

INTRODUCTION

Part 3 2020 of the ICLR is published against the background of unprecedented worldwide anxiety and economic uncertainty. The Covid-19 pandemic, which has struck all inhabited corners of the world, has profoundly affected the way that we view our global connectedness. Travel bans, self-isolation and quarantine have all limited the scope of our physical movement. This does not, however, require us to be disconnected from those living away from us. Our growing appetite for innovation and developments in technology have resulted in inventive and original solutions to address our physical limitations. It is therefore only fitting that, in this Part, we are fortunate to have a particularly international breadth of articles and Correspondent's Reports. The scholarship in this issue draws from jurisdictions as diverse as Australia, Chile, South Africa and Malaysia. The comparative nature of these articles is reflective of the global networks that remain even during a global pandemic.

We begin with "How Do International Construction Arbitrators Make Their Decisions? The Status of Substantive Law", which was written by Haytham Besaiso and Peter Fenn, and has been peer-reviewed by the ICLR Peer Review Board. This article explores the decision-making processes of international construction arbitrators. It has often been said that the decision-making processes of arbitral tribunals are like a "black box" – secretive and opaque. Calls for greater transparency of arbitral reasoning, or at least of the "substantive norms that influence arbitrators' decisions" have increased in recent years.¹ In response to the paucity of legal scholarship in this area, Besaiso and Fenn conduct a detailed analysis of arbitral decision-making behaviour, drawing upon their own empirical research. Besaiso and Fenn consider the data collected from published arbitral awards and semi-structured interviews with 28 construction arbitrators of several different nationalities. The authors use this data to examine the attitude of arbitrators toward the duty to apply the law and the effect of substantive law on tribunal decisions regarding contractual interpretation. They conclude that, in the majority of cases, international construction arbitrators respect their duty to apply the law and do indeed apply it, unless the parties have agreed otherwise. The interview template and the profiles of the research participants have helpfully been appended to the article, and provide greater insight into Besaiso and Fenn's empirical research.

Next, we turn to Janine Stewart, Grant de Lisle and Katie Karpik's article, "A Global Perspective on Extensions of Time in Construction Projects". In this paper, Stewart, de Lisle and Karpik consider the application of the all-important extension of time clause in construction contracts. Their discussion of extension of time clauses encompasses the adjacent issues

¹ Besaiso, H and Fenn, P, "How do International Construction Arbitrators Make their Decisions? The Status of Substantive Law" [2020] ICLR 199, 201.

of concurrent delay, mitigation and acceleration. The scope of this article is a particular strength. The authors' analysis includes perspectives from numerous jurisdictions: New Zealand, Australia, the UK, continental Europe and the Middle East, comparing the treatment of time between civil and common law jurisdictions. These topics are also discussed in relation to standard form contracts, such as the FIDIC Red Book 2nd Edition 2017 and the NZS3910 (the standard form contract widely used in New Zealand). Construction arbitration practitioners across the globe are likely to find utility in this piece, particularly due to the clear and concise explanations of the law and the comparison of international perspectives.

Our final article in this Part is by Guillermo Alarcon Zubiaurr, entitled "The Project Definition Role in the Election of a Public Project Delivery Model in Australia and South America". The article examines the extent to which the legislative frameworks from Australia and South America recognise the role of project definition of public infrastructure projects. In Zubiaurr's view, project definition is a crucial aspect of project delivery which, if properly implemented, prevents disputes and reduces inefficiency. Zubiaurr undertakes a comparative analysis of project definition legislation and regulations in the Australian states of New South Wales and Victoria, and Chile and Peru. He concludes that the legislative frameworks in New South Wales and Victoria, which were developed after extensive policy research and advice from relevant stakeholders, adopt best practices and give government agencies the necessary flexibility to select the most appropriate delivery model for the project. On the other hand, the legislation in Peru and Chile are more rigid and restrict the delivery models available for use, which are likely to result in avoidable delays and inefficiencies. This article usefully provides a detailed explanation of the project delivery frameworks and has a thorough comparative element, which will undoubtedly be of assistance to those working, or seeking to work, in these jurisdictions.

