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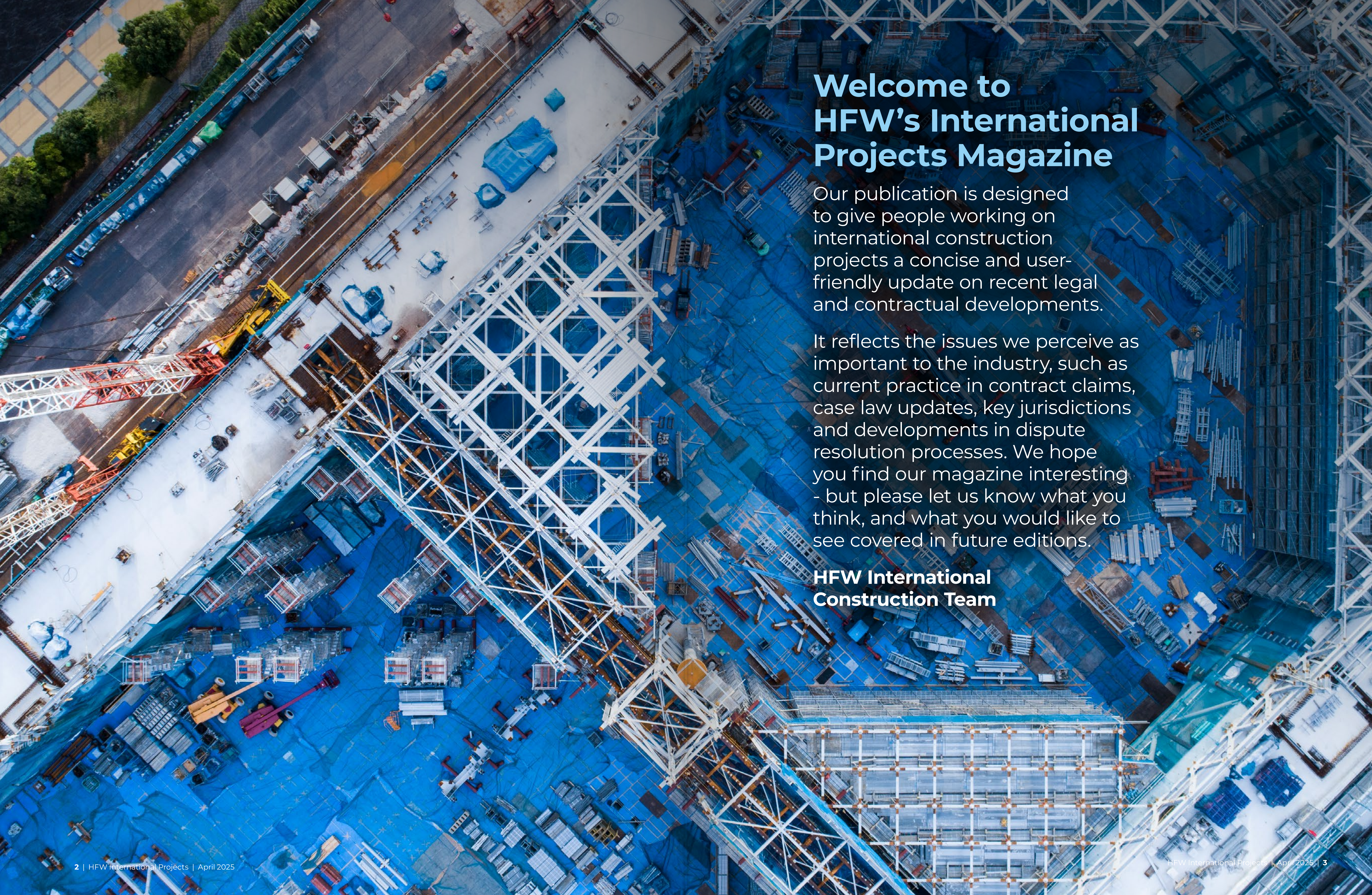

Welcome to HFW's International Projects Magazine

Our publication is designed to give people working on international construction projects a concise and user-friendly update on recent legal and contractual developments.

It reflects the issues we perceive as important to the industry, such as current practice in contract claims, case law updates, key jurisdictions and developments in dispute resolution processes. We hope you find our magazine interesting - but please let us know what you think, and what you would like to see covered in future editions.

HFW International Construction Team

No Variation Instruction: no payment?

The recent Singapore appellant court judgment, *Vim Engineering v. Deluge Fire Protection* [2023] SGHC(A)2, has provided an illuminating review of the law concerning variation instructions. The case provides timely guidance for contractors faced with the age-old problem of variations where it has failed to obtain the written instructions stipulated by the contract. Whilst the case was decided in the Singapore courts, the judges drew heavily on a review of UK authorities, and therefore provides useful commentary for all lawyers operating in common law jurisdictions.

The case concerned a 54-storey residential building. The main contractor hired Deluge as its subcontractor to undertake certain M&E work, and Deluge in turn employed Vim to carry out the installation and testing of pipework. Vim sought payment for variations which Deluge refused. Vim left the project site before the works were completed.

At first instance, the Singapore High Court rejected Vim's claim and so the sub-subcontractor took the case to the Singapore appellant court.

Variations were dealt with by clause 16 of the contract, which included the following text:

'Any variations… shall be on a back-to-back basis with the Main Contract. Such variations shall be carried out only with written instruction[s] from [Deluge's] Project Manager….'

Deluge did not issue any written instructions for variations. Instead, it issued oral instructions and provided drawings detailing the changes required. In addition, Deluge's Project Manager counter-signed variation work forms issued by Vim, but expressly did so as an acknowledgement that the work had been undertaken, with the proviso that payment would be subject to the main contractor's approval.

Deluge had successfully argued at the initial High Court trial that clause 16 operated such that a variation instruction was a condition precedent to payment. No written instructions were issued under the clause and so there could be no entitlement to be paid.

The appellant court came to the opposite conclusion, finding that: (1) a written instruction was not a condition precedent under the wording of the clause; (2) Deluge had in any event waived any requirement for a written instruction.

"The courts will be cautious about enforcing a requirement for a written variation instruction as a condition precedent."

Condition precedent

The court concluded that clause 16 was "*not drafted in a stringent manner requiring strict compliance*". Therefore, Vim's failure to obtain written instructions was not fatal to its claim.

