ROUNDTABLE

The International Who's Who of Construction Lawyers has brought together five of the world's leading practitioners to discuss key issues facing lawyers today.

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NON-CONTENTIOUS WORK

According to our sources, energy and infrastructure construction projects remain particularly active. Is this the case in your jurisdiction? Are there any other construction projects under way?

Andrew Ness: Absolutely – in the US market energy and infrastructure projects are where the action is now. The fracking revolution has entirely changed the US energy picture in a remarkably short time. The prospect of ample supplies and low prices for natural gas for years to come initially spurred projects to collect, transport, store and deliver increased quantities of natural gas. As the reality became clearer that ample gas supplies were here to stay for the foreseeable future, we have more recently seen a spate of projects to put all that gas to good use, from conversions of power plants to burn gas to LNG export facilities. Low gas prices and increased regulation of coal (as well as fears of greenhouse gas regulations to come) have led to a large number of early retirements of coal-fired power plants, particularly smaller ones. This lost capacity will need to be replaced in the coming years, presumably by a combination of gas-fired combined cycle plants and renewable sources like wind and solar, so the outlook of energy projects appears poised to stay strong for years to come. Public and PPP infrastructure projects have been less active, with financing still a problem, and the 2009 economic stimulus package money largely spent at this point. The other notable bright spot has been hospital construction and expansion, as the health-care industry continues to expand with new treatments and procedures ultimately requiring expanded and more sophisticated physical facilities.

David Courtney-Hatcher: The answer to both of these questions is yes. The overall position can be summarised as follows. The construction and projects market in Oman is in good health. Oman's eighth Five-Year Plan runs from 2011 to 2015. It envisages total capital outlay of $79 billion, of which the bulk is set to be invested in large construction projects across the country. The chief beneficiaries of this investment programme will be the following sectors: transportation, particularly airports, ports, highways and, in the longer term, railways; tourism, with several upscale resort and hotel projects planned or under construction across the Sultanate, capitalising on Oman's magnificent mountain, desert and coastal scenery, as well as its ecotourism potential; and oil and gas, since – although making steady progress towards diversifying into more downstream-orientated industries – Oman remains at heart a hydrocarbons-based economy, with a number of world-class exploration and production projects under development, including investment-heavy enhanced oil recovery schemes. In addition, significant projects in the power generation and transmission, wastewater treatment and water desalination, health-care and housing sectors are also under construction or in advanced stages of planning.

Bearing in mind Oman's relatively small population of only 2.8 million people, the scale of these construction and infrastructure development projects already committed to and/or under construction across a wide range of sectors is impressive.

Major projects already under construction or in advanced stages of engineering, design and/or planning include: the Oman Convention Centre, with a project cost of $1 billion and an expected completion date of late 2015; Sohar Airport, with a project cost of $400 million and an expected completion date of 2014; the Salalah Port expansion, with a project cost of $350 million; Oman's national rail network, with an as-yet-unknown project cost and an expected completion date of 2017; the Duqm city, drydocks and refinery, with a total project cost of $20 billion; the Salalah independent water and power project, with a project cost: $1 billion, and an expected/targeted completion date of 2012; the Batinah Expressway, with a project cost of $2.59 billion; and Muscat International Airport, with a project cost of $1.2 billion.

Helena Chen: In Taiwan, energy and infrastructure construction projects have played important roles. However, the market for energy and infrastructure construction projects has grown mature over the years.

The Taipei Twin Towers project, near Taipei Railway Station, will serve as the main hub for the Taiwan Taoyuan International Airport MRT line to Taipei and five other railways and MRT lines. This project attracts much attention, not only because of its scale but also because of scandals relating to the bidding process. The winner of this project was disqualified in February 2013 because of a failure to submit the performance bond by the deadline. The Prosecutors Office is investigating people involved in the bid-awarding process. The Taipei City Department of Rapid Transit Systems will start a new round of negotiation with the second winner shortly. This project might not be completed in 2017, as scheduled.

In terms of energy construction projects, after the Fukushima Daiichi nuclear disaster in Japan, people in Taiwan have become more concerned about nuclear safety issues and many groups are lobbying for an immediate halt to the construction of the Fourth Nuclear Power Plant in Gongliao District, New Taipei City, Taiwan. It is not clear now whether the Fourth Nuclear Power Plant will be put into commercial operation, or even whether the construction of it will be finished. If the Fourth Nuclear Power Plant will never achieve commercial operation, there will be a market for the construction of facilities using alternative energy sources.