We are also very fortunate to have, in this Part, four Correspondent's Reports from around the world. We begin with the Correspondent's Report from Germany, written by Mathias Fabich and Viliam Koprda, entitled "EIC Contractor's Guide Position on the FIDIC Yellow Book 2nd Edition 2017". The federation of European International Contractors (the EIC) are a group comprised of members from European construction firms representing the interests of the construction industry in the region. In 2020, in line with previous practice, the EIC published a guide to the FIDIC Conditions of Contract for Plant and Design-Build (the Yellow Book) 2nd Edition 2017. In this article, Fabich and Koprda summarise the observations and analyses in the EIC Guide, providing a much-welcome European viewpoint to the FIDIC 2017 Yellow Book. The authors provide a detailed summary of the EIC's position of key individual clauses of the Yellow Book, before concluding that, in some respects, the 2017 Yellow Book is too prescriptive and more akin to a project management manual rather

than a standard form contract setting out the obligations and balance of risks between parties. This work continues a series of articles published by the ICLR on the EIC Contractor's Guide position on the FIDIC suites, including on the original FIDIC Yellow Book 1999, which was published in Part 3 2003.

We then have the Correspondent's Report from Malaysia authored by Mohanadass Kanagasabai, which is a case note of the recent Malaysian Federal Court case *Jack-In Pile (M) Sdn Bhd v Bauer (Malaysia) Sdn Bhd* [2020] 1 MLJ 174. The case involved issues surrounding the Malaysian Construction Industry Payment and Adjudication Act 2012, and in particular whether it should be construed as having retrospective or prospective applicability. At the time of enactment, this was an unsettled question. In *Jack-in-Pile*, the Federal Court finally resolved the issue by finding that the Act could only be applied prospectively. Kanagasabai observes that this ruling would impact funds paid out under adjudication decisions which have, by this decision, now been rendered invalid. Of course, the practical consequences of the decision are yet to be seen.

Our next Correspondent's Report arrives from South Africa, in Patrick Lane's "The Tension between the Application of Good Faith and *Pacta Sunt Servanda*". Lane examines the contrasting treatments of the doctrine of good faith in contract law between the South African Constitutional Court and the Supreme Court of Appeal, and in particular the effect on the principle of *pacta sunt servanda*. Lane notes that the approach in the Constitutional Court is broader than that in the Supreme Court of Appeal, and elevates good faith and public policy in contracts to an actionable right in itself. Interestingly, the Constitutional Court considered the role of "ubuntu", a uniquely South African concept capturing the values of solidarity, humanity and compassion in defining good faith. Lane, however, argues that the approach adopted by the Supreme Court of Appeal strikes a better balance between the promotion of good faith and fairness, and commercial parties' freedom to contract. The tension between the courts is certainly thought-provoking and a stimulating insight into South African contract law.

Finally, Paul Starr provides us his Correspondents' Report from Hong Kong, considering a diverse range of developments in the Hong Kong legal sphere, especially in the context of the Covid-19 pandemic. One of the topics considered is the *Arrangement Concerning Mutual Assistance in Court-Ordered Interim Measures in Aid of Arbitral Proceedings by the courts of China Mainland and of the Hong Kong Special Administrative Region*, which came into effect on 1 October 2019 and allows parties in Hong Kong and Mainland China seated arbitrations to apply for interim measures in each other's jurisdictions. Starr also comments on the new third-party funding legislation which entered into force on 1 February 2019, before turning to updates on construction case law since his last Correspondent's Report published in the ICLR in 2016. Of particular interest is *Maeda Kensetsu Kogyo Kabushiki Kaisha v Bauer*

Hong Kong Ltd [2019] HKCFI 1006 (HCCT 5/2018) which elaborated the tests for overturning an arbitral award due to a serious irregularity giving rise to substantive injustice and for leave to appeal on a question of law. Starr then finishes with statistics from Hong Kong arbitral institutions and a prediction on what the future of construction law in Hong Kong may hold.

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