It said that a variations clause might expressly require a written instruction as a condition precedent to payment. Sometimes such a provision operates so that following the owner's request for an item of work to be undertaken, the contractor notifies that it is additional to scope, subsequent to which the owner can decide whether to issue a formal variation instruction, which is required to trigger payment. This approach is justified because an employer legitimately wants an opportunity to consider and potentially withdraw a request for work once it becomes aware it is a variation.

The court concluded that the provision was not drafted in this way: "*Clause 16 does not state that if there are no written instructions for variations from Deluge's project manager, Vim will forfeit any right to payment…*". It also emphasised that the contract contained no provision to allow Vim to give written confirmation of the verbal instructions which had undoubtedly been given.

The judgment also recognised that over the years the courts have been anxious to avoid the injustice of strict condition precedent variation clauses. This has led to the courts circumventing strict application, with arguments such as the implied promise to pay and waiver, (see insert box "No written instruction").

Waiver

Waiver arose because of the way Deluge's Project Manager managed the change administration process. As noted above, Vim submitted variation work forms which the Project Manager signed, stating on the document that the claims required the main contractor's approval before Vim was paid.

The court emphasised that waiver may occur where a party relinquishes a contractual right. A party may have two inconsistent rights and if it elects to exercise one of those rights, it will be held to have abandoned the other. This occurred when the Project Manager stated that entitlement to be paid was subject to the main contractor's approval because this was inconsistent with a right to reject the claims owing to a lack of a written instruction.

It stated: "*it was irreconcilable for Deluge's representatives to sign the variation work claims and include written comments that these would be subject to [the main contractor's] approval, and then for them to subsequently insist that the work ought to have been carried out only under written instructions from Deluge pursuant to clause 16 of the contract.*"

Lessons to be learnt

The courts will be cautious about enforcing a requirement for a written variation instruction as a condition precedent. There are many arguments that contractors successfully employ to circumvent the strict wording of such clauses.

As an owner managing a project, to successfully rely on the requirement for a written variation, it is necessary to operate the change process carefully and strictly in accordance with the contract. In this case, Deluge became unstuck because it purported to pass responsibility for denying the variation onto the main contractor, even though that was not what the contract provided for.

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No written Instruction: Checklist of contractor arguments

The following arguments are those typically relied upon by contractors where no written instruction has been issued.

1. The requirement for a written instruction is not an operative condition precedent for payment. See case note.
2. The parties have entered into a standalone agreement (express or implied) to amend the contract scope, rather than operating the contractual variation mechanism.
3. Waiver or estoppel. See case note.
4. Implied promise to pay. This arises where the owner fails to give an instruction in the mistaken belief that the item of work is within scope, but this assumption is subsequently proved to be incorrect. See *Molloy v Liebe* (1910) 102 LT 616 PC.
5. Power to grant or determine an entitlement falls within the arbitrator's power of review. See *Brodie v. Corp Cardiff* [1919] AC 337.
6. Unjust Enrichment and Quantum Meruit.
7. The entitlement to be paid for the work arises under a separate collateral contract.
8. An entitlement to be paid for additional work arises under a different contract provision, such as the ground conditions clause.

Misrepresentation: Comparison of law in the UK, Australia and Middle East

If a party makes a false statement that induces another party to enter into a contract and that party suffers a loss, the party that made the false statement could be liable for a claim in misrepresentation. Misrepresentation claims are strategically important in construction disputes, particularly where a party's ability to bring a claim under the contract is limited by exclusion or exclusive remedies clauses and/or caps on liability.

In these circumstances, parties may wish to look outside the four corners of the contract in order to explore other avenues for a claim; and a claim for misrepresentation may present such an opportunity. We discuss below how the misrepresentation laws are considered under English law, in Australia and across the Middle East.

Fundamental ingredients for misrepresentation claims

Under English law, to bring a misrepresentation claim the representor must have made a false statement of fact (express or implied) that is relied upon by the representee, which consequently induces entry into the contract, and causes loss to the representee.

Australia has similar requirements for misrepresentation, but the terminology differs. The most common cause of action is for "misleading or deceptive conduct" under the Australian Consumer Law (MDC). In Australia, a misrepresentation claim can cover conduct (including silence) as well as literal statements of information. The Australian regime specifies that the MDC must occur in the course of trade or commerce and "bear a trading or commercial character". Similar to English law, a misrepresentation claim in Australia does not need to be strictly fraudulent, unlike in some Middle Eastern jurisdictions such as the United Arab Emirates (UAE), Saudi Arabia (Saudi), and Kuwait.

In the Middle East – specifically, UAE, Saudi and Kuwait, for a misrepresentation claim, a deceptive representation needs to be made that is relied on by the representee, which induces the representee into the contract.[1] Furthermore, a representation can be made through conduct or the omission of information.[2] However, the deception must be made on a fraudulent basis. Additionally, in Saudi, contractual mistakes are recognised, according to the conditions outlined in Saudi law.

Source of misrepresentation laws

English law

There are three categories of misrepresentation under English law - fraudulent, negligent and innocent.

- A fraudulent misrepresentation (founded in the tort of deceit) is one that has been made knowing it is false, or without belief in its truth, or recklessly as to its truth.
- A negligent misrepresentation (a statutory claim arising under Section 2(1) of the Misrepresentation Act 1967 (MA 1967)), is one that is made by the representor without having reasonable grounds for believing in its truth. A negligent misrepresentation could, therefore, potentially be made carelessly.
- An innocent misrepresentation (arising from an amalgamation of common law principles and Section 2(2) of MA 1967) is one which has been made entirely without fault on the part of the representor. These claims are rare in practice as they only give rise to damages in very specific and limited circumstances.

Australia

In Australia, MDC originates from a single statute – Section 18 of the Australian Consumer Law (ACL). Unlike most other similar jurisdictions, the ACL applies to corporations – it is not confined to protecting individual "consumers" from the conduct of businesses. Section 18(1) of the ACL provides that "*A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive*".

"Parties may wish to look outside the four corners of the contract in order to explore other avenues for a claim; and a claim for misrepresentation may present such an opportunity."

