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# THE INTERNATIONAL CONSTRUCTION LAW REVIEW

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## INTRODUCTION

Managing risk, and the allocation of responsibility for risk, are central to construction and engineering projects, wherever the projects are located around the world and irrespective of the sector. Risk is what governments, contractors, professionals and insurers focus on at the outset, when tenders are submitted and contracts entered into. It dominates, implicitly if not expressly, much of the administration of the contract during the construction period and it is right at the heart of dispute avoidance and dispute management. The consequences of misjudgements or errors in relation to risk can be grave. Much of this final ICLR of 2018 is concerned with risk: where it arises, and how to reduce it, or at least manage it.

We start with *Bond Call Insurance: Is It Worth the Candle?* in which Nicholas Brown and Ang Wee Jian consider the various ways in which contractors can manage the risks associated with on-demand performance bonds, particularly in relation to calls on the bond. The authors discuss the challenges faced by contractors who want to injunct a call on a bond through the courts. The discussion concentrates on the respective approaches in England and Wales, New York State, and Singapore and reviews the various, often ultimately largely unsuccessful, approaches contractors generally adopt in an attempt to strengthen their application for an injunction. This forms the backdrop for an interesting analysis of the pros and cons of bond call insurance, often overlooked by contractors as an option. The review focuses on two policies, issued by the United Kingdom Export Finance and the Swiss Export Risk Insurance. There are clearly challenges flowing from the onerous conditions frequently attached to entitlement and lengthy indemnification processes. However, for some contractors, such policies enable a competitive tender. While the utility of such insurance will undoubtedly vary from project to project, and from contractor to contractor, contractors, and those advising them, should be aware of the availability of this type of insurance, and this article provides a valuable reminder of the central issues.

Some 60 years after the first FIDIC form, the Red Book, was introduced, a second edition of the FIDIC suite of contracts has been launched. Frédéric Gillion, Rob Morson, Sarah Jackson and Chloé De Jager take the opportunity presented by the first anniversary of this release, to consider the new forms, *The New FIDIC Suite 2017: Significant Developments and Key Changes*. The review focuses on three important aspects, risk allocation, contract management and new claims and disputes procedures. Risk allocation, commercially at the heart of any contract, is largely unaltered. As for processes, both in terms of the management during the course of the project, and in terms of the management of disputes, we will need a few more years to be able to assess the impact on the industry of these changes, in particular the last two. It is hoped that the extensive changes to

the contract management processes combined with the complete rewrite of the claims and dispute process and the introduction of equal treatment of claims, whether of the contractor or the employer, will result in a more balanced and transparent contract, with a greater emphasis on reciprocity between the Parties. Consistent with this the authors conclude that proper use of the 2017 Edition should lead to improved contract management with more claims being resolved timeously and efficiently, and with consequently fewer disputes. Time will tell whether the new contracts are being used properly and without extensive amendments and whether the predicted shift is the result.

ICLR readers will recall Matthew Bell's contribution to Part 3 of the 2018 ICLR, *How is that even possible? Raising Construction Regulation from Grenfell Tower*. Professor Stéphanie van Gulijk continues the necessary and important discussion around how the construction industry prevents tragedies such as the Grenfell Tower fire in London or the Eindhoven Airport parking garage collapse, also in 2017, in her highly topical article, *Construction Quality Improvement: A comparative overview and discussion of the role of insurance in assuring construction quality and safety*. The backdrop to this article is draft legislation published in 2014 in the Netherlands, focused on improving construction safety, titled "Kwaliteitsborging voor het bouwen", in English "Quality Assurance for Construction". The Dutch Senate has postponed the vote on the amended draft legislation until next year, but if passed by the Dutch Senate at that point, this legislation will fundamentally change the supervision of building works and the rules concerning liability for construction failure. Van Gulijk's article considers the role of insurance in quality assurance and also draws on recent developments in two neighbouring jurisdictions, Belgium, where compulsory insurance of civil liability of builders, architects and others in the construction industry came into force in July 2018, and England, where a system of 'approved inspectors' was introduced several years ago. While each jurisdiction will have its own challenges, many of the issues are the same. The very recent bridge collapse in Genoa has again highlighted concerns relating to the safety of buildings and the effectiveness of building regulations. This is a case of constant vigilance being required.

International dispute resolution has in the last decades become ever more competitive, with the number of arbitration centres continuing to grow. Recent years have seen a trend towards international dispute centres promoting not just arbitration but also international commercial courts. Our fourth and final article, by Anne-Sophie Goapper, introduces readers to the newly created International Chamber of the Court of Appeal located in Paris and to its recently promulgated Protocols on Procedural Rules which apply to the International Chamber of the Paris Commercial Court and to this newly created Court. In *A new venue for international dispute resolution: the Paris International Commercial Chambers and bespoke procedural*

*rules* Goapper offers a comprehensive review of this new chamber for international disputes and discusses whether it will offer an attractive alternative for international litigants both to arbitration and to other EU and foreign international commercial jurisdictions. Although the article does not mention Brexit in terms, it seems likely that the possible Brexit was at least a partial driver behind the creation of this new jurisdiction.

Next, we have Correspondents' Updates from the United States and South Africa, respectively. Both correspondents write about arbitration in their jurisdictions, highlighting the continued competition between arbitration forums, following on from the previous article by Goapper on the possible attractions of the latest French court proposals. We start with a view from the United States arguing for arbitration in preference to court proceedings. In *The Appeal of Appellate Arbitration*, Philip Bruner reviews the options for, and the increasing popularity of, appellate arbitration and summarises the differences between the different institutions' rules, concluding that appellate arbitration is the "wave of the future". This is followed by the report of Patrick Lane SC from South Africa: *The New Dawn in International Arbitration in South Africa* which provides a timely update on the current position and developments in arbitration in South Africa. Lane anticipates that the construction industry in South Africa will be considerably impacted by the arguably overdo promulgation of legislation. Following some political challenges, legislation has come into force which brings South Africa in line with international development and which incorporates the Model Law.

We conclude with a review by Dr Colin Ong QC of the second edition of Ben Patten QC's and Hugh Saunder's comprehensive *Professional Negligence in Construction*, described by Ong as a useful book for experienced lawyers, project management and construction industry professionals.

CHANTAL-AIMÉE DOERRIES QC  
DOUGLAS S JONES AO