer has a duty to exercise their functions with reasonable skill and care. Where the engineer is employed as an expert, they have a higher duty than when they are employed as an agent. Breach of such duty will entitle the Employer to sue for damages.

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a "pay when paid" clause?

The parties have discretion to dictate terms they want included in the contract regarding payment. Therefore, the parties have to agree to this situation of the contractor getting paid when the Employer gets paid.

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

It is entirely up to the parties to agree in advance to a fixed sum of damages to be paid in the event of breach. Such sum is usually determined according to the value of the project and what would be a fair percentage to be paid in respect of breach of contract. The parties must be guided by the laws governing contractual penalties, such as the Contractual Penalties Act [Chapter 8:04], and therefore it is expected that they will apply rates that are just and equitable. However, the courts may revise the agreed rate of liquidated damages if they do not make economic value to the aggrieved party. Essentially, the court is guided by the Contractual Penalties Act, and will revise any liquidated damages if they are out of proportion. The general rule is to compensate the aggrieved party for actual loss, or to try and place the party in a position they would have been had it not been for the breach, and then balance such rule with the intention of the parties when they agreed to a fixed rate of damages. The courts will not enforce rates which would be against the law.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

The employer must generally follow the guidelines on variations provided for under the contract. Should the design of the work contracted for require variation as the work proceeds, parties can enter into an aside agreement concerning the same or simply add an *addendum* to the main agreement to provision for such variation. It is rare for construction work to be completed as exactly according to the original contract provisions and so usually contracts would provision for the need for variation. Such variations may be reduced into writing and may be made orally if the contract does not dictate that all variations be reduced into writing. However, where the Employer varies the work unilaterally, the Contractor is strictly not bound without express provision to execute more than the contract work, and the Contractor would be in breach of contract if they omit a part of the work included in the contract without contractual provision allowing them to do so.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

It generally depends on why the work is being omitted and whether it is being omitted by mutual agreement of the parties to the contract. If it is so, then the employer may perform the work himself if he is capable of doing so, or he may procure a

third party to perform it if he so wishes. However, in the event of work being omitted without mutual agreement, the Employer may call for specific performance from the contractor, or enforce the work to be done through court process.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

It is always advisable that all important terms be expressly provided for within the contract. Terms will only be implied in so far as there are other expressed terms in the contract that are incidental to the implied terms. Terms that are usually to be found in construction contracts are terms that require the Employer to give possession of the site within a reasonable time and give instructions within a reasonable time. Similarly, the contractor must carry out his work with proper skill and care or in a workmanlike manner. The duty to act in good faith is also usually implied in a construction contract because parties must endeavour to carry their obligations in a manner that is not prejudicial to the other party. The goods and materials must normally be of good quality and reasonably fit for their purpose. However, there will be no implied term where the matter in question is dealt with by express terms.

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

The contractor is entitled to an extension of time where there has been a delay in its instance. Where the delay has been caused by the Employer, the contractor would generally be entitled to costs. However, as a general principle, each party bears their own costs for their own delay.

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

Yes. In terms of the Prescription Act [Chapter 8:11] parties to a contract must generally bring their claims against each other within three years from date when the cause of action arose (i.e., the date when the obligation to perform became due) and is made known to the aggrieved party.

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

The contractual time limits to bring a claim must be cognisant of the actual statutory periods within which a claim may be brought. Any provision seeking to vary the statutory time limits to bring a claim should do so expressly. Generally, the courts honour the parties freedom to contract and hold private contracts as sacrosanct. Parties are therefore at liberty to provision for warranty periods beyond the statutory periods so long as this is done expressly and the intention to deviate from the statutory period is apparent.

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

Usually, the contract should provide for what happens should unforeseen ground conditions occur. In this regard, it should provide for who bears the responsibility for thorough preliminary works and surveys upon which the construction designs are based. However, where the unforeseen ground condition is a supervening impossibility which could not have been seen or predicted, then all parties are absolved of any liability arising from such unforeseen events and no party bears such risk. This is, however, a very critical issue which by all means should be properly addressed, and risk apportioned in the contract.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

A change in law affects both parties to the contract, and therefore both parties must bear the risk. Where a change of law takes place, it would be advisable for the parties to the contract to restructure their contract and obligations in a manner that accommodates the change in law. However, in contracts involving government and public entities, guarantees may be sought from the government to cushion the contractor from any adverse effects at the instance of changes in law.