Middle East

The misrepresentation regimes for the UAE, Saudi, and Kuwait originate from their respective civil codes. In Saudi, the provisions of the KSA Civil Code are influenced by the Islamic principle of "gharar", which prohibits uncertainty or deceit in contracts. As a result, misrepresentation is prohibited, and contracts affected by deceit or fraud can be invalidated or may entitle claimants to other remedies.

Standard of proof for misrepresentation claims

English law

Under English law, the required standard of proof is always "on the balance of probabilities" but in practical terms English courts apply stricter standards to be persuaded that an allegation of fraudulent misrepresentation has been successfully established compared to negligent misrepresentation.

Whilst the standard of proof for fraudulent misrepresentation is high, it is sufficient to show that the representor acted recklessly. That is to say that the representor was indifferent to whether the statement was true or false.

The standard of proof for negligent misrepresentation is lower.

Australia

As for Australia, with the exception of representations as to future matters discussed below, claimants must prove the impugned conduct to the high evidentiary onus imposed by Sections 18 and 236 of the ACL. Specifically, the following must be established:

- The conduct occurred in the course of trade or commerce and '*bear[s] a trading or commercial character*';
- The conduct must, as a question of fact, be objectively misleading or deceptive or likely to mislead or deceive, and must lead or be capable of leading the recipient into error, taking into account the surrounding circumstances and context, including the target audience which may be of varying experience and credulity;
- The claimant subjectively relied upon the conduct; and
- Causation, i.e. that the claimant's reliance on the misleading and deceptive conduct was the proximate cause of its losses, the loss must have "flowed directly from the inducement".

Middle East

In the UAE, Saudi and Kuwait, because of the focus on fraudulent deception, the standard of proof is high. In the UAE, for example, the victim of misrepresentation must show that (i) they were deceived by the misrepresentation; and (ii) that the deception was intentional.

Burden of proof

English law

Under English law, the burden of proof depends on the category of misrepresentation. In fraudulent misrepresentation claims, the burden of proof is on the claimant to demonstrate each of the evidential tests have been met.

However, for negligent misrepresentation claims, the burden of proof is reversed. Once a representee has established that a false statement has been made, the burden of proof is on the representor to prove that it reasonably believed in the truth of the representation that it made. This in practice makes negligent misrepresentation claims potentially significantly easier for a potential claimant to succeed.

Australia

In Australia, the burden of proof for an MDC claim is on the claimant. That changes only in respect of representations as to future matters (meaning predictions, forecasts or projections), where the burden is shifted to the defendant who bears the burden of proving that the statement was made on objectively reasonable grounds. Allegations of representations as to future matters may be made for strategic and tactical purposes in the course of construction disputes because the reversal of the burden of proof can exert significant pressure on a defendant who may find it difficult to adduce evidence of the reasonableness of its representations.

Middle East

In the UAE, the claimant bears the burden of proof. This is the same for Saudi and Kuwait.

Remedies for a successful misrepresentation claim

English Law

Under English law, the remedy for a successful fraudulent misrepresentation claim is damages.

A successful claim for fraudulent misrepresentation can provide the key to unlock an otherwise copper-bottomed contract in two respects. First, as a matter of public policy, it is not permissible to exclude liability for fraudulent misrepresentation. A party cannot contract out of its fraudulent behaviour. Second, is the principle that fraud 'unravels all'.

The result is that a successful claim for fraudulent misrepresentation can render ineffective contractual caps on liability, exclusive remedies clauses, or clauses seeking to limit the nature of recoverable losses. These types of clauses, might otherwise, but for the fraud, have seriously restricted a party's ability to recover compensation.

In cases of fraudulent misrepresentation, damages are evaluated entirely differently compared to those for breach of contract. The objective is to place the claimant in the position they would have been in had the misrepresentation not occurred, and had they not entered into the underlying contract based on that misrepresentation. Consequently, this often results in what is known as a "total loss" claim. Additionally, such damages are not constrained by the traditional rules of remoteness applied to contract claims, meaning the claimant is not required to demonstrate that the loss suffered was foreseeable.

The measure of damages for negligent misrepresentation is equivalent to those for fraudulent misrepresentation, notwithstanding that negligent misrepresentation is potentially easier to prove. However, in practice, contracts are often drafted to exclude a party's ability to bring a claim for negligent misrepresentation or they may make any such claim subject to contractual caps and limitations on liability similar to those for breach of contract claims.

Australia

In Australia, similar to English law, the most common form of relief is damages. Section 236 of the ACL allows a person to recover the amount of any loss or damage suffered due to another's misleading conduct. Other available remedies include declarations, injunctions, adverse publicity orders, and orders amending or varying contract terms. Additionally, claimants' recoveries of damages under MDC claims may be higher than under contractual claims, as they may not be limited by contractual terms or common law rules on damages, particularly when making a "no contract" claim (where claimants claim their entire losses in the project alleging that had they known that the information was misleading or deceptive, then they would not have entered into the contract) or "alternative contract" claims, where claimants allege that had they known that the information was misleading or deceptive, then they would have entered into the contract on better terms and at a contract price proportionate to the risks. The Australian courts have significant discretion in determining claimants' damages entitlements in MDC claims. While the conventional view is that expectation losses are not considered when calculating damages for MDC, recent cases indicate that the Courts may award expectation losses (such as loss of profits) where claimants can prove that, but for the misrepresentation, they would have taken a different action which would have earned them such profits.

Middle East

In contrast to English and Australian law, where damages are typically the primary remedy for misrepresentation claims, the UAE, Saudi, and Kuwait primarily rely on rescission or termination instead. Further, the right to rescind or revoke the contract can be extinguished by the express or implied ratification of the contract by the Claimant.

The UAE Civil Code considers misrepresentation as a defect in the consent of the contracting parties. If misrepresentation is proven by the affected party, the element of consent is considered vitiated or defective.

"The legal framework for claims of misrepresentation in major construction projects is more developed in Australia than under English law which is in turn less restrictive than in the Middle East."

Consent, capacity of the contracting parties, the subject of the contract, and its cause are essential elements of a contract. When one of these elements is found to be defective or missing, the contract may collapse and can either be terminated or nullified, depending on which essential element is at fault.

Misrepresentation under UAE law serves as grounds for termination. However, misrepresentation, on its own, is not grounds for compensation as it is not deemed a breach of contract. In the eyes of UAE law, the contract never existed.

