FENWICK ELLIOTT 40

Celebrating 40 years in construction and energy law

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International Quarterly

International Quarterly provides informative and practical information regarding legal and commercial developments in construction and energy sectors around the world.

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Welcome to Issue 42

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Welcome to our latest edition of *International Quarterly* which highlights issues important to international arbitration and projects.

In our 42nd issue, we begin with a look at current hostilities in the Gulf region, and the impacts these may have on construction law and ongoing projects. Nicholas Gould, who was in Abu Dhabi on business when hostilities broke out, explores how force majeure and other issues interact under FIDIC-based contracts, with practical guidance for preserving entitlements in volatile conditions.

We then turn to a recent case out of the Privy Council, *Uniform Building Contractors Ltd v The Water and Sewerage Authority of Trinidad and Tobago,* as Philip Hancock analyses the judgment concerning alleged variations under a FIDIC Yellow Book Contract. His article highlights the importance of understanding the scope of the original works and complying with contractual notice procedures when pursuing additional payment or time.

Shahed Ahmed reviews the significant reforms introduced in the United Arab Emirates' New Civil Code, and outlines the key changes affecting construction stakeholders.

Next, Jonathan Clarke and Leila Huthart examine the High Court's decision in *Bourlakova v Bourlakov*, which demonstrates that the English courts may be willing to order targeted disclosure in exceptional circumstances.

Layla Blair and Freddy Ashe survey the legal and market developments presently shaping the global offshore wind sector, taking a look at the UK's AR7 auction, China's arbitration reforms, and a recent UK Supreme Court decision.

And finally I'd like to introduce my co-editor, Sam Thyne. As many of you know, Sam, one of our NZ-qualified lawyers, has a wealth of international experience and is perfect for the role.

If there are any areas you would like us to feature, (or Sam to write about), in our next edition, please let me know.

Jeremy and Sam

News and Events

News

This year, Fenwick Elliott celebrates 40 years in construction and energy law. We are proud to celebrate this milestone and we would like to thank everyone who has helped make us the firm we are today. Your collaboration, partnership and shared commitment have enabled us to achieve so much together over the last four decades, and we look forward to building on our successes in the years to come.

Fenwick Elliott has once again been named as a top tier firm by the *Chambers* Global guide and a leading firm by the *Legal 500* EMEA guide. We have also been shortlisted for 'UAE Specialist Law Firm of the Year' at the Chambers Middle East Awards 2026. Congratulations to our Dubai team for this well-deserved recognition for their dedication and hard work.

Events

Fenwick Elliott is proud to sponsor the Dispute Resolution Board Foundation International Conference in Rome, Italy from 13-15 May. Partner Jeremy Glover will be a featured panellist for "*Global Enforcement of Dispute Boards: Challenges, Trends, and the Road Ahead*", and Partner Dr Stacy Sinclair will be featured on the Artificial Intelligence panel on 15 May. Click here to register.

Webinars

Fenwick Elliott hosts regular webinars that address key issues and topics affecting the construction industry. To watch our previous webinars on demand, click here.

As well as our hosted webinar series, many of our specialist lawyers also contribute to webinars and events organised by leading industry organisations, where they are asked to share their knowledge and expertise of construction and energy law and provide updates on a wide range of topical legal issues.

We also are happy to organise webinars, events and workshops elsewhere. We are regularly invited to speak to external audiences about industry specific topics including FIDIC, dispute avoidance, BIM, digital design and technology.

If you would like to enquire about organising a webinar or event with some of our team of specialist lawyers, please contact Dr Stacy Sinclair (*ssinclair@fenwickelliott.com*). We are always happy to tailor an event to suit your needs.

This publication

We aim to provide you with articles that are informative and useful to your daily role. We are always interested to hear your feedback and would welcome suggestions regarding any aspects of construction, energy or engineering sector that you would like us to cover. Please contact Jeremy Glover (*jglover@fenwickelliott.com*) or Sam Thyne with any suggestions (*sthyne@fenwickelliott.com*).

Construction amid war and hostilities: the principal issues under FIDIC

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I was in Abu Dhabi on 28 February when the hostilities began across the region.[1] Within hours of my arrival, airspace disruptions, attack interceptions (with the resulting missile debris) and the steady cadence of official alerts reframed the environment across the Gulf region. What was meant to have been a routine visit quickly became something quite different: a close-up view of a rapidly escalating regional conflict.

Though I am now back in the United Kingdom, many colleagues, clients and friends continue to live and work in the region during these uncertain times. This piece is written with them in mind, and with a sincere hope for the safety, security and stability of all affected.

The present situation inevitably reminds me of the outbreak of the conflict in the Ukraine, when my colleagues and I dealt with the long tail of disputes that followed, and helped contractors and employers divert equipment to alternative projects once it became clear it could no longer be used in Kyiv or Odessa.

There are numerous lessons one can take from these conflicts, but I have kept my reflections to the impact on the principal issues arising under FIDIC-based construction contracts.

Force majeure (AKA exceptional events) and contractual relief under FIDIC

Many contracts in the Gulf region are based on standard FIDIC forms. The commonly used 1999 and 2017 standard versions of the FIDIC Rainbow Suite both have mechanisms for events that disrupt projects, referred to as "*force majeure*" in the 1999 edition and as "*exceptional events*" in the 2017 edition. In both editions, such events relieve the parties from performing their obligations under the contract. "*War, hostilities (whether war be declared or not), invasion, act of foreign enemies*" are listed as triggers for these mechanisms under both editions.

Generally (barring any relevant provisions under local codes) the application and effect of a force majeure or exceptional events clause depend on how it has been drafted, and whether contractual requirements are followed precisely.

Establishing force majeure

Whether an event qualifies as force majeure will often turn on a single issue: ***was it reasonably foreseeable at the time of the contract?***

Assessing this relies on the facts: tribunals will examine what the parties knew, or ought reasonably to have known, taking into account project location and the prevailing conditions at the time. A contract agreed during a period of relative stability may support an argument that the scale or nature of the exceptional event could not reasonably have been anticipated. By contrast, where a project is located near military sites, major energy facilities or other sensitive locations, tribunals may find that certain risks were intrinsic to the nature of the project and should have been considered from the beginning.

Ultimately, "*foreseeability*" in FIDIC-based contracts depends upon context. Careful evidence of what was known at the time, what was genuinely unexpected and how the specific circumstances unfolded will be critical to establishing force majeure. Contemporaneous records often carry more weight than reports written after the fact. Parties seeking to rely upon force majeure will need to demonstrate not only that the event has occurred, but that it was beyond the parties' control, could not have been provided against or reasonably avoided, and is not caused by the other party.

Footnotes

1. Abdi Latif Dahir. (2026). "Iran Hits Back Across the Mideast, Targeting U.S. Bases and Allies." *New York Times*, 28 February 2026. https://www.nytimes.com/2026/02/28/world/middleeast/iran-retaliatory-strikes-region.html.
2. Both the 1999 and 2017 editions of the FIDIC Rainbow Suite provide an option for termination "*if the execution of substantially all the Works in progress is prevented for a continuous period of 84 days... or for multiple periods which total more than 180 days*" due to the same qualifying event.
3. Julia Kollewe. "Maritime insurers cancel war risk cover in Gulf as Iran conflict disrupts shipping." *Guardian*. 2 March 2026. https://www.theguardian.com/business/2026/mar/02/maritime-insurers-war-risk-cover-gulf-iran-shipping-strait-of-hormuz.

Notices

If the force majeure clause is to be relied upon, the procedural requirements of the contract must be followed. Under the 2017 FIDIC Rainbow Suite, the contractor must give a notice of a qualifying event in the proper way within 14 days of becoming aware, or when they should have become aware, of the exceptional event.