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

The rights of ownership in relation to design and operation of the property are usually determined by the contract. The contract will determine the ownership of design, the copyright over the design, and if the parties are allowed to reuse the designs in other construction projects. Generally, where the Employer provides a complete design for the Contractor to construct, then ownership rights belong to the Employer and the contractor retains rights to use.

3.10 Is the contractor ever entitled to suspend works?

At common law, there is no right of suspension outside the terms of the particular construction contract. The contractor will be justified in suspending works where a ground for delay exists which gives rise to an extension of time and suspension may be ordered by the engineer or architect for technical reasons. There is normally no right to suspend work for nonpayment or other breach by the employer, unless so provided under the contract. The construction contract may stipulate that the contractor has a right to suspend performance until full payment is made or other condition, subject to giving notice and stating the grounds.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party's grounds for termination must be set out (e.g. in a termination notice)?

Construction contracts usually expressly set out the grounds under which the contract may be terminated automatically or by notice. However, outside the contract, there are common law grounds that would entitle termination of a contract when a party

commits repudiatory breach. A repudiatory breach occurs when one party expressly or by implication refuses to perform their obligations or commit a breach that is serious, that goes to the root of the contract. For termination to occur under repudiation, it is a requirement that the innocent party expressly accepts the repudiation by the other party. The innocent party may then claim for damages arising from the breach and damages for termination of the contract.

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor's profit on the part of the works that remains unperformed as at termination?

Construction contracts in Zimbabwe provide for termination under the circumstances expressly provided for in the contract which entitle the Employer to terminate the contract. Outside what is specifically provided for, a contract may only be terminated by an Employer on just cause, where the contractor has failed to perform their obligations for example, or where the contractor fails to execute the project, or delays the project where time is of essence. Then the employer is entitled to withhold the contractor's profit or may only release part of its equivalent to the job done only.

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

Force majeure is a known concept within the Zimbabwean jurisdiction. The purpose of the concept is to relieve a party from performing its contractual obligations when an unexpected, external event occurs which prevents the party from performing. Other jurisdictions refer to the concept as an act of God or a supervening impossibility.

What happens in a case of *force majeure* is usually dependent on what the contract stipulates. Some contracts will stipulate that termination must automatically occur, whilst others will suspend rights and obligations, and therefore grant an extension of time within which the contract may be performed. The most common remedy is that it suspends the rights and obligations of the parties until the passing of the *force majeure*.

It is unusual to argue successfully that the contract becoming uneconomic will be treated as a *force majeure*. Changes in monetary legislation that affects the economic operation of the contract always mean that the parties to the contract must continue to operate the contract under the new laws. In this regard, provision must be made in the contract for possible amendment of contract provisions should such uneconomic tenability occur.

3.14 Is there any legislation or court ruling that has been specifically enacted or handed down to provide relief to parties to a construction contract for delay, disruption and/or financial loss caused by the COVID-19 pandemic? If so, what remedies are available under such legislation/court ruling and are they subject to any conditions? Are there any other remedies (statutory or otherwise) that may be available to parties whose construction contracts have been affected by the COVID-19 pandemic?

No legislation has been enacted to provide for relief to parties to a construction contract for delay occasioned by the COVID-19.

Furthermore, no court rulings were handed down in respect to the subject matter. COVID-19, being a pandemic that was outside the control of the affected parties, led to forced and regulated shutdowns which in all likelihood occasioned delays in construction projects. Whilst there are no statutory remedies available to parties whose construction contracts were affected by the COVID-19 pandemic, there are remedies available to construction contracts affected by the COVID-19 pandemic. The affected parties may invoke the supervening impossibility or *force majeure* as a defence for their failure to perform.

3.15 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

Generally, the common rule of privity applies. This is the concept that contracts cannot be enforced by or against a person who is not a party to that contract. However, where a contract is specifically made for the benefit of a third party and such third party has accepted, then rights may vest in the third party. Assigns can also become entitled to claims in instances where the contract includes them. The law of agency is also an exception to the common privity rule. Under agency, the principal may sue and be sued on contracts made by his agent. Specific circumstances under which a third party may sue include statutory contracts on land or other property, and third-party insurance policies.