It is also important to note that the UAE Civil Code indicates that UAE Law interprets "misrepresentation" and "lésion - gross unfairness" together and at the same time. Therefore, to terminate an agreement, both "misrepresentation" and "lésion - gross unfairness" should exist together and at the same time. Because of this, the UAE is often regarded as having a high threshold for finding that a contract should be terminated on account of misrepresentation.

In Saudi, apart from rescission, compensation is available in some circumstances. The KSA Civil Code provides that where a contract is void or is annulled, the parties are to be reinstated to the position they occupied prior to the contract. If that is not possible, compensation for damages may be awarded. Another remedy for misrepresentation under Article 144 of the KSA Civil Code is compensation from the guilty party who has been unjustly enriched.

The remedy for misrepresentation in Kuwait is rescission of the contract. But it is important to be aware that Kuwait differs from other jurisdictions in the Middle East in relation to ratification of the contract expressly or impliedly. Article 185 of the Kuwait Civil Code states that "nullity of a contract does not disappear by ratification".

Conclusion

Misrepresentation claims offer parties significant strategic and tactical benefits in construction disputes because they may enable parties to impose significant pressure on opponents and potentially allow recovery of actual and expected losses on a more generous basis than breach of contract claims. Each of the different jurisdictions above has its own nuances and thresholds for establishing misrepresentation and the corresponding relief. The legal framework for claims of misrepresentation in major construction projects is more developed in Australia than under English law which is in turn less restrictive than in the Middle East where misrepresentation must be proved to have occurred on a fraudulent basis.

Claims based on alleged misrepresentation can be both expensive and factually complex for claimants and defendants to support or defend, especially in document-heavy disputes involving mining, oil and gas, energy, and complex infrastructure projects. However, the contrast between the use of these claims under English law and the Middle East on the one hand and Australia on the other hand is startling. While these claims are infrequently made under English law (for example, during 2023 and 2024 there were 317 claims for breach of contract, compared to only 5 claims involving misrepresentation in the English Technology and Construction Court), most construction disputes in Australia involve MDC, even though few succeed. The frequent use of MDC claims is largely due to their strategic and tactical value in dispute proceedings. While claimants' prospects of success with MDC claims may often be sub-optimal, the risks imposed on defendants can be very significant, with "bet the company" MDC cases being an established feature of the Australian construction dispute resolution landscape. With that in mind, claimants looking to succeed in misrepresentation claims under English law and in the Middle East may wish to contemplate the approaches and techniques adopted by parties in Australian MDC cases.

Overall, given the complexity and risk profile of these types of claims, parties should seek specialist legal advice when faced with a potential misrepresentation claim as to how to bring or respond to the claim, collate evidence and navigate the legal process effectively.

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FOOTNOTES:

1. For the purposes of this article, we will only cover the UAE, Saudi and Kuwait.
2. In fact, under Saudi law, good faith in contracts is a requirement and a deliberate failure to make a material disclosure in the contract is considered as acting in bad faith.

Jurisdiction in Focus: Saudi Arabia

Joshua Coleman-Pecha discusses the construction sector in Saudi Arabia.

Can you provide an overview of the current state of the construction sector in Saudi Arabia?

Construction in Saudi Arabia is a large, and fast growing, sector. Development of the country's infrastructure, tourism, and amenities is central to Saudi Vision 2030. Saudi has the largest pipeline of construction and infrastructure projects globally. The latest estimate from MEED as to value of construction projects in Saudi is approx. USD 1.8trn.

Projects are delivered through SPVs. Most have heard of Neom, and think of it as the linear smart city known as 'the Line'. However, Neom also encompasses 'Oxagon' (an industrial complex, port, and the world's largest floating structure), Trojena (a six-district sustainable tourism development), and Shusha Island (a high-value, boutique, residential, and tourism location).

Of similar size to Neom are projects such as the: Red Sea Development, Amaala, Qiddiya, SEVEN, Roshn, Rua Al Madinah, Jeddah Central and many more.

Saudi will host a multitude of international events over the coming years. Perhaps the largest of these are the World Expo in 2030 and FIFA World Cup in 2034.

Is Sharia the governing law of Saudi?

Yes and No. Sharia is the basis of all Saudi law. Where there is no relevant written legislation Sharia applies. However, Saudi is in the process of drafting and enacting many items of legislation. Such legislation codifies principles or express elements of Sharia but also adds clarity and depth to the Sharia with detailed provisions.

What is the Saudi Civil Transactions Law (often referred to as 'the Civil Code')?

The Civil Transactions Law (CTL) was issued pursuant to Royal Decree M/191 dated 29/11/1444H (corresponding to 19 June 2023G), which came into force on 02/06/1445H (corresponding to 15 December 2023G). The intent of the CTL is to codify Sharia principles under a single set of regulations. Therefore, the CTL offers a higher level of certainty and predictability on commercial transactions in Saudi Arabia. Updates and additions to the CTL are anticipated soon.

The CTL sets out a waterfall of priority. First, it contains 719 Articles on the fundamentals of legal relations between parties including: formation and termination of contract, torts, damages, and mandatory provisions. Second, if these Articles are not specifically relevant to a particular issue, Article 720 of the CTL lists 41 maxims that must be applied. Third, if an issue remains unclear, Sharia must be applied.

How does the tender process operate in Saudi Arabia?

For Government tenders, the Government Tenders and Procurement Law and its implementing regulations apply. All government tenders are publicly listed and must be applied for through the government's Etimad online portal.

Private entities have their own procurement processes which are also often online. Aramco, for example, has online tutorials to help bidders by explaining their bidding process. It also lists available contracts online and requires online applications.

Which dispute resolution method is preferred?

Depending on the counterparty to your client's contract you may have no option but to agree to Saudi courts having jurisdiction over a dispute. If there is a choice, then usually we recommend arbitration. As a civil law system, prior judgments of the Saudi courts are not binding precedent and are of indicative use only.

When selecting arbitral institutions and the legal seat for an arbitration it is possible to select LCIA or ICC proceedings seated in Saudi. A reliable choice is also the Saudi Centre for Commercial Arbitration (SCCA). The SCCA has the stated aim of being the biggest arbitration centre in the MENA region by 2030. It has several experienced international figures leading it, the SCCA Rules are new, and are based on the UNCITRAL arbitration rules.

Will an arbitration award be enforced in Saudi?

Saudi Arabia is signatory to the New York Convention and has enforced arbitral awards since 1983. Furthermore, it has two pieces of legislation that create an arbitration friendly environment: (i) Saudi Arabia Royal Decree No. M34/1433 Arbitration Law (Saudi Arabia Cabinet Decision No. 156/1433 Approving the Arbitration Law), passed in 2012, which is largely based on the UNCITRAL Model Law; and (ii) Saudi Arabia Royal Decree No. M53/1433 related to the Saudi Arabia Execution Law (Saudi Arabia Cabinet Decision No. 261/1433 on the Approval of the Execution Law).

Whether the arbitration award is domestic (i.e. the legal seat of the award is Saudi), or foreign, application for enforcement must be made to the Saudi Enforcement Courts. This process is relatively swift and cost-effective (compared to most jurisdictions). Statistical evidence shows that both numbers of applications for enforcement and value of awards being enforced in Saudi is growing significantly.

Is there a difference between how domestic and foreign arbitral awards are enforced?

It is easier to enforce a domestic arbitral award in Saudi. This is because nullification of a domestic arbitral award can only occur if: (i) it violates Sharia or Saudi Public Policy; or (ii) the matter in dispute was not capable of being solved by arbitration under Saudi law.

Enforcing foreign arbitral awards is more complex. The party requesting enforcement must demonstrate that: (i) there is reciprocity between Saudi and the jurisdiction from which the award emanates; (ii) Saudi courts must not have jurisdiction to decide the dispute; (iii) the tribunal issuing the award must have jurisdiction; (iv) the arbitral proceedings complied with due process; (v) the award is not subject to appeal; (vi) the award does not contradict laws or court decisions on the same subject in Saudi; (vii) the award does not violate Sharia or Saudi Public Policy.

The usual grounds of refusing enforcement as under the New York Convention are also applicable for both domestic and foreign awards. If an award contains some elements that are contrary to Saudi law, Public Policy, or Sharia then those elements may be severed from the award so that the rest of the award can be enforced.

We note, however, that, Saudi wishes to be seen as a global leader in arbitration alongside London, Paris, and Singapore. It's 2030 goal is to be the leading arbitration centre in the Middle East.

Is Saudi a 'safe' jurisdiction to operate in?

There is a huge pipeline of construction projects and opportunity in Saudi Arabia. For entities that are willing to commit to the jurisdiction in terms of set-up costs, etc. there is no shortage of work on which those costs can be recovered. There is a shortage of top-tier contractors, so any company bringing expertise and delivery capability will find opportunity.

On the other hand, setting up in Saudi can be challenging, time-consuming, and comes with cost. Traditionally, contractors have found that getting paid on time in Saudi is difficult, but this issue seems to be lessening. The widest reported problem currently is availability/escalation in costs of labour and materials. The demand is so high that contractors suffer a very real risk of delay and/or price escalation which, of course, damages profitability.

We consider Saudi to be a relatively 'safe' jurisdiction to operate in from a legal perspective, provided that local legal counsel is consulted. If a client is considering entering the Saudi market a good strategy may be to form a strategic alliance with a local contractor familiar with the issues and solutions.

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Rise of the use of Adjudication and Dispute Boards in Construction Disputes

Construction projects are exposed to various hazards and risks and are frequently subject to disputes. If these disputes are not resolved promptly, they can lead to increased costs, delays, or even project abandonment. In order to resolve these disputes quickly, there has been a rise in parties using adjudication and dispute boards.

Litigation and arbitration are the primary methods of resolving construction disputes. However, given the complexities inherent in construction projects and the necessity for prompt resolution, relying solely on litigation or arbitration can potentially disrupt the entire project. Moreover, the procedural requirements associated with arbitration or litigation are time-consuming and can negatively impact the cash flow of contractors.

In these circumstances, parties are resorting to adjudications and dispute boards to resolve their disputes. These methods typically involve one or three independent members who have the authority to resolve disputes under the contract or a set of rules. Both methods aim to provide a speedy resolution of disputes and are generally less expensive than litigation or arbitration.

Adjudication

Adjudication is a quick method of dispute resolution which allows for a temporarily binding resolution of disputes in complex projects by an adjudicator who has the necessary expertise to understand the project. This enables projects to continue without major disruption. Adjudication can be statutory or contractual. Statutory adjudication has been introduced in a number of jurisdictions and for the purpose of this article, the UK, Australia and Hong Kong are the jurisdictions considered below.

Statutory Adjudication

Statutory adjudication is widely used and considered a successful mechanism in the UK and Australia. In light of the success of this system across various jurisdictions, and with the aim of addressing improper payment practices within its construction industry, Hong Kong enacted the Construction Industry Security of Payment Ordinance (CISP) in December 2024.

Statutory adjudication was introduced in the UK by the Housing Grants, Construction and Regeneration Act 1996 (the UK Construction Act), where any type of dispute could be referred to adjudication at any time. In Australia, statutory adjudication is limited to payment disputes, and each of the eight Australian states and territories have enacted their own Security of Payment (SOP) legislation. Like Australia, Hong Kong's CISP regime is limited to payment disputes as well.

According to the UK Construction Act, the adjudicator is required to deliver a decision within 28 days from the date the dispute was referred for adjudication. This period may be extended with the consent of both parties. Similarly, under the CISP regime in Hong Kong, the adjudicator must issue a decision within 55 working days, with the possibility of extension if agreed upon by the parties. Australian jurisdictions, while providing for a rapid mechanism like in the UK and Hong Kong, do not allow the time period to be extended.

All three statutory regimes recognise that the adjudicator's decision is binding until it is resolved in court or by arbitration. Furthermore, each regime prohibits conditional payment clauses and allows for the prompt enforcement of the adjudicator's decision.

UK Statutory Adjudication

- The UK Construction Act allows parties involved in construction contracts to refer disputes to adjudication at any time.
- Decision reached within 28 days of the referral, unless parties agree to extend.
- The presence of a payment mechanism that is applied through every construction contract.
- Decision is binding until it is resolved in court or by arbitration.
- Decision is enforceable even if it is incorrect.

Australia SOP regime

- The SOP regime in Australia applies only when a payment claim has been submitted by the contractor.
- The process is also very quick – e.g. under the New South Wales SOP legislation, a party can receive the adjudicator's determination within 35 business days.
- Time period is fixed – no extension.
- Decision is binding until it is resolved in court or by arbitration.
- Quick enforcement.

Hong Kong CISP

- Only payment disputes (including time-related payment disputes) are subject to the adjudication.
- Applies to contracts for construction work in Hong Kong with a value of not less than HK$ 5 million, or HK$ 500,000 for related goods and services.
- Decision within 55 working days from its appointment or a longer time if agreed.
- Decision is binding until it is resolved in court or by arbitration.
- Quick enforcement.

Contractual Adjudication

Separate to statutory adjudication, parties can choose adjudication as a dispute resolution process under the contract for an independent adjudicator to resolve a dispute. Some standard form contracts such as the Joint Contracts Tribunal (JCT) and the New Engineering Contract (NEC) allow for a tiered dispute resolution clause that provides for adjudication of a dispute before it reaches arbitration. The adjudicator is not a party to the construction contract, which means that a separate contract is needed to regulate his/her service. The International Federation of Consulting Engineers (FIDIC) contract forms envisage the use of a dispute board as a dispute resolution mechanism, before arbitration, and we will consider that below.

Dispute Boards

Dispute boards are another alternative dispute resolution mechanism used by parties in major infrastructure projects. They are a creation of contract and consist of a panel of one or three independent members. Dispute boards were first developed in the United States to settle disputes in major infrastructure projects such as dams and tunnels. Dispute boards can be established at the start of a project or when a dispute occurs.

Some contracts provide that the dispute board is to be appointed when contracts are signed, with it remaining in place during the project. This is known as a 'standing' board – the standing board receives regular progress updates and can undertake site visits at regular intervals. One of the benefits of a standing dispute board is that the members become familiar with the projects and can address the difficult issues immediately. An ad-hoc dispute board is similar to adjudication, where the board is appointed during a dispute, and the appointment expires after it gives its decision.

The contract or the applicable dispute board rules specify each party's responsibility for costs related to dispute boards. Typically, each party is responsible for half of the costs. Parties can be reluctant to get involved and face these costs, especially in the case of standing dispute boards. However, a good dispute board can reduce the cost substantially if it is successful in resolving disputes and could lead to a cheaper outcome than if arbitration or litigation were to be used.

There are also different types of dispute boards – (i) Dispute Review Board (DRB) which issues non-binding recommendations; (ii) Dispute Adjudication Board (DAB) which issues binding decisions; and (iii) a combined dispute board which does both functions – Dispute Avoidance/ Adjudication Board (DAAB).

Dispute boards were first introduced in a standard form contract by FIDIC in 1995 and were included in the 1999 editions of the FIDIC contract form. Dispute boards have also been introduced in other standard form contracts such as NEC and JCT. Moreover, institutions such as the International Chamber of Commerce (ICC) and the Chartered Institute of Arbitrators (CIARB) have introduced their own dispute boards rules. In this article, we will be considering only the FIDIC forms.

Dispute Boards under FIDIC

Under the 1999 editions, the FIDIC Red Book suggested a permanent DAB while the FIDIC Yellow and Silver Books suggested the use of ad hoc DABs. The 2017 forms introduced a DAAB, a standing dispute board which would issue decisions like a DAB, in addition to issuing recommendations to resolve

2024 Dispute Boards International Survey

The survey collected data on the use of dispute boards over the past six years globally and analysed responses from individuals (i.e., practitioners), entities (i.e., users), funders, and institutions; and covered 4,019 dispute boards. Key findings:

- **Compliance with Decisions -** Individuals and entities agreed that binding dispute board decisions were generally followed, with parties typically accepting the decisions and only occasionally seeking further litigation or arbitration.
- **Dispute Avoidance Measures -** The survey found that 50% of individuals and 32% of entities that use dispute boards regularly adopted dispute avoidance measures – often leading to avoidance or relative reduction of disputes.
- **Costs and Enforceability -** Cost concerns remain a key hurdle for including a dispute board in the contract, along with the enforceability of dispute board decisions.
- **International Convention -** There was broad support for the idea of an international convention facilitating the enforcement of dispute board decisions.

issues before they turn into disputes.

Under the FIDIC 2017 forms, obtaining a DAAB decision is a condition precedent to referring a dispute to arbitration. Even before referring a dispute to the DAAB, the parties must first refer it to the Engineer (or any other party under the Silver Book) who will have 84 days to resolve the dispute or issue a determination.

Sub clause 21.4 provides that the DAAB should give its decision within 84 days of a dispute being referred to it. The decision is binding, and the parties must promptly comply with it, regardless of whether the dissatisfied party has issued a Notice of Dissatisfaction (NOD). If either party fails to comply with the DAAB, the other party may refer it directly to arbitration.

If a party is dissatisfied with the decision, it can issue a NOD within 28 days of the decision. In the event that a party does not issue a NOD within 28 days, the decision becomes immediately enforceable in arbitration. If the NOD has been issued, the parties are obliged to settle the dispute amicably within 28 days before an arbitration can be commenced. In case the arbitration award is not complied with, the successful party would need to enforce the arbitration award through the courts.

Sub clause 21.3 relates to the avoidance function of the DAAB. It provides that parties may jointly request the DAAB to provide assistance and informally discuss and attempt to resolve any issue or disagreement between the parties. The DAAB's recommendation is not binding, and the parties can refer the matter to dispute resolution notwithstanding the DAAB's advice or recommendation.

Disadvantages of Contractual Adjudication and Dispute Boards

One disadvantage of the contractual adjudication system, especially in jurisdictions without a statutory adjudication regime or where statutory adjudication is inapplicable (e.g. non-payment disputes in Australia and Hong Kong), is the unenforceability of the adjudicator's decision. Similarly, a key criticism regarding the use of a dispute board is the lack of enforcement if a party refuses to comply with the dispute board's decision.

The ordinary recourse in this case would be an action for breach of contract against the party not complying. This would then need to be referred to arbitration or litigation. While doing so, depending on the jurisdiction, an arbitral tribunal or court might decide to review the merits of the adjudicator's or dispute board's decision, instead of just enforcing it. This is not ideal as it defeats the purpose of a quick dispute resolution process.