Sumeet Kachwaha: Construction is the second largest contributor to the Indian economy (after agriculture). With economic reforms and liberalisation came the realisation of the huge infrastructure gap India faces and how it can be both an impediment and a vehicle for economic growth. The government is committed to, and focused on, plugging the infrastructure gap. The current five-year plan (2012-2017) envisages a spend of $1 trillion in this period. Amongst the busier sectors, roads see the maximum activity. The target here is (and has been for the last several years) 20 kilometres a day (or 7,300 kilometres per year). The airport sector has announced 14 new greenfield airports to be signed off on a PPP basis over the next few years. The port sector will see two new major ports on the East coast, which will add 100 million tonnes capacity. A new outer harbour in South India through PPP, estimated to cost $1.5 billion, will add another 42 million tonne capacity. Another mega-construction project is the Delhi-Mumbai industrial corridor, with the support of the government of Japan. This will encompass seven new industrial cities and two new smart industrial cities en route. Work will commence in 2013.

CONTENTIOUS WORK

What impact has the current financial climate had on the number of disputes in your jurisdiction? What method of dispute resolution is most popular with clients? Are parties taking proactive steps to deal with potential disputes earlier?

Andrew Ness: Traditional construction disputes regarding cost overruns, changes, delays and the like have been trending slowly downward since the financial crisis really hit near the end of 2008. With the reduced number of projects, particularly the dearth of commercial projects in the pipeline at present, the likelihood of any significant, near-term upturn in disputes is slight. Dispute Review Boards (DRBs) continue to grow in popularity for larger projects, particularly infrastructure projects, and DRBs continue to build a track record of greatly reducing the number of disputes that reach a more formal dispute resolution process such as litigation or arbitration. More generally, mediation remains the ADR method of first choice, with almost every construction dispute being mediated at some point in the process.

I wish I could report that clients are getting smarter about taking proactive steps to head off disputes at an earlier stage, but my perception is that, under present market conditions, the opposite is true. The reluctance to spend the money to call in lawyers with in-depth expertise early on is instead the driving consideration for many clients, although it only makes the dispute more expensive in the end. It's a case of "pay me now or pay me (considerably more) later", as projects that are going off-track rarely right themselves. Getting involved in a troubled project early on while there is still time to head off bigger problems is invariably the most cost-effective service I can render.

David Courtney-Hatcher: The current financial climate has had a limited affect on this jurisdiction. Oman enjoys a healthy budget surplus relying chiefly on its hydrocarbon resources. However, major projects in this jurisdiction are as prone to disputes as elsewhere in the world.

Construction contracts in Oman, other than for small-scale works, whether awarded by public or private sector project procurers, will invariably provide for disputes to be referred to arbitration. The Law of Arbitration in Civil and Commercial Disputes promulgated by Sultani Decree 47/1997, as subsequently amended, provides Oman with a comprehensive modern legislative regime for arbitration as an alternative to court proceedings. Court litigation is not usual as a means of determining construction disputes, not least because the language of the construction industry tends to be English, and litigation in the Omani courts proceeds in the Arabic and necessitates all documentation to be translated into Arabic.

As for arbitration, the contracts awarded by Omani public authorities will typically provide for resolution of disputes by arbitration if not amicably resolved. The seat of arbitration will be Muscat, Oman. The procedure will be as provided in the Law of Arbitration in Civil and Commercial Disputes. English will be the language of reference. On the other hand, venues including London, Paris, or Dubai are sometimes agreed by negotiation, typically according to the LCIA, ICC or Dubai International Arbitration Centre rules, according to preference.

When it comes to alternative dispute resolution (ADR), there are only limited signs of parties taking proactive steps to deal with potential disputes earlier. For example, orthodox ADR methods – conciliation, mediation and adjudication – have been rarely used in Oman, even on large projects. It may be a feature of the Omani character that there is a general tendency to craft negotiated amicable settlements rather than resort to formal, or even informal/alternative, legal proceedings. There are signs that FIDIC-style Dispute Adjudication Boards (DABs) will increasingly become a feature of major public sector contracts, particularly when the Oman Standard Conditions are brought into line with the FIDIC 1999 suites of standard forms.

Lindy Patterson QC: The ongoing economic uncertainty has had a huge impact on the number of disputes within the UK and on the trends emerging regarding resolution of these disputes.

Whilst the number of disputes which go to formal dispute resolution has decreased, those which do go "all the way" are often very large, eg, the big infrastructure projects. On the domestic front this remains in the main through adjudication. Often there are serial adjudications with a number of adjudications, one following the other. In addition there may often be a counter-adjudication by the respondent. The choice of issue to go to adjudication and the use of counter-adjudications is tactical. My experience is that a lot of time is now spent on the strategy of pursuing disputes through adjudication.

Many more declarations as to parties' rights are being sought through findings of the adