INTRODUCTION

We are pleased to provide the third instalment of the *International Construction Law Review* for 2021, which brings with it a host of timely and insightful contributions spanning several jurisdictions. The articles in Part 3 contain comprehensive analyses of developments in the landscape of dispute resolution for international construction projects and review the responses of governments and institutions to ongoing changes and challenges facing the construction industry.

We begin with Philip Bruner's article, "Joinder of Nonsignatories in International Arbitration", an analysis of the interaction between the New York Convention and US domestic law on the issue of joinder. This article follows the 2020 decision of *GE Energy*[1] in which the US Supreme Court found that nonsignatory third parties could compel international arbitrations and be joined in them under the New York Convention and US Federal Arbitration Act. Bruner highlights that, in doing so, the Supreme Court found that, despite Article II(2) of the New York Convention requiring agreement in writing to submit to arbitration, a nonsignatory party could still be joined if they were found to have consented to arbitration under the written agreement using traditional state law principles. The Supreme Court's finding that the Convention does not prohibit the application of domestic law to nonsignatories is, in the author's view, the continuation of a decades-long trend by US courts towards supporting and promoting arbitration for complex commercial cases. The article then outlines the landscape of domestic law in the US, covering 15 legal principles which may be available to allow enforcement by, or against, nonsignatories, including assumption, incorporation by reference, estoppel, agency and implied consent. In outlining these principles, Bruner makes the case for a judicial movement towards favouring joinder of third parties in international arbitration.

Next, Kieran Fano explores the scope of contractual rights protection under bilateral investment treaties (BIT) for international construction projects. His article, "'Building Bridges' in Investor-State Arbitration: International Construction Projects and the Protection of Contractual Obligations Under Bilateral Investment Treaties in a Post-Brexit World", acknowledges and responds to the forecasted rise of investment treaties in UK economic policy following Brexit. Fano highlights the benefits of having disputes fall under the investor state dispute settlement (ISDS) provisions of investment treaties. These include providing access to the International Centre for Settlement of Investment Disputes (ICSID) and remedies under international law instead of those awarded in domestic courts which may

[1] *GE Energy Conversion France SAS Corporation v Outokumpu Stainless USA LLC* 140 S Ct 1637 (2020).

be subject to delays and legislative hurdles. In this vein, Fano conducts a thorough analysis of several decisions by investment tribunals to discern their approach to deciding which types of construction claims would constitute treaty violations (rather than purely contractual claims) for the purposes of determining jurisdiction, and therefore access, to ISDS. In this section, the author considers claims relating to non-payment, performance guarantees, failure to conclude negotiations, legislative changes and termination. In the second part, Fano explores umbrella clauses, broad provisions which seek to bring the full scope of a host state's obligations regarding investments within the remit of the BIT. Here, the author analyses the differing views of tribunals on the issue of whether an umbrella term can transform a contractual claim into a treaty claim. We return to the topic of developments in UK policy on construction projects later in Part 3, in Nicholas Downing's UK Correspondent's Report.

Our next article, from Professor Renato Nazzini, James Pickavance and Julian Bailey, "Navigating the Quagmire: Conflicts in International Construction Arbitration", proposes to do just that – navigate the host of ancillary conflicts which may arise in the process of dispute resolution. The article looks at the capacity of English law, in the context of international construction disputes, to respond to issues of conflicts of laws and both perceived and real conflicts of interest. The authors provide several, practical examples for readers and practitioners demonstrating how these conflicts may manifest, and analyse recent English cases including *Enka v Chubb*[2] and *Halliburton*[3] to offer guidance on their resolution. Nazzini, Pickavance and Bailey first outline four main approaches to resolving issues of conflict of laws: (1) giving effect to the parties' specific choice of laws; (2) inferring that the choice of law of the main contract applies to the arbitration clause; (3) applying the law of the seat; and (4) construing the contract to give validity to the arbitration agreement. The authors then turn to conflicts affecting arbitrators, addressing issues of impartiality and independence as well as best practice on disclosure. The authors finally address issues affecting expert witnesses, turning to English civil procedure law to analyse uncertain conflict of interest questions and the developing legal standards for the independence of expert witnesses. In doing so, Nazzini, Pickavance and Bailey deliver a comprehensive guide on conflicts about conflicts.

We are fortunate to have two Correspondent's Reports in Part 3, from the UK and Austria. First, Nicholas Downing and his co-authors deliver the UK Country Review, an overview of recent government publications and initiatives relating to the construction sector. The authors' review of

[2] *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* (SC) [2020] UKSC 38; [2020] 2 Lloyd's Rep 449; [2020] 1 WLR 4117.

[3] *Halliburton Company v Chubb Bermuda Insurance Ltd* (SC) [2020] UKSC 48; [2021] BLR 1; [2021] 1 Lloyd's Rep 1; [2020] 3 WLR 1474.

key policy and strategy developments in the UK is of particular interest because it comes at a time of significant change and adaptation demanded by Brexit and the Covid-19 pandemic. The authors guide readers through new initiatives including the *Construction Playbook* on procurement by government and public sector clients, updates to the NEC4, RIBA and FIDIC suites of contracts, new draft building safety legislation and a *National Infrastructure Strategy* focusing on economic infrastructure and responses to the climate crisis.

Wolfgang Wiesner writes from Austria on "The Austrian Contract Form OENORM B 2203 for Underground Works: A Well-Established Alpine Predecessor of the FIDIC-ITA Emerald Book". This Report builds on the contribution by Gillion et al in Part 4 2019 of the *ICLR* on the FIDIC Emerald Book and Geotechnical Baseline Reports.[4] In this report, Wiesner heralds the unique standard form contracts for underground works in Alpine countries. He argues that their decades-long success with underground structures including cross-Alps tunnels, provided a tried and tested model for the Emerald Book. In particular, Wiesner offers a detailed insight into the standard contract forms provided by the Austrian Standards Institute and the procedure for geotechnical design emerging from the Austrian Society for Geomechanics, both of which deliver useful principles and methodology for underground construction projects, particularly in the context of unpredictable ground conditions.

Finally, Part 3 contains a helpful review by Kevin Pascoe of *The International Compendium of Construction Contracts* edited by Phillip Greenham and the Society of Construction Law, Australia. The *Compendium* collates key issues emerging from construction contracts, with each chapter dedicated to a different country. Pascoe heralds the book as a useful reference work for readers seeking to compare the varied approaches of different jurisdictions to similar construction law issues, an important endeavour in a time of increasing internationalisation in the construction industry.

Together, these articles provide yet another collection of diverse and thought-provoking insights into topical issues in construction law which we hope will be interesting and useful for all readers of the *ICLR*.

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[4] Gillion, F, Blamire-Brown, C, Morson, R and Frye, R, "FIDIC Emerald Book and Geotechnical Baseline Reports–Digging into the Use of GBRs in Underground Works", [2019] ICLR 506.