However, in the context of dispute board decisions, it seems that the rate of compliance amongst parties is relatively high. In the 2024 Dispute Boards International Survey conducted by King's College London's Centre of Construction Law and Dispute Resolution, it was found that dispute board decisions were generally followed, with parties typically accepting the decisions and only occasionally seeking further litigation or arbitration. The survey also indicated that there was broad support for an international convention that would facilitate the enforcement of dispute board decisions.

International Convention – Is the UNCITRAL Model Clause on Adjudication the answer?

Since 2022, the United Nations Commission on International Trade Law (UNCITRAL) has been exploring a framework by which the adjudicator's decision can be enforced in the context of contractual adjudication.

On 28 November 2024, UNCITRAL published its Model Clause on Adjudication (Model Clause). The intention of the Model Clause is for the parties to obtain a fast and cost-efficient determination by an adjudicator with the requisite experience, so that disagreements are resolved quickly, allowing any projects to be kept on track.

> **"Both adjudication and dispute boards offer independent and impartial panels that assist in maintaining project continuity and fostering a collaborative construction environment."**

One of the most noteworthy features of the Model Clause is that the adjudicator is to make its reasoned determination within 30 days from the acceptance of appointment for the dispute. This 30-day window can be extended up to a maximum of 60 days.

The adjudicator's decision is contractually binding, and the parties are to comply with the determination without delay. Any party dissatisfied with the adjudicator's decision retains the right to refer the dispute to arbitration to obtain a final award on the same issues that were the subject of adjudication.

The Model Clause tries to solve the issue of international enforcement by providing a mechanism by which the decision of the adjudicator can be enforced through a highly expedited arbitration process under the UNCITRAL Arbitration Expedited Rules.

Even though the Model Clause is a welcome development, there is still a need for a comprehensive legal framework for the enforcement of the adjudicator's decision in contractual adjudications, and in a similar vein, in relation to dispute board decisions.

Conclusion

As construction projects grow in complexity and scale, alternative dispute resolution mechanisms are necessary to address disputes early and avoid the time and expense associated with litigation and arbitration. Both adjudication and dispute boards offer independent and impartial panels that assist in maintaining project continuity and fostering a collaborative construction environment.

The use of both adjudication and dispute boards have now spread across different jurisdictions and standard form contracts. Statutory adjudications began in the UK and have spread to many English-speaking common law countries. Contractual adjudications and/or dispute boards are now available in various standard form contracts and used globally in major infrastructure projects. Further, UNCITRAL has now published its Model Clause, which, if adopted, could lead to a wider application of contractual adjudication.

A key aspect of statutory adjudication is that the adjudicator's decision can be enforced in the national courts without a review of its merits. This advantage, however, cannot be replicated in the case of contractual adjudication or dispute boards, and especially where there is a need for enforcement across different jurisdictions. There is now evidence to suggest that in the case of dispute boards, these decisions are usually complied with by the parties. However, there is a need for a harmonised legal framework by which adjudicator's/dispute board's decisions can be enforced in the same manner as international arbitration awards.

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IBA's Site Visit Model Protocol: Standardising a Key Component in International Arbitration

IBA's "*Site Visit Model Protocol for International Arbitration*" provides a structured framework setting out the best international practice for the conduct of site visits and to enhance the effectiveness of site visits during arbitration proceedings. Site visits play a crucial role in clarifying factual disputes and providing arbitrators with direct insights into the physical locations pertinent to the case. The protocol aims to streamline the site visit process, ensuring it is efficient, fair, and procedurally sound.

Site visits are an important part of construction arbitration as they allow arbitrators the opportunity to gain a clearer understanding of a complex construction project or technologies, which is often difficult to achieve through documents or oral evidence alone. However, these visits can raise procedural, logistical, and evidentiary challenges. The Arbitration Committee of the International Bar Association (IBA) published the IBA Site Visit Protocol for International Arbitration (Protocol) in September 2024, which was developed to assist parties in conducting site visits. The Protocol was intended to provide a standardised approach that balances the interests of the parties and reduces the risk of "disputes within a dispute".

The Protocol consists of 13 default clauses in the form of articles along with drafting notes which provide further information on the related procedural matters. The Protocol is not intended to be a comprehensive code on site visits, but a strong starting point for parties' discussion. It covers a wide range of issues including purpose, scope and itinerary of the visit, preparatory work required before the visit, transport, costs and post site matters. The Protocol also does not specify the form it should take – it could be a Party agreement, or a procedural order issued by the Arbitral Tribunal or a combination of the two. Some of the key features of the Protocol are discussed below.

Key features of the Protocol

Preparation for the site visit

The Protocol emphasises early planning and coordination among parties, arbitrators, and other stakeholders. Some of the key steps include:

- defining the objective or purpose of the site visit (whether this is providing content to the dispute, to understanding the layout of a site, or observing relevant conditions);
- identifying the participants who will attend the site visit (who should attend is outlined by the protocol, which also considers the potential need for technical personnel, contractors or consultants involved in the project); and
- agreeing on logistical arrangements (this includes securing access to the site, ensuring safety measures are in place, and arranging transportation and security to, from, and at the site). The parties should also bear in mind that site conditions may change due to weather, local or religious considerations (for example Ramadan).

Conducting the visit

The Protocol provides detailed guidance on how the visit should be conducted. This guidance includes the following:

- video recordings, photographs and detailed notes to document the visit may be used as, and admitted into evidence, subject to the Arbitral Tribunal's assessment of the evidence;
- remote participation through live video feeds; and
- the site visit is to be conducted in accordance with the itinerary.

The Protocol recognises that parties may use automated aerial vehicles, drones or any virtual reality technology to enhance a Site Visit. However, parties need to ensure that they are complying with the relevant local and legal requirements.

Evidentiary considerations

Site visits can generate evidence that may influence the outcome of the arbitration. The Protocol recognises that any observations or evidence collected during the site visit are admissible as evidence. Furthermore, detailed records of the visit should be maintained to ensure that all observations can be verified and referenced during the proceedings.

It is important to note, however, to the extent that communications between the Parties' legal counsel and their respective participants are recorded or overheard during the site visit, these communications are presumed to be subject to 'legal impediment or privilege' and may be declared inadmissible as evidence.