When qualifying events occur and where proper notification is made, the contractor is excused from performing contractual obligations that are impacted by the event. Typically, the contractor will be entitled to an extension of time, but they are not necessarily entitled to financial compensation. In cases of prolonged disruption, the parties may ultimately become entitled to terminate, although that will usually only arise if the situation persists for months rather than weeks.[2]

Parties to construction contracts must look out for specific amendments made to the contracts which diverge from the template agreements. For example, it is common for parties to agree shorter notice periods. It is also essential that the parties follow the procedures and conditions precedent that the contract specifies. The exact wording of required notices will matter, as often there are prescriptive requirements that must be followed. A failure to meet the requirements of notice provisions often will result in a loss of entitlement.

Insurance and war-risk coverage

The insurance landscape is also becoming more volatile, which in turn impacts the construction disputes environment. In particular, war-risk insurance is being reassessed by insurers due to attacks on infrastructure and maritime chokepoints. As a result, premiums are increasing, cover is being restricted and, in some cases, war-risk insurance is being withdrawn altogether throughout the GCC.[3]

Beyond immediate shipping and insurance implications, this has downstream effects on contract performance and commercial risk allocation, particularly where insurance is a contractual condition of performance. Parties should review their policies carefully, identify any changes in cover and record the practical impact on project performance.

Supply chain disruption and material delays

Construction projects the world over are heavily dependent on international supply chains. Even in stable conditions, the timely delivery of materials, equipment and specialist personnel requires coordination across multiple jurisdictions.

The current hostilities in the Gulf region have placed that system under strain: the closure of the Strait of Hormuz, together with airspace closures and restrictions on commercial flights, are slowing

down or halting deliveries that these projects depend on. Where materials are significantly delayed, the consequences may extend beyond the immediate activity, potentially affecting sequencing and productivity across the programme, with cascading knock-on effects.

In such cases, the critical question is which party bears the risk under the terms of the contract. Parties may start to explore claims for extensions of time, delay damages or the need for variation orders where alternative materials or methods must be adopted. Contractors may seek relief through extension of time provisions, arguing that the delays arise from events beyond their control, while employers may scrutinise whether the contractor could reasonably have mitigated the disruption.

Project teams should proactively document delays and rerouting in real time, ensuring that any claims or notices are firmly grounded in contemporaneous evidence.

Cost escalation and price adjustment claims

If shipping routes are disrupted and insurance costs rise, as discussed above, contractors could face significant cost increases.

While FIDIC contracts include a cost escalation provision (see Sub-Clause 13.7 in the 2017 edition for example), it is common for parties to disapply these. In such instances, the contractor may be limited in their ability to recover additional cost, even where the underlying cause lies outside their control.

Attention is therefore likely to turn to other potential routes of relief. These may include change-in-law provisions, where government measures have had a direct impact on cost, or, in some jurisdictions, doctrines that allow for adjustment of contractual obligations in exceptional circumstances.

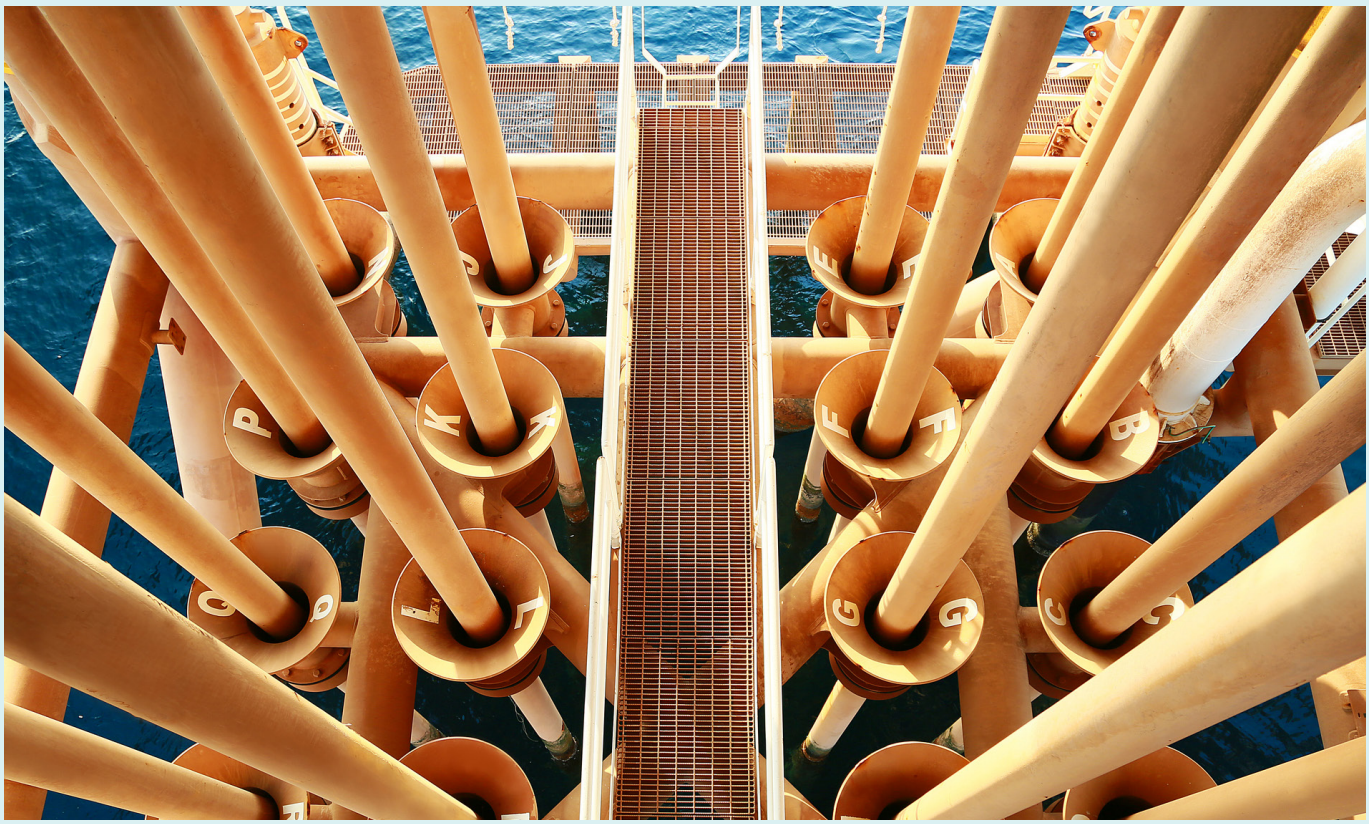
Under UAE Civil Code Article 249, for example, a court may reduce an obligation to a reasonable level where exceptional public events make performance excessively onerous. This is often referred to as "*hardship*". In practice, this is not a quick or automatic remedy but can act as a type of safety valve if price adjustment measures are not present to effectively address the cost escalation.

Compliance, sanctions and geopolitical restrictions

United States sanctions on Iran, and potentially Iran's countermeasures, could create compliance risks for companies operating in the region. Contractors will need to ensure that suppliers, subcontractors and logistics providers are not violating sanctions regimes. Even indirect dealings with Iranian-linked entities can create liability under US law.

Compliance in this area requires active management. Contractors and employers will need to understand the origin of materials, the ownership and control of counterparties and the routes by which goods are transported. In some cases, the steps required to ensure compliance may themselves contribute to delay or cost.

Where sanctions affect performance, the contractual



consequences will depend on the drafting. In some cases, they may fall within force majeure or change-in-law provisions. In other instances, the position may be less clear.

Site safety, security and duty of care

Site safety and security have direct implications for construction operations. In recent weeks, incidents affecting civilian infrastructure and US military bases in the region have prompted increased scrutiny of safety arrangements, both in regard to occupied buildings and active construction sites.

Employers may be required to implement enhanced security measures, including stricter access controls, revised working practices and evacuation procedures. The standard of what constitutes reasonable precautions is likely to evolve as conditions change.

A failure to respond appropriately may expose parties to contractual claims and, depending on the jurisdiction, liability under local labour and safety laws. For international contractors, internal standards may impose additional obligations beyond those required by local law.

In practical terms, risk assessments should be updated to reflect current conditions rather than those assumed at tender stage. As previously advised, the existence of a clear and contemporaneous record will be important.

Government intervention and regulatory delays

Government intervention must also be considered. Regulations introduced for security or public safety reasons (including movement restrictions, temporary suspensions of work and changes to regulatory requirements) can have an immediate effect on project delivery.