3.16 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

Direct agreements or collateral warranties are common. The need for collateral warranties may be determined by the underlying construction contract between an Employer and a Contractor. Collateral warranties act as security in construction projects where the Contractor may be carrying on construction on the strength of investment made by investors other than the employer. They also act as security to forward purchasers of the assets under construction. Collateral warranty agreements allow the party giving a warrant to warrant to the third party concerned with an interest in the project that it will perform its duties and obligations in accordance with the underlying construction contract. Therefore, the third parties can claim breach for the promise to comply with the underlying contract where the Contractor breaches the underlying contractual agreement.

3.17 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

Yes. When two parties are mutually indebted to each other, both debts being liquidated and fully due, then the doctrine of compensation comes into operation. The one debt extinguishes the other *pro tanto* as effectually as if payment had been made. The rights of set-off must relate to a transaction between the two parties, meaning that (P1), who owes money to (P2), may not set off the amount where (P2) is owed by (P3) and (P3) owes (P1). Furthermore, the counterclaim by (P1) must operate as a defence to the claim by (P2), and not as a separate cross-action.

3.18 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

Yes. Parties to a construction contract owe duty of care to each other, just as parties to any other contract would. Parties to construction contracts are expected to avoid any conduct that could lead to harm of the other party's contractual rights. Besides the duty of care that maybe express or implied in a contract, generally at common law, duty of care exists for parties in order to ensure that they refrain from conduct that has an injurious effect on the other party, and that they do not act negligently and recklessly, resulting in foreseeable risk to the other party. Therefore, the duty of care can exist concurrently with other contractual obligations and liabilities. Failure to exercise duty of care by one party may cause the offending party to be found liable under the law of delict also known as the law of tort.

3.19 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

In cases of ambiguity, the Courts prefer applying the golden rule of interpretation, which states that a contract or document must be given its ordinary and grammatical meaning of the language used. The other way the courts will deal with ambiguity is using the context of the text being debated upon. The courts may allow extrinsic evidence to be produced in determining the context and therefore meaning of a clause.

3.20 Are there any terms which, if included in a construction contract, would be unenforceable?

Yes. Terms that are against the law and terms that are against public policy would be unenforceable.

3.21 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

The employer enters into a separate agreement with the designer for the design work to be carried on by the designer. In that contract, the designer must give a direct guarantee in respect of his work. In that manner, the designer's obligations are absolute and can be enforced by the Employer in the event of breach by the Designer. With regard to the extent of liability, the terms of the guarantee are made to cover any part of the work limited to that which is the responsibility of the designer. The Designer is only absolved from liability over inability to perform obligations due to circumstances beyond his control, such as delays by the Employer or due to a supervening impossibility.

3.22 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

Decennial liability does not apply in the Zimbabwean jurisdiction. There is no compulsory requirement for its applicability or provision in construction contracts. However, it is optional for parties entering into a construction contract to include its applicability in their contracts.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

There are two ways through which general construction disputes are generally resolved in Zimbabwe. One way is by use of judicial courts, and the other, and most preferred in construction, is the alternative dispute resolution mechanisms such as arbitration, mediation, negotiation, and conciliation. Construction agreements always contain clauses on the dispute resolution mechanisms that will govern the contracts and they also dictate the process for appointing arbitrators. Therefore, disputes may be referred to the Commercial Arbitration Centre if parties nominate arbitration as a dispute resolution method or the disputes maybe referred to the Dispute Adjudication Board or the Alternative Dispute Solutions Centre for other forms of dispute resolution methods. If parties favour judicial court systems, then they provide for the court whose jurisdiction will apply for instance they may choose the High Court Commercial Division, a court specifically constituted to deal with commercial disputes.

Construction disputes relating to engineers may be submitted to the affiliate body of Engineers, the Engineering Council of Zimbabwe. The regulatory body has the authority to preside over complaints relating to engineers.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

Yes, the FIDIC construction contracts widely used in Zimbabwe provide for Dispute Adjudication Boards (DAB) as a form of dispute resolution mechanism that may be resorted to either as *ad hoc* or standing DAB. A dispute is referred for adjudication to an adjudicator by the administrator of the National Joint Practice Committee established by the Construction Industry Federation of Zimbabwe. When the dispute is referred to the adjudicator, the parties are required to submit their submissions and the said submissions will be determined by the adjudicator.