Confidentiality and privacy

Given the sensitive nature of many arbitration cases, the Protocol places a strong emphasis on maintaining confidentiality. This includes ensuring that any proprietary or sensitive information observed during the visit is protected and requiring all participants to sign confidentiality agreements if necessary.

Cost allocation

Site visits can be expensive, particularly in international cases involving multiple parties and distant locations. The Protocol suggests that the parties should negotiate and consider which costs should be shared and which shall be borne by each party separately. An example of costs that should be shared is security and equipment costs, whereas party-specific costs may include flights, visas and accommodation. Advance agreements on cost-sharing can prevent disputes later in the process.

Principles and Compliance

The Protocol provides a set of guiding principles to ensure a fair, efficient and productive conduct of the site visit. The parties are to cooperate with each other in good faith and act in a timely and a cost-efficient manner. Further, any objection to the manner in which the site visit is conducted must be raised as soon as reasonably practical with the Arbitral Tribunal. If the objection, if upheld, would prevent or materially change the conduct of the site visit, the Arbitral Tribunal shall rule on that objection as a matter of urgency, and within the time period so that the site visit can continue.

Conclusion

The Protocol is a timely and much-needed addition to the toolkit of international arbitration. By providing clear guidance on preparation, conduct, and post-visit procedures, the Protocol ensures that site visits are conducted efficiently, transparently, and fairly. The Protocol's emphasis on flexibility and technological integration makes it a valuable tool for arbitrators and parties navigating complex disputes.

However, the success of the Protocol depends heavily on its practical implementation. For instance, the ability to balance technological advancements with traditional methods of evidence collection will be crucial. The inclusion of remote participation is a significant step forward, but its effectiveness hinges on reliable technology and the willingness of parties to embrace digital tools - it is also important to be aware that remote participation may not always provide the same level of detail and clarity as a physical visit.

The emphasis on early coordination and agreement among parties is seen as a double-edged sword. While it minimises disputes during the site visit, it requires a level of cooperation that may not always be achievable in contentious cases. Further, the coordination of site visits across jurisdictions with differing legal systems and logistical constraints (which could potentially involve parties from different cultural or legal backgrounds with varying expectations about the role and conduct of the site visits) is likely to be challenging. As such, arbitrators may need to play a more proactive role in facilitating discussions and ensuring compliance with the protocol.

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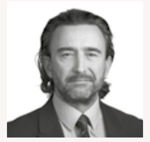
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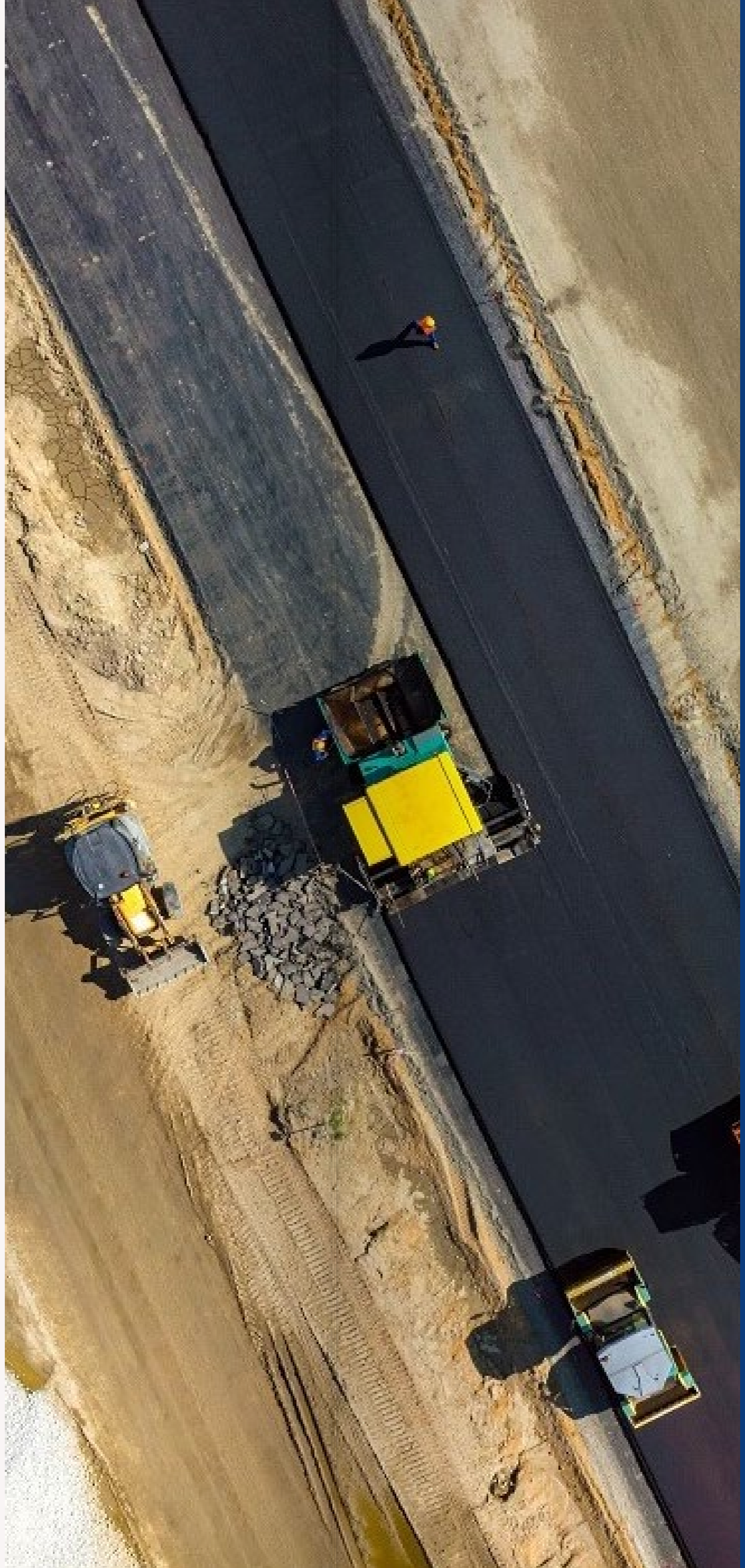

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