Under FIDIC contracts, such regulations may give rise to excusable delays and, depending on the terms, entitlement to additional cost. The key issue is causation. It must be shown that the government intervention in question has affected the works in a way that triggers the relevant contractual provisions.

One feature of the present situation is the frequency of short-term interruptions. As I experienced myself while in Abu Dhabi, and as many of my colleagues in our Dubai office continue to experience, frequent security alerts, requiring temporary suspension of activity and advising individuals to find shelter, can be brief but still disruptive. In the construction context, they may disrupt operations that depend on continuity, such as lifting operations or concrete pours. Over time, these interruptions may have a cumulative effect on progress.

Capturing that impact requires careful record-keeping. Without it, the effect of repeated short-term disruption may be difficult to demonstrate.

Conclusions

The legal framework within FIDIC can address many of the issues listed above. The difficulty lies in its application to rapidly changing circumstances and whether parties properly followed the necessary procedure to preserve entitlement.

In practice, outcomes are likely to operate on the detail of a specific case: what was known at the time of contract, how the risk was allocated, whether notices were given in time and what the records show about the actual impact on the works.

For both employers and contractors, the immediate priority is therefore not only to respond to the operational challenges, but to ensure that their contractual position is protected as the challenges unfold. With that in mind, project teams should:

- **review force majeure, exceptional event and wider risk-allocation clauses**, and ensure that all relevant conditions precedent are met. The entitlements are due only if the procedures are properly followed, and failure to comply can doom otherwise valid claims;
- **issue clear and timely notices** to preserve entitlements. Prompt notification is often the single most important factor in dispute avoidance and resolution;
- **reassess insurance arrangements**, such as war-risk cover, and check exclusions or reductions in scope as markets tighten;
- **map supply-chain vulnerabilities**, including reliance on specific ports, airspace routes and long-lead items, and ensure that delays and disruptions are recorded as they occur;
- **strengthen sanctions-compliance controls**, and undertake proper due diligence on suppliers, subcontractors and logistics partners; and
- **update safety and security protocols**, to ensure that risk assessments, evacuation procedures and emergency response plans reflect the current realities on the ground and meet statutory duty of care requirements.

Your legal advisers will be able to support you in navigating these issues, and may recommend specialist input where the risks intersect with insurance, sanctions, security or local labour frameworks.

Lastly, my thoughts remain with those who continue to live and work in the regions affected by the ongoing hostilities. All of us who work in the Middle East will be hoping for stability and peace as soon as circumstances allow. ■

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FIDIC Notice of Contractor Claim under Sub-Clause 20.1 required where Variation procedure not followed

Last year I wrote in *International Quarterly*, Issue 40 about a recent Privy Council decision relating to a FIDIC-based contract and said it was a rare treat (because FIDIC contracts are often considered in confidential arbitrations). Like London buses, another such decision has come in (fairly) quick succession, again relating to a project in Trinidad and Tobago.

This case, *Uniform Building Contractors Ltd (Respondent) v The Water and Sewerage Authority of Trinidad and Tobago (Appellant)* [2026] UKPC 2, is a helpful discussion of variations and contractor claims under FIDIC contracts. The issues addressed include:

1. Is something a Variation? That depends on the contract terms, and in particular what is/is not included in the Works and Employer's Requirements, which requires close analysis of the contract documents.
2. A Sub-Clause 20.1 notice of claim may be required where the Contractor claims additional payment, and the Engineer/Employer is not engaging with the contract terms re: Variations or has failed to determine the Contractor's entitlement. Important to remember that a Sub-Clause 20.1 notice is, generally, a condition precedent to entitlement, so a compliant notice should be submitted within the stated time period.

Facts of the case

WASA (the Employer) engaged UBC (the Eontractor) to design, supply and install 28km of pipeline in Southeast Trinidad and Tobago. The contract was based on the FIDIC Yellow Book (1999 edition – the *"Plant and Design-Build Contract"*) with bespoke amendments. Disputes arose during the works, and WASA terminated the contracts with UBC. Several years later, UBC started a court claim against WASA, and WASA counterclaimed. At first instance, both UBC's claims and WASA's counterclaims were dismissed.

UBC appealed the dismissal of its claims relating to four alleged variations, relating to (i) laying pipework in the roadway, (ii) removal of excavated material unsuitable for use as backfill, (iii) importation of suitable backfill, and (iv) night work (the "**Alleged Variations**").

WASA disputed these constituted variations and, if they did, argued that UBC had failed to comply with procedural requirements of the contract, negating UBC's entitlement to additional payment.

There were almost no contemporaneous documents dealing with how the four Alleged Variations arose. However, the Engineer (appointed by WASA) gave evidence on behalf of UBC, asserting that he considered the four items were variations, and that the Parties had impliedly waived the requirements to comply with the procedural requirements of the Contract in relation to them.

Court of Appeal judgment

The Court of Appeal of the Republic of Trinidad and Tobago concluded that the first instance judge "*was against the weight of the evidence*", relying in particular on the Engineer's evidence that the Alleged Variations above were variations. The Court of Appeal also indicated that Sub-Clause 20.1 (Contractor's Claims) did not apply once the contract had been terminated.

Privy Council judgment

Sir Peter Coulson gave the judgment of the Privy Council. The judgment contains very useful

guidance on the nature of the FIDIC Yellow Book, and some issues that frequently arise in relation to FIDIC-based contracts.

1. FIDIC Yellow Book (1999 edition)

First, the court dealt with an argument by UBC that the Contract terms should not apply to them, partly because UBC alleged full site investigations had not been possible before the start of the works. The court described that argument as "*radical*", that there was "no legal basis for UBC's attempt at such a comprehensive re-allocation of risk and reward as between the parties", and rejected it.

The court explained that under the FIDIC Yellow Book the Contractor is responsible for the design and construction of the works. It is a lump sum contract, and the Contractor is taken to have allowed for all foreseeable risks in the Contractor's rates: "*[The Yellow Book] is designed to provide as much financial certainty as possible for both sides*".

2. Determining whether work is a "*variation*" under the contract

Second, the Privy Council noted the Court of Appeal did not address the terms of the Contract but instead determined the Alleged Variations were Variations because they were so considered by the Engineer.

The Privy Council explained that "*the question whether one or more of the four disputed items is or is not a variation is* ***a function of the contract terms***" [emphasis added]. To determine whether there has been a Variation under the Contract, one needs to look at how "*Variation*" is defined. Under the FIDIC Yellow Book, it is "*any change to the Employer's Requirements or the Works...*" (Sub-Clause 1.1.6.9). So, one must determine the scope of the Employer's Requirements and Works, and whether the Alleged Variations are within that scope, or additional to it.

The Privy Council considered that all four of the Alleged Variations were part of the Works. On proper analysis of the Employer's Requirements and other Contract documents, the Alleged Variations were (or should have been) in the contemplation of UBC, and so within the fixed lump sum price. The court relied on several provisions (including certain bespoke terms), which supported the premise that the Yellow Book transfers full design and build responsibility to the Contractor.

3. Requirement for a Sub-Clause 20.1 Notice of Claim

Third, the Privy Council explored the contractual process for Variations and effectively concluded that none of the contractual process had been followed by either party (not an uncommon situation!). Broadly, the process entails an instruction, or request for proposal, initiated by the Engineer, ultimately leading to a determination by the Engineer under Sub-Clause 3.5 (Determinations) of the Contractor's entitlement to additional payment.

Importantly, the court explored the relevance of Sub-Clause 20.1 (Contractor's Claims) to Variations.

This was a situation where there had been no engagement by the Engineer in relation to the Alleged Variations; there had been no notice or request under Sub-Clause 13.1 (Right to Vary), nor any determination under Sub-Clause 3.5. In the circumstances, if UBC wanted additional payment, it was necessary to submit a claim under Sub-Clause 20.1.

Sub-Clause 20.1 directs that the Contractor must submit a notice of claim "*as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance [giving rise to the claim]*". If the Contractor fails to do so, the Sub-Clause expressly states that the Contractor loses its entitlement to an extension of time/additional payment. On this point, the judge also cited a book co-authored by my colleague Jeremy Glover (together with Simon Hughes KC) on this point – *Understanding the FIDIC Red and Yellow Books, 3rd Edition* – confirming that the Sub-Clause 20.1 notice of claim is treated as a condition precedent and failure to comply can provide a counterparty a complete defence to the claim.

The Privy Council found that UBC's failure to submit a Sub-Clause 20.1 notice of claim was "*fatal*" to its claim.

The Privy Council also found that, because the claim regarding the Alleged Variations arose prior to termination of the Contract, Sub-Clause 20.1 applied (thereby rejecting the Court of Appeal's finding that Sub-Clause 20.1 did not apply due to the termination).

4. Waiver, estoppel, fairness and acquiescence by silence

UBC argued that it was entitled to additional payment partly because to find otherwise would be unfair, in circumstances that the Engineer agreed the Alleged Variations were Variations, and WASA had the benefit of the additional work. UBC relied on arguments including waiver and estoppel.

The Privy Council disagreed with UBC. Their key conclusions included that:

a. The fact that UBC got on with the works and did not make a contemporaneous claim for the Alleged Variations indicated there was no reliance on a positive statement by WASA, or detriment to UBC (which are necessary ingredients of estoppel).

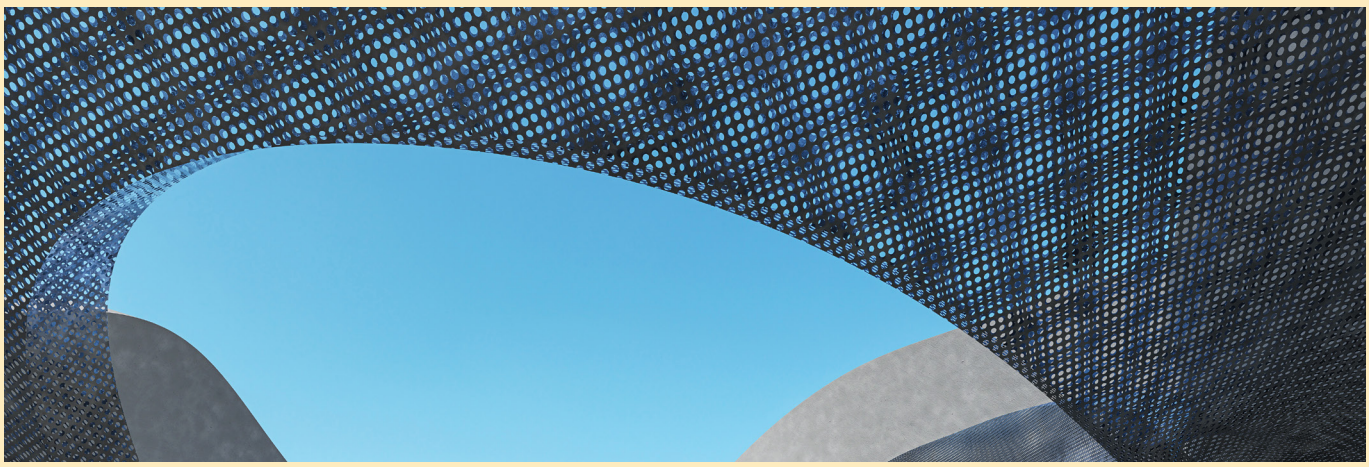
b. To override clear written requirements for a claim, there would have to have been some words or conduct unequivocally representing the Variation was valid (relying on *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24, at paragraph 16).

c. UBC conflated/equated the Engineer with the Employer. Whilst the Engineer acts with the Employer's authority, carrying out duties specifically delegated to him, the Engineer expressly does not have authority to vary or waive terms of the Contract (Sub-Clause 3.1 – Engineer's Duties and Authority – "*The Engineer shall have no authority to amend the Contract.*"). The Engineer could not waive the Contract requirement that certain procedures – e.g. a Sub-Clause 20.1 notice of claim – must be followed for the Contractor to be entitled to additional payment.

d. UBC asserted that because WASA did not object to UBC carrying out the Alleged Variations, WASA evidently accepted that they constituted Variations. The Privy Council disagreed: "*that misses the point: under a design and build, lump sum contract, it is not for the employer to object to any particular element of the work being undertaken unless there is a concern about how that work is being carried out, or the employer has received notice from the contractor that the work is said to be a variation, and the employer disagrees*".

Conclusions

This might seem to some quite a harsh result, given the Engineer considered the Alleged Variations were indeed variations. However, it is a useful reminder that one must first understand the original scope of Works to determine if there has been a variation to them. It is also important to follow the processes and procedures under the Contract, at the time particular issues arise, so that parties do not lose their entitlement over a procedural non-compliance. ■



The New UAE Civil Code

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The UAE continues to develop its legal framework with the recent enactment of Federal Decree Law No. 25 of 2025 (the "**New Civil Code**"), which replaces and significantly reforms major components of the well-known and long-serving Federal Law No. 5 of 1985 (the "**Old Civil Code**"). The New Civil Code, which is expected to come into effect on 1 June 2026, is designed to modernise the UAE's civil legal framework, streamline statutory overlap, strengthen contractual certainty and enhance protections across commercial activities. This article analyses how the latest amendments affect construction stakeholders.

Key Reforms

Judicial interpretation and hierarchy

Article 1 of the New Civil Code reconfirms that the courts are to apply the New Civil Code to all matters with no scope for interpretation where provisions are clear and unambiguous.[1] However, the New Civil Code does grant courts the broader discretion to apply Islamic Shari'ah principles where no explicit or implicit statutory rule exists. Whilst the Old Civil Code directed the courts to consider the schools of Imam Malik and Imam Ahmad bin Hanbal in the absence of statutory rule in the first instance, Article 1 of the New Civil Code no longer refers to a specific school of jurisprudence or single Shari'ah principle:

> *"(2) Where no applicable legislative provision exists, the court shall adjudicate according to Islamic Sharia, selecting the most appropriate solution in accordance with public interest."*

So, in the absence of statutory provision, the courts shall look to Islamic Shari'ah for an appropriate solution that aligns with public interest. Where no rule of Shari'ah is found, Article 1 further guides the court to apply ordinary custom or alternatively find a solution that is fair and delivers justice.[2] This may influence how a court approaches issues like unjust enrichment and contractual risk allocation, which are common issues that arise between parties on construction projects.

Further, Article 4 of the New Civil Code reinforces that special laws shall take precedence over general laws, directing the courts to specialised laws that may be relevant:

> *"(3) A special legal provision shall not be repealed or amended by a subsequent general provision unless expressly stated; the special provision shall prevail over the general provision within the matters it governs."*

This principle is further reinforced under Article 33 which provides that a specific provision prevails over a general provision. This is important in the context of construction disputes where overlapping laws may be applicable. As a result, reliance by parties on a general provision to support their position in a dispute may not be persuasive before the courts where a specific provision of law applies.

Autonomy to agree governing law

The Old Civil Code was prescriptive in terms of the governing law of the contract, which was based on either the state in which the parties were resident or, if the parties were resident in different states, the state in which the contract was concluded. Under Article 19(1) of the New Civil Code, however, the parties have the prerogative in the first instance to decide upon the governing law, and only in the absence of agreement between the parties will the default position apply.

Disclaimer

The author has relied upon an unofficial translation of the New Civil Code when drafting this article; and, therefore, the contents of this article must be considered in that context.

Contract interpretation

The overarching principle under the Old Civil Code that clear terms agreed between contracting parties are to be given primacy is maintained under the New Civil Code. However, additional interpretation guidelines have now been incorporated, including amongst other things, that a contract will be interpreted "*in a manner that achieves justice and good faith*" and "*according to the actual circumstances surrounding the contract at the time of its conclusion*"[3]; allowing courts the discretion to add context to contract terms rather than being strictly bound by the plain meaning of words.

Pre-contractual negotiations and disclosure obligations

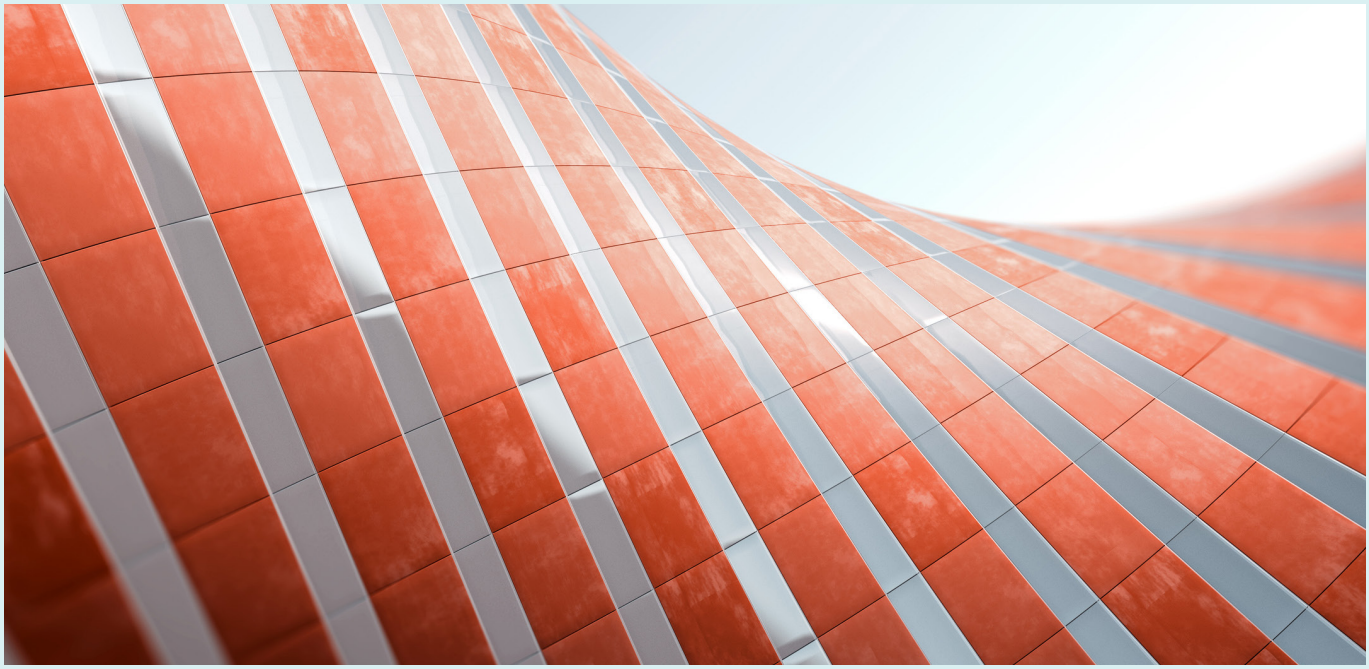
A significant introduction is the express duties imposed in respect of pre-contractual obligations. Whilst pre-contractual negotiations shall not obligate a party to conclude the contract,[4] Article 121 requires that pre-contractual negotiations, their conduct, and their termination "*must be in accordance with the requirements of good faith*";[5] any failure of which may result in a defaulting party being liable to compensate the actual damage suffered (although such damages shall not include expected benefits or loss of profit, unless otherwise agreed).[6]

Further, Article 121(4) provides that the deliberate failure to disclose material information affecting the validity of the contract shall be considered bad faith. Article 122 further expands on this, as follows:

> *"(1) A party to negotiations or contracts who knows information of decisive importance to the consent of the other party must inform them of it, unless the latter is presumed to know the information and has placed trust in the contracting party. Information of direct and necessary connection to the content of the contract and the status of the parties shall be considered material and decisive to the parties' consent.*
>
> *(2) Disclosure of material and decisive information is an obligation on both parties to negotiations and contracting, whereby each party must exercise due diligence in providing the other party with information and data relating to the negotiations, the contract to be concluded, and the circumstances of the contractual process."*

Article 122 is a mandatory provision as parties cannot limit, exempt or exclude the duty to disclose key information. As a result, care must be taken in supplying and exchanging information. This is particularly important within the construction industry where procurement is highly dependent on accurate pre-contractual information such as, for example, design intent, site conditions, geotechnical data, stakeholder requirements and time constraints.

The New Civil Code clearly increases the need for rigorous tender documentation and pre-award diligence. Employers will therefore need to consider disclosure (and possibly draw attention to specific information) to contractors during the tender phase. Similarly, contractors must ensure accuracy of technical proposals, price breakdowns and necessary qualification and technical statements, because omissions or underpriced bids (with a view to negotiating the price after the project is won) could trigger liability. Furthermore, because liability can now arise during negotiations, parties using interim arrangements such as letters of intent or initial notices to proceed will need to consider robust controls to define the



binding nature of such documents and clearly identify what information has been disclosed.

Framework agreements

Unlike the Old Civil Code, Article 138 of the New Civil Code defines framework agreements as *"a contract by which the contracting parties determine the basic terms to which contracts concluded between them according to the provisions of this agreement shall be subject"*. The ability for parties to agree core terms in advance, which then form the basis of subsequent call-offs is now recognised.

For construction parties with projects in the pipeline, this enhances business continuity and contractual efficiency providing some certainty around key risks and responsibilities, which in turn will reduce ambiguity and the need to renegotiate terms. This is particularly helpful for parties who work together regularly and / or those who intend to build long-term relationships.

Assignment of rights

Under the Old Civil Code, assignment was specific to the transfer of a debt and claim, however the New Civil Code now refers to assignment of rights more generally. Article 405 states:

> *"The creditor may assign his right to a third party unless the assignment is prohibited by law, by agreement, or by virtue of the nature of the obligation. The assignment shall be valid without requiring the debtor's consent."*

Significantly, the debtor's consent is no longer required in order for the assignment to be valid, however the New Civil Code provides that the debtor must nevertheless be notified of the assignment.

Furthermore, the New Civil Code provides clear statutory protections for assignees. First, where assignment is made for consideration, Article 411 imposes on the assignor a warranty that the right to assign exists. If no such right existed, Article 413 stipulates that the assignor must return the consideration and reimburse the assignee's expenses. Additionally, if it was known that no such right existed, the assignor will be liable to pay damages.

Greater clarity in respect of assignments is a welcome change, with assignment between parties on construction projects being clearer, with stronger protections for assignees.

Latent defects

The New Civil Code provides that a defect will be considered "*latent*" (or "*hidden*"), if it is:

> *"pre-existing, having existed prior to the sale, or arose thereafter while the item remained in the seller's possession and before delivery, and if such defect is not ordinarily discernible through normal inspection, or would not be detected by a person of average attention, or cannot be discovered except through an expert examination or practical testing".*

Parties typically rely on decennial liability for structural defects, but this amendment enhances remedies for non-structural issues (e.g. finishes, fixtures). Also, the available remedies are now expanded. Whereas in the Old Civil Code the buyer could either return the defective goods or accept them at the agreed price, Article 495 now gives the buyer the option to retain the goods and claim a proportional reduction in price relative to the defect.

Notably, the New Civil Code also clarifies that the seller could avoid consequences if replacement goods are provided without defect. This may encourage parties to reach an amicable solution, as opposed to raising a formal dispute immediately.

In addition, the New Civil Code extends the limitation period for latent defects claims from six months to one year from the date of delivery, unless the seller has expressly guaranteed the goods for a longer period. The lengthier prescription period strengthens buyer protection as they benefit from more time to discover, and subsequently pursue, claims against contractors and suppliers for latent defects. ■

Footnotes

1. Article 1(1), New Civil Code.
2. Articles 1(3) and 1(4), New Civil Code.
3. Articles 119(11) and (12), New Civil Code.
4. Article 121(2), New Civil Code.
5. Article 121(1), New Civil Code.
6. Article 121(3), New Civil Code
7. Article 494, New Civil Code.

Arbitral confidentiality vs. specific disclosure applications before the English courts where there is a suspected "sham" arbitration

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Bourlakova and others v Bourlakov and others [2025] EWHC 3085 (Ch)

In a case described as "*highly unusual*"[1] by both parties and the judge, the English High Court ordered limited disclosure of specified documents relating to an arbitration commenced under the rules of the International Commercial Arbitration Court in Moscow (the "**ICAC Rules**"). The order was made for the twelfth defendant ("**Edelweiss**") to provide the first and fourth claimants (the "**Bourlakovas**") with specific documents relating to the arbitration (including pleadings and hearing transcripts) despite the usual rules of arbitral confidentiality being in play.

Mr. Andrew de Mestre KC, sitting as a Deputy Judge of the High Court, held that the emergence of this "*bogus and potentially collusive arbitration*"[2] gave rise to a real risk of assets being lost or dissipated, and that this was unreasonable where those assets were being expressly protected by an undertaking previously given by Edelweiss to the English court. It was therefore determined that disclosure was necessary to protect those assets and ensure the effectiveness of the undertaking.

The decision was significant in demonstrating the English court's wide discretion to order targeted disclosure notwithstanding the usual rules of arbitral confidentiality.

Background

The present decision is part of a saga between some twenty defendants that has been ongoing in England and Wales since 2020 and involves multiple sets of proceedings in other jurisdictions including Panama, Switzerland and the Bahamas.

In short, this dispute stems from high-value fraud claims by Mrs Bourlakova and her children against the estate of her late husband and his relatives and business associates.

The July 2025 decision

In March 2025, Mr Justice Richard Smith heard strike-out/reverse summary judgment applications, as well as the Bourlakovas' application for a worldwide proprietary freezing order against Edelweiss.

This hearing then resulted in a judgment by Mr Justice Richard Smith on 18 July 2025,[3] which:

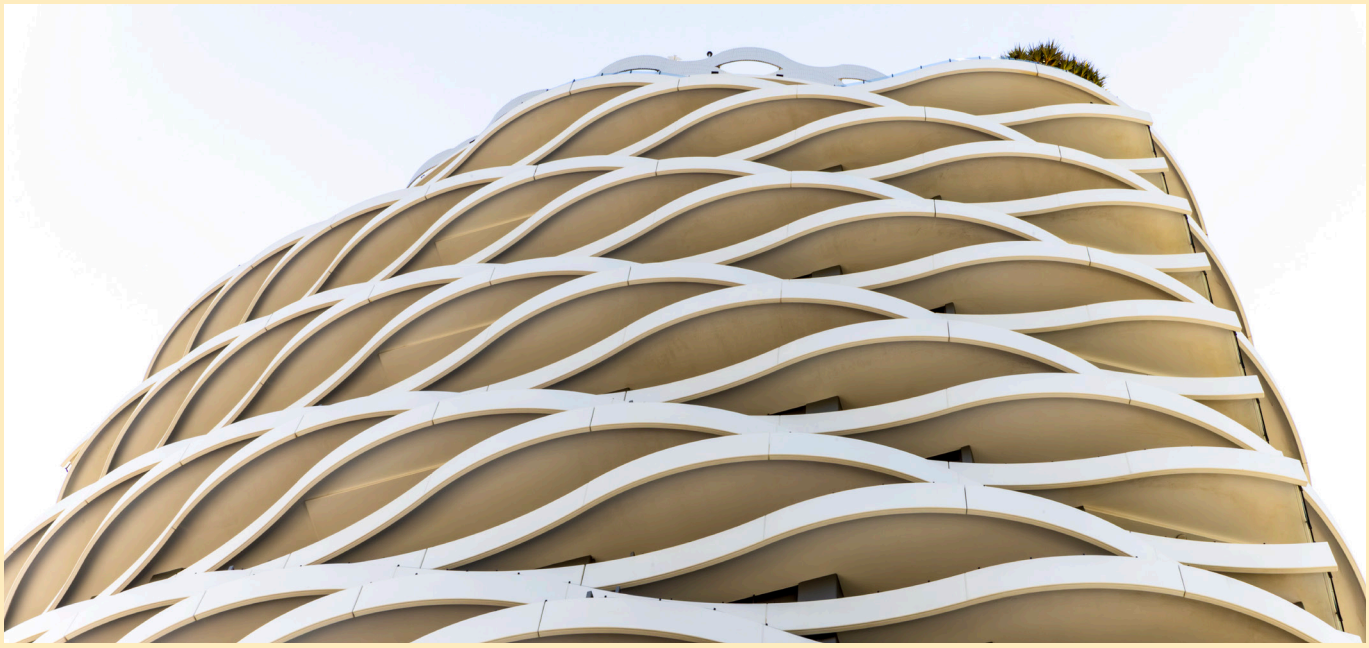
1. dismissed the application by Edelweiss (and several other defendants) that the claims against them be struck out or reverse summary judgment be granted. The judge concluded that the case in relation to the ownership of Edelweiss had a real prospect of success;
2. rejected an application by the Bourlakovas for a worldwide freezing order against Edelweiss on the basis that there was no sufficient risk of dissipation; and
3. ruled that the Bourlakovas had made out a case for a proprietary freezing order against Edelweiss and others, because risk of dissipation was not a requirement for this order.[4]

The consequentials hearing

Following the 18 July 2025 decision, there was a consequentials hearing on 23-24 July 2025 to deal with the terms of the proprietary freezing order.

Footnotes

1. *Bourlakova and others v Bourlakov and others* [2025] EWHC 3085 (Ch), para. 54.
2. Ibid, para. 61.
3. [2025] EWHC 1792 (Ch).
4. The judge's conclusion on the proprietary freezing order against Edelweiss is the subject of an appeal to the Court of Appeal pursuant to permission granted by Lord Justice Zacaroli on 9 October 2025.
5. *Bourlakova and others v Bourlakov and others* [2025] EWHC 3085 (Ch), para. 38.
6. *Various Claimants v Standard Chartered Plc* [2025] EWHC 2136 (Comm), para. 41.
7. *Bourlakova and others v Bourlakov and others* [2025] EWHC 3085 (Ch), para. 16.
8. Ibid, para. 57.



As Edelweiss offered an undertaking not to dispose of its assets other than in the ordinary course of business, this was accepted in lieu of an order for an injunction. The undertaking stated as follows:

> "*(2) Until further order of the Court, Edelweiss undertakes not to* ***in any way dispose of, deal with or diminish the value of any of its assets*** *whether they are in or outside England and Wales*" [emphasis added].

Edelweiss also undertook to provide a quarterly list of *"liabilities and all claims asserted against it"* exceeding US$50,000, along with any specific details relating to any such claims or liabilities.

The "bogus" arbitration

At the consequentials hearing, an oral application was made by the Bourlakovas' leading counsel for the provision of documentation and information relating to an arbitration that Edelweiss was now involved in that the Bourlakovas had become aware of. The arbitration allegedly arose out of the sale of Burneftegaz, which was a company that bought up oil fields at auctions.

The judge recognised that the existence of the arbitration was a "*not insignificant concern*", but also that the issues of confidentiality which had been raised by Edelweiss could not be "*lightly ignored*". As a consequence, the judge declined to order the disclosure sought by the Bourlakovas but ordered Edelweiss to provide an explanation and to provide copies of pre-arbitration correspondence.

Correspondence continued between the parties, but tensions only increased.

The current application

In October 2025, the Bourlakovas sought more extensive relief. They applied for orders requiring Edelweiss to:

1. provide the statements of case, evidence and procedural orders in the arbitration;
2. notify them of any award and enforcement;
3. refrain from paying any award without notice; and
4. provide transcripts or recordings of the arbitral hearings.

The arguments

The Bourlakovas contended that the orders sought were fundamental to ensure the effective and proper policing of the undertakings by Edelweiss. They maintained that there was a real risk of a "*perfect storm*",[5] where assets could be removed through foreign proceedings in which they were not a party.

It was no surprise that Edelweiss rejected the Bourlakovas' arguments and asserted that, based on the earlier decision in July 2025, there was no risk of dissipation.

