

INTRODUCTION

As the construction industry develops in the modern age, so too do its challenges. With growing technological capabilities and globalisation come new problems in collaboration; the assessment of damages continues to give rise to difficulties in construction disputes; and the prevention principle remains a hotly debated issue. Part 3 of the 2019 *International Construction Law Review* provides readers with key insights into these topics.

The first article, “Collaborating and Contracting for Success: How Future-Proofed are the New NEC4 and FIDIC 2017 Suites for the Needs of the Global Construction Industry in the Technological Age?”, authored by Charles Blamire-Brown and Danielle Griffiths, explores the relevance of the 2017 editions of the NEC4 and FIDIC Standard Contract suites in light of a modernising construction sphere. Rapidly increasing globalisation and technological innovation have significantly changed the nature of construction contracts, chiefly through a renewed focus on collaboration. The authors argue that this focus must now drive reform in standard contract structures. The ways in which the NEC4 and FIDIC suites facilitate collaboration are considered under four topics: use of technology (with particular focus on BIM), risk allocation, contract management and dispute resolution. Attention is then turned to NEC-specific conditions based around incentivising collaboration between parties to a project, such as the Alliance Contract. Relevantly, the Alliance Contract and NEC4 are further explored in the United Kingdom Correspondent’s Report later in this Part.

Next, we enter the challenging area of damage recovery, in an article by Phillip Bruner entitled “Damage Recovery Measurement Issues Unique to Construction Disputes”. While the measurement of damages can be complex, construction disputes give rise to an additional layer of difficulty, resulting in what Bruner characterises as a “veritable Gordian knot”. The paper begins with a case note on a recent decision in the United States, *Northern Petrochemical Co v Thorsen & Thorshov Inc* 211 N W 2d 159 (Minn 1973), a negligent breach of contract case in which the Minnesota Supreme Court grappled with the “extraordinary confusion” of damages measurements. Bruner then provides an overview of the numerous recognised concepts for measuring damages, including the doctrine of contract constraint, and the doctrine of economic loss and substantial performance, concluding that uniformity of legal remedies applicable to modern construction disputes is far from being achieved. Interestingly, Bruner concedes that such unification of damage recovery principles will likely remain no more than a vision and proposes not a solution, but a way of managing the “Gordian knot”; that is, a better understanding of the nuances in the application of the various approaches to damage measurement and acknowledgment of its difficulties.

We then move to “The Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Manufacturing and

Supply Contracts for International Construction Projects” in which the authors, Seung-Hyeon Kim, Mino Han and Umaer Khalil, debate the importance of considering the CISG during the drafting of contracts. The relevance of the CISG in international construction projects is often underestimated, despite its relatively wide application and potential to resolve issues yet undecided in common law jurisprudence. This paper is underpinned by a case study of a recent SIAC arbitration arising out of a supply contract between a Korean steel manufacturer and an Australian contractor, where the concurrent operation of the prevention principle with a time-bar notice provision was a critical issue. The authors commence with a detailed exploration of existing jurisprudence on the “prevention principle v time-bar conflict issue”, which remains unsettled in some common law jurisdictions. The authors then turn to a potential solution offered by the CISG under article 80, which provides that a party cannot rely on a failure of the other party to the extent that such failure was caused by the first party’s act or omission. Article 71 is presented as a further instance of where the CISG eschews conventional common law remedies, regarding a supplier’s right to withhold performance. The article highlights some interesting areas where the CISG can have significant implications for international construction contracts and encourages greater consideration of the CISG at the drafting stage.

Aptly, our final article for this Part deals further with issues relating to the prevention principle, considered by the English Court of Appeal in *North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744; [2018] BLR 565; 180 Con LR 1 (“*Cyden*”). Max Twivy’s “The Prevention Principle After *North Midland v Cyden Homes*” considers the consequences of this decision, and the Court of Appeal’s conclusion that the juridical basis of the prevention principle was the implication of a term prohibiting acts of prevention by the Employer, rather than operating as a rule of law or legal principle. After undertaking a comprehensive analysis of the international jurisprudence on the issue, the author suggests that reform to the application of the principle is needed. While the consequences of the prevention principle can be harsh, it is argued that the principle continues to serve an essential purpose in disallowing a party from benefitting from its own act of prevention. Therefore, a middle ground is proposed: rather than setting time at large, the Employer should be prevented from levying liquidated damages only in the periods of delay which have been caused by the Employer’s own acts. This article will continue to spark debate between many readers.

Part 3 then presents two Correspondent’s Reports, providing the most recent construction law updates from the United Kingdom and Spain. Our first Correspondent’s Report, originating from the United Kingdom is by Nicholas Downing, James Doe, Susannah Davis and Noe Minamikata. The authors embark on a sweeping overview of developments in UK construction law, spanning Value Added Tax to the Construction Industry Council Revised Building Information Modelling Protocol to no less than nine recent decisions by the UK courts. Appropriately, this Report also elaborates on a number of

topics explored previously in this Part. Attention is paid to the NEC4 Alliance Contract, building upon the article by Charles Blamire-Brown and Danielle Griffiths, and we are provided with a short case summary of the English Court of Appeal's decision in *North Midland v Cyden Homes*, complementing Max Twivy's earlier article. Readers interested in the development of English law will appreciate the wide ranging and thorough analysis offered.

Next, we have a Correspondent's Report from Spain, by Dr Rosa Milà Rafel, exploring the application of the Spanish Construction Act. While the Construction Act was enacted over 19 years ago, the Spanish Courts have only recently begun to effectively apply it. The Report therefore analyses recent Spanish Supreme Court judgments on a number of contentious issues in the Construction Act, particularly on the liability of parties within a construction dispute. Notably, the Construction Act is restrictive on the question of which parties to a construction project can also be a party to a suit. Under the Act, it appears that only owners and third-party acquirers of buildings possess a right to sue and only construction professionals within a provided closed list can be liable. This Report, containing a comprehensive explanation of the Act in conjunction with the existing Spanish Civil Code, will be especially valuable to readers who wish to commence work or have ongoing projects in Spain.

Part 3 of 2019 concludes with two book reviews. The first is authored by Dr Donald Charrett, who examines Charles O'Neil's *Global Construction Success*. In this book, O'Neil, with the assistance of 17 highly experienced industry practitioners, investigates the elements required for a successful construction project. Uniquely, the book focuses on the role of human dynamics in influencing the outcome of a construction project, including themes such as teamwork, communication, and corporate and project management. The incorporation of perspectives from a wide variety of disciplines within the construction sphere is regarded by Dr Charrett as "one of the book's great strengths". Indeed, the authors provide practical insights from government, engineer and financier perspectives, making this a useful read for all stakeholders involved in a construction project.

Our final contribution reviews the second edition of the Global Arbitration Review's *The Guide to Construction Arbitration* ("*Guide*"). The reviewers, Andrew White, Hyun Ah Park and Geary Choe, commend the *Guide* for "skilfully" compiling information from a wide range of sources rich in expertise, being essential to practitioners in construction arbitration. Readers of the first edition will likely find the second to be a worthy investment, as it incorporates new material ranging from developments in international arbitration, to the FIDIC Suite of Contracts and region-specific updates on construction arbitration. Ultimately, demand for comprehensive guidebooks like the GAR *Guide* is likely to continue to grow as the arbitration and construction industries develop in close association.