Interim dispute resolution mechanisms are also available through judicial court process. Interim relief may be obtained by an aggrieved party by filing for an urgent chamber or court application before the High Court Commercial Division where the Court may grant interim relief on an urgent basis. On the interim hearing, only the urgency of the matter brought is considered for determination, hence an application for this nature must be accompanied by a certificate of urgency. An interim relief is then issued pending the return date where final relief will be granted upon determination of the merits of the case.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

Yes. The construction contracts do contain arbitration clauses. The clause must be clear that arbitration will be the first choice in the resolution of a dispute. The clause will also provide for who has the prerogative of choosing an arbitrator and where the arbitration proceedings will seat (place of arbitration). Usually, the seat of the arbitration will depend on a number of factors, which include the nationalities of the parties to the contract, and which law they would elect to govern their contract. Arbitration seat rule is that the law of the place of arbitration is the applicable law. When a dispute arises, and the matter is referred

for arbitration, the arbitrator will make an award based on the submissions by the parties. Such an award is binding upon both parties. For the award to be enforceable in Zimbabwe, it has to be registered by the High Court of Zimbabwe.

4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

Yes, the courts recognise international arbitration awards, and they are enforceable in Zimbabwe. Zimbabwe has an international obligation to recognise and enforce international arbitration awards in light of the various international conventions it entered into such as the Convention on the Settlement of Disputes Between States and Nationals of Other States, and the Model Law on International Commercial Arbitration which basically governs the international bilateral investments and trade agreements between States for the reciprocal promotion and protection of investments by nationals of the contracting parties. Zimbabwe also acceded to the Convention on the recognition and enforcement of foreign arbitral awards and the said convention was incorporated into domestic law by enactment of the Arbitration Act [Chapter 7:15] which basically mirrors the Convention on the recognition and enforcement of foreign arbitral awards also referred to as the New York Convention.

There are present legal obstacles to the enforcement of international arbitral awards. In terms of the Arbitration Act, the High Court is empowered to refuse to recognise an award if another party opposing the registration award proves that the award emanated from an invalid law, the arbitration proceedings were carried in an unfair manner to the prejudice of the party against whom the arbitral award is made, the resolution of the issues were not contemplated by the arbitration agreement, irregularity in the procedure used by the arbitration tribunal, and if the arbitration award violates arbitration public policy.

From a practical point of view, enforcement of international arbitral awards has been time consuming and expensive where the other party against whom the arbitral award is given chooses to oppose the registration of an award.

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

There are three levels of courts that would be applicable, the Magistrates Court, which is the low level and determines disputes that are within the monetary jurisdiction of the court, the High Court which has the jurisdiction to deal with all and any type of disputes referred to it and acts as a court of appeal from the Magistrates Court, the Supreme Court which is the final court of appeal from the High Court, and the Constitutional Court which is also the final and highest court within the jurisdiction to determine matters of a constitutional nature.

The contract will state the court that will have jurisdiction in dealing with a dispute. Usually the High Court, which is divided into two divisions, the commercial division and the ordinary division allows an aggrieved party to file their dispute either by way of application procedure or by way of action procedure. Application procedure is only used where the matter does not have material disputes of fact and all evidence required for a determination is documentary. Such evidence is submitted accompanied by affidavits deposed to by the parties to the

proceedings. Once all affidavits and documents are submitted, parties must submit the heads of arguments that support their case. The dispute is set down for a hearing before a judge and parties, through which their legal representatives argue on the substantive and legal issues of the dispute. The judge then gives a ruling or judgment either on the day of arguments or some other time after the hearing of the arguments.

On action procedure, a dispute is registered with the court through summons to which the other party must give their defence against the summons. When all pleadings are filed, the parties are given an opportunity to settle the matter out of court by convening a round table meeting, when that fails, the matter proceeds for a pre-trial conference, where parties curtail issues for trial and attempt to solve their dispute before a trial is convened. The trial is the last stage where parties are called in to give testimonial evidence and their legal representatives make closing legal submissions before a determination is made by a judge.

Where one party is not satisfied with the ruling or judgement, they are at liberty to appeal against the determination to the supreme court where a bench of three judges will determine the appeal made upon consideration of the documents submitted and the legal arguments made. There is no room to appeal a supreme court decision unless it's on a constitutional matter.

Where the contractual dispute refers to a constitutional matter, then the High Court is empowered to deal with such matter failing which the Constitutional Court may only deal with the constitutional issues arising and give a final determination.