Edelweiss further submitted that the enforcement of any arbitral award would be a court-ordered process, rather than a voluntary dissipation of assets, and that the extensive relief sought by the Bourlakovas lacked practical utility and intruded into matters protected by confidentiality under the ICAC Rules.

The decision

The Court ultimately agreed with the Bourlakovas and granted disclosure of the requested arbitration documents.

Although the Court had previously declined to order disclosure at the consequentials hearing, the judge considered that the position had materially evolved. It was now common ground that the arbitration was at least "*bogus*" and that there was a significant threat to around 10% of Edelweiss'

assets. The possibility that any award would benefit from the pro-enforcement policy of the New York Convention compounded that risk.

The Court's reasoning is summarised below:

1. **Risk to assets:** The Court maintained that the purpose of ancillary orders, such as disclosure orders, can include a policing function even where any loss may result from court-ordered enforcement rather than voluntary dissipation.
2. **Practical utility:** The Court accepted the Bourlakovas' argument that the ordering of disclosure documents at this stage in proceedings would have practical utility. It would enable the Bourlakovas to determine whether to take further steps to protect their interests while the arbitration was ongoing, rather than waiting until an award (which could be enforced quite easily) was issued.
3. **Confidentiality:** The Court maintained that the arbitration documents were subject to confidentiality obligations under Rule 46 of the ICAC Rules.

However, following the approach taken in *The Public Institution for Social Security v Al Wazzan* [2023] EWHC 1065 (Comm) and *Various Claimants v Standard Chartered Plc* [2025] EWHC 2136 (Comm), the Court focused on whether there was a real risk of prosecution rather than merely a potential breach of foreign law. It was emphasised that, where a real risk of criminal prosecution cannot be shown, then "*some lesser form of regulatory action…for preserving confidentiality*"[6] is unlikely to outweigh the need for disclosure in certain circumstances.

The Court further observed that confidentiality under the ICAC Rules is not absolute, as materials may be deployed to advance a party's case. Balancing these considerations against the "*not insignificant concern*"[7] to a material portion of Edelweiss' assets, the Court concluded that ICAC confidentiality did not amount to a "*sufficiently countervailing factor*"[8] to displace what was otherwise a just and convenient order for disclosure necessary to protect the relevant assets.

Comment

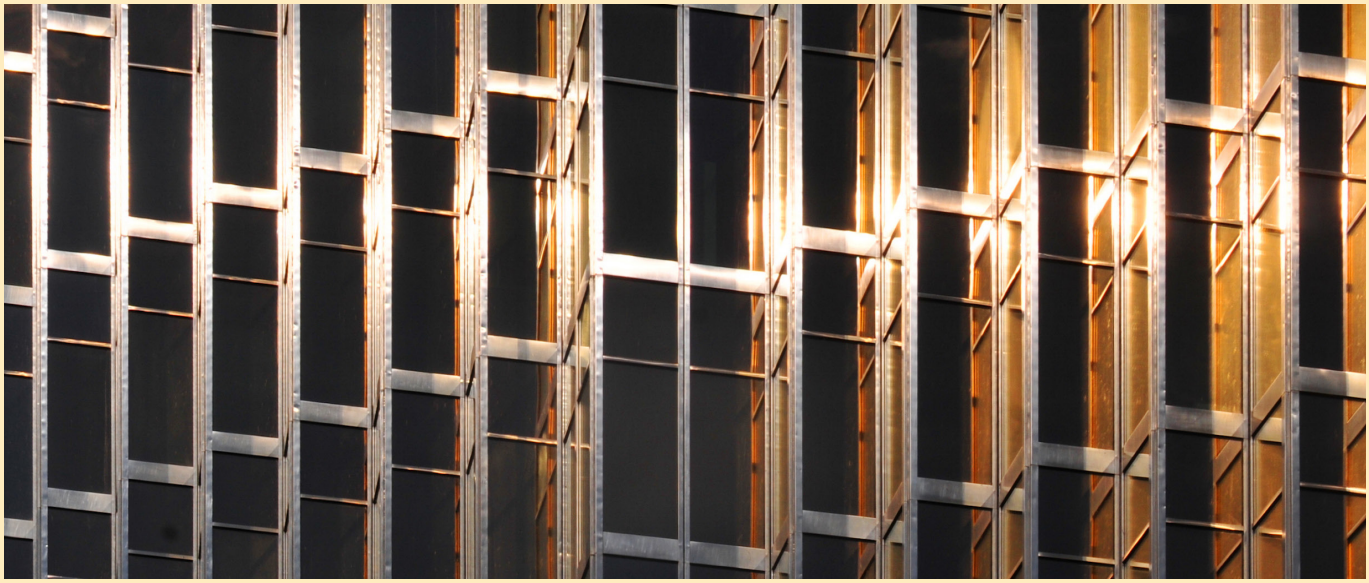
The Court's approach in this case is notable and shows that sometimes the need for disclosure may outweigh the usual confidentiality of an arbitration.

This decision provides a helpful insight into some of the factors that a court may find persuasive in such situations.

For example:

1. **Breaching confidentiality was not a criminal breach:** the judge's reliance on recent authorities indicating that, absent a real risk of criminal prosecution for breaching confidentiality, the balance may favour disclosure is particularly interesting;
2. **Genuine risk to assets:** this decision showed that there is no need to show a "*real risk*" that an order or undertaking relating to assets will be breached, but rather a "*real risk*" that assets may be dissipated. This threshold is arguably lower and may be capable of being established earlier on; and
3. **Any evidence of sham proceedings:** as the Court stated, this was a highly unusual case, with allegations of forgery and dishonesty. Such conduct issues are likely to assist when a court is faced with balancing competing policy considerations between arbitral confidentiality and court ordered disclosure.

Ultimately, this decision highlights the broad discretion of the English courts when granting ancillary relief and serves as a notable exception to the customary practice of arbitral confidentiality. ■



Winds of change: legal and market developments shaping the global offshore wind sector

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This year marks the 25th anniversary of the first offshore wind farm commissioned in the UK. The 4-megawatt Blyth project in Northumberland was commissioned in December 2000 and generated enough power for around 3,000 homes. Since then, the UK's offshore wind sector has grown dramatically. By 2025, offshore wind farms were generating enough electricity to power around 80% of UK homes.[1]

The global trend of increased offshore wind capacity and reliance on wind farms as a source of renewable energy can be seen nowhere more clearly than in China. China now accounts for around 52% of global operational offshore wind capacity,[2] and for the fifth consecutive year has delivered more than half of the world's annual offshore wind installations.[3] However, forecasts for 2026 predict that increased output from the UK, Germany and Taiwan may reduce China's share.[4]

Against this backdrop, this article explores recent developments in the UK and in other countries that are shaping the global offshore wind sector. In the UK, we focus on Allocation Round 7 ("**AR7**") under the government's Contracts for Difference Scheme ("**CfD**"). Globally, we highlight key updates to China's arbitration laws. We also consider the recent case of *Kingdom of Spain v Infrastructure Services Luxembourg S.A.R.L and Republic of Zimbabwe v Border Timbers Ltd* [2026] UKSC 9 which may have important implications for developers and investors operating across the sector globally.