All proceedings from all court levels must be conducted within the time limits in the rules of the Court in question, and which vary between seven to 15 days within which each step of the pleadings or processes is submitted. Therefore, it normally takes four to 12 months before the matters at the High court are initiated and concluded. It also would generally take between two to six months before appeal matters are initiated and concluded.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

There is a provision in the law for the enforcing of judgments of foreign courts under common law and under statute law. Under common law, the requirements for recognition and enforcement can be found in judicial precedent. These requirements are (a) *the foreign court in question had the requisite international jurisdiction or competence according to our law*; (b) *the judgment concerned was final and has the effect of res judicata according to the law of the forum in which it was pronounced*; (c) *the judgment must not have been obtained by fraudulent means*; (d) *it must not entail the enforcement of a penal or revenue law of the foreign State*; (e) *it must not be contrary to public policy in this country*; and (f) *the foreign court must have observed the minimum procedural standards of justice in arriving at the judgment*.

Under statute law, the Civil Matters (Mutual Assistance) Act [Chapter 8:02] allows Zimbabwe to enforce judgments of a foreign country. Only countries that are designated in terms of the Act may have their judgments enforced in Zimbabwe. For the country to be designated, a statutory instrument is gazetted listing the country as designated to have their judgments enforced in Zimbabwe. Some of these countries as currently designated include South Africa, Bulgaria, Australia, Germany, Portugal, Italy, Zambia and Ghana amongst other countries.



Simbarashe Murondoti is the Senior Partner of Absolom & Shepherd Attorneys. He has vast experience in corporate and commercial law cases, both in litigation and transaction advisory. Part of his past work includes the recovery of 38 million Yuan (USD5.6 million) in a multi-jurisdictional complex investment dispute. He has also advised a superior court in Europe (Dresden) on Zimbabwe's currency laws. Additionally, he has been a speaker/delegate at high level events which include the Wilton Park Conference in the United Kingdom, the Tony Elumelu Entrepreneurship Forum in Lagos and the Youthspark Conference in Ghana. He is the chairperson of the Zimbabwe German Society and sits on four other boards. Simbarashe is also a 2023 Mandela Washington Fellow.

His notable work includes:

- Recovery of 38 million RMB (Approx. USD5.6 million) in a complex investment dispute.
- Successful litigation in a dispute over 25 ha of prime land with a market valuation of USD4.2 million.
- Advising a German based investor regarding disinvestment of valuable assets with an estimated value of USD12 million.
- Litigation in a shareholding dispute in a leading Life Assurance Company, with shares in dispute valued at USD5.8 million.

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Sandra Dizwani is a Senior Associate with Absolom & Shepherd Attorneys with experience in commercial and civil litigation. Her areas of specialty are land, mining, energy, construction and engineering and property law. Sandra has litigated on behalf of a number of commercial entities and individuals in the High Court and Supreme Court of Zimbabwe. She has recovered well over USD20 million worth of investment for her clients. Sandra is also an experienced conveyancer, and she is currently in charge of the firm's conveyancing portfolio. She has worked with some of the nation's prime real estate companies. Her litigation skills have been commended and complimented by judges sitting at the High Court.

Additionally, Sandra actively participates in the firm's social responsibility and moot programmes. She is a former moot court champion having won and participated in various moot court competitions during her days at law school. She was the best oralist and winner of the University of Zimbabwe Commercial law moot court competition in 2016, first Runner up University of Zimbabwe Nationality and Statelessness moot court competition in 2017, Participant of the African Human Rights regional moot court competition in 2017 (Held in Mauritius), first Runner up Nationality and Statelessness, national Universities competition in 2018.

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Absolom & Shepherd Attorneys is a corporate law practice in Zimbabwe. It offers a wide array of legal services in the fields of corporate, banking, commercial, investment and technology law. It handles multi-million-dollar transactions and disputes and identifies itself as a go-to market leader in corporate and commercial law. Among the significant mandates in 2022 was being lead advisor in the acquisition of a lucrative chrome miner, obtaining a court order for the recovery of USD8.1 million and advising a European diplomatic mission. The firm has remarkable talent and specialists in the fields of Mergers and Acquisitions, Investments, Construction and Engineering Law, Shareholder rights, corporate and commercial litigation among other related fields. The firm's client portfolio includes a European diplomatic mission in Zimbabwe, the shareholder in a large life assurance entity, a multi-national mining and energy concern among many other valuable clients. The firm's keen emphasis on excellent service delivery is embedded in its mantra, which compels all its stakeholders to hearken to the future of law practice.

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