UK Legislation Updates

The UK continues to commit to expanding its offshore wind industry. The UK's CfD AR7 is a major 2025/2026 government auction aimed at securing renewable energy projects. CfD is the UK's main mechanism for supporting low-carbon electricity generation, and operates by giving renewable energy generators a long-term contract with a fixed "*strike price*" for the electricity they produce.[5] The fixed price gives developers investment certainty in the UK for projects with long construction timelines and high upfront costs.[6]

Under AR7, a further 8.4 GW of offshore wind capacity was secured, including offshore wind (6.9 GW), offshore wind in Scotland (1.4 GW) and floating offshore wind (0.19 GW).[7] AR7 awarded six offshore wind projects and two floating wind projects, which together will generate enough clean electricity to power the equivalent of 12 million homes.[8] This is a new European record for offshore wind procurement,[9] and supports the UK's clean power mission by 2030 while also representing progress in emerging technologies, in particular, the use of floating offshore wind.[10] While the capacity awarded to floating wind projects under AR7 remains comparatively small, the 192 MW secured represents a clear commitment to floating-specific auctions[11] and reinforces the UK's position as the global leader in this technology.[12]

Notably, under AR7 the government has gone well beyond the initial budget of £1.1 billion – now at £1.79 billion.[13] This is particularly striking when compared with developments in the United States, where the Trump administration has taken a more cautious approach to offshore wind development.[14]

The UK adjusted its AR7 auction parameters to reflect current market conditions; the lease periods were extended from 15 to 20 years and the "*strike prices*" were increased from 2012 prices (which have been presented in all previous

allocation rounds) to 2024 prices.[15] These changes are expected to reduce revenue volatility and overall project risk. There will be greater certainty to developers who will be able to know in advance the price at which they will be able to sell their electricity for up to 20 years, and these changes will help to lower financing costs.[16]

The next auction round, AR8, will begin later in 2026 and will be critical for projects aiming for delivery in the early 2030s.[17] It will be important to maintain momentum and ambition in the offshore wind sector, particularly as AR7 faced significant delays which created cost challenges and difficulties for the wider supply chain.[18] We also note that on 10 February 2026, the results of the seventh allocation round for non-offshore wind projects were announced, procuring 6.2GW of onshore wind, solar and tidal energy projects.[19]

Changes to China's Arbitration Law

As offshore wind projects expand globally, the legal frameworks governing dispute resolution are becoming increasingly important. The Arbitration Law of the People's Republic of China (the "**Arbitration Law**") came into force in 1995 and has remained largely unchanged, with only limited amendments in 2009 and 2017. In light of China's substantial share of global operational offshore wind capacity and growth in popularity as a choice of arbitration seat,[20] the revised Arbitration Law (the "**New Arbitration Law**") which took effect on 1 March 2026 is particularly significant. By modernising China's arbitration framework and aligning it more closely with international standards, the reforms may increase the attractiveness of China as a seat of arbitration.

Three provisions of the New Arbitration Law are particularly noteworthy: Article 78 on arbitrable disputes; Article 86 on foreign arbitral institutions; and Article 81 on the seat of arbitration.

Article 78 – Arbitrable disputes

Previously, the 2017 Arbitration Law amendments limited foreign-related arbitrations to disputes arising in four sectors: economic, trade, transportation and maritime. Article 78 in the New Arbitration Law expands this scope to include "*other foreign related disputes*". This broader formulation may allow disputes arising from offshore wind projects to be arbitrated in China.

Article 81 – Seat of arbitration

In line with modern practice, the New Arbitration Law introduces the concept of a seat of arbitration. The seat may be agreed by the parties in writing or by the arbitral tribunal. Article 81 provides that the parties may choose the applicable procedural law governing the arbitration.

Article 86 – Foreign arbitration institutions

Perhaps the most significant development in the New Arbitration Law is introduced by Article 86 which allows foreign arbitration institutions to establish case management offices in free-trade pilot zones on mainland China to conduct foreign-related arbitration activities for the first time. This signals a clear intention to modernise China's arbitration framework and align it more closely with international arbitration practice.

Case law

On 4 March 2026, the UK Supreme Court delivered judgment in

Kingdom of Spain v Infrastructure Services Luxembourg S.A.R.L and Republic of Zimbabwe v Border Timbers Ltd [2026] UKSC 9. The appeals considered whether two foreign sovereign states subject to adverse arbitration awards rendered pursuant to the ICSID Convention[21] could rely on sovereign immunity to set aside the registration of those awards under the Arbitration (International Investment Disputes) Act 1966 (the "**1966 Act**").[22]

The dispute arose after Spain implemented energy subsidies guaranteeing investors a reasonable return on investments in renewable energy facilities.[23] The respondents invested approximately €139.5 million in reliance on these incentives, which were later rolled back. They commenced arbitration under the Energy Charter Treaty and succeeded, with the tribunal awarding around €101 million in damages.[24]

The respondents subsequently obtained an order from the High Court of England and Wales registering the award as a judgment under the 1966 Act. Spain sought to set aside the order, arguing it was immune from the jurisdiction of the English courts under the State Immunity Act 1978 (the "**SIA 1978**"). While Spain's challenge failed at first instance, the issue ultimately reached the Supreme Court.

The Supreme Court held that Spain could not rely on sovereign immunity to prevent the registration of the ICSID award in the UK, and that the ICSID constituted a clear and unequivocal submission to the English court's adjudicative jurisdiction.

For offshore wind and other renewable energy projects, the decision highlights a key risk: governments may change regulatory regimes or incentive schemes after projects are built, prompting investors to pursue investment treaty arbitration. The ruling also reinforces that, by signing the ICSID Convention, states effectively waive immunity in respect of the recognition of awards, providing greater certainty for investors in large-scale renewable energy projects.

Conclusion

As offshore wind projects continue to expand globally, developers and investors must navigate an evolving landscape of regulatory frameworks, subsidy regimes and dispute resolution mechanisms. The developments highlighted in this article illustrate how legal and regulatory changes will continue to shape the offshore wind sector in the years ahead. ■

Footnotes

1. https://www.renewableuk.com/energypulse/blog/uk-wind-energy-pipeline-in-2025-a-year-in-review/
2. https://www.renewableuk.com/energypulse/blog/global-offshore-wind-pipeline-in-2025-a-year-in-review/
3. Ibid.
4. Ibid.
5. https://www.cfdallocationround.uk/about
6. https://www.energy-uk.org.uk/publications/energy-uk-explains-allocation-round-7-results/
7. See https://assets.publishing.service.gov.uk/media/6966861de8c04eb2919f773a/contracts-for-difference-allocation-round-7-results-.pdf. Floating offshore wind refers to turbines mounted on floating platforms enabling development in deeper waters.
8. https://windeurope.org/news/uk-awards-8-4-gw-in-europes-largest-offshore-wind-auction-ever/; and https://www.gov.uk/government/news/record-breaking-auction-for-offshore-wind-secured-to-take-back-control-of-britains-energy.
9. Ibid.
10. https://www.gov.uk/government/news/record-breaking-auction-for-offshore-wind-secured-to-take-back-control-of-britains-energy
11. Ibid.
12. https://windeurope.org/news/uk-adjusts-auction-parameters-for-wind-energy-to-reflect-market-realities/
13. https://windeurope.org/news/uk-awards-8-4-gw-in-europes-largest-offshore-wind-auction-ever/
14. See, for example, developers such as Ørsted obtaining preliminary injunctions allowing its Project Revolution Wind to continue construction despite government stop-work orders: https://orsted.com/en/media/news/2025/09/court-issues-preliminary-injunction-allowing-revol-14591935.
15. The strike price is the guaranteed revenue per megawatt-hour paid to generators, see https://assets.publishing.service.gov.uk/media/6881ea7c901d5f8d4712057e/cfd-ar7-pot-and-price-notice.pdf.
16. https://www.energy-uk.org.uk/publications/energy-uk-explains-allocation-round-7-offshore-wind-results/
17. https://www.enlit.world/library/how-to-accelerate-offshore-wind-in-the-uk-after-ar7
18. Ibid.
19. https://www.enlit.world/library/how-to-accelerate-offshore-wind-in-the-uk-after-ar7; and https://www.theguardian.com/business/2026/feb/10/uk-onshore-windfarm-new-green-energy-projects-contracts
20. Beijing and Hong Kong ranked within the top five seats globally; see https://www.qmul.ac.k/arbitration/media/arbitration/docs/White-Case-QMUL-2025-International-Arbitration-Survey-report.pdf.
21. 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States 575 UNTS 159.
22. *Kingdom of Spain v Infrastructure Services Luxembourg S.A.R.L and Republic of Zimbabwe v Border Timbers Ltd* [2026] UKSC 9, [1].
23. Energy Charter Treaty 1994 ("**ECT**") in 1997; Royal Decree 661/2007
24. *Kingdom of Spain v Infrastructure Services Luxembourg S.A.R.L and Republic of Zimbabwe v Border Timbers Ltd* [2026] UKSC 9, [3]-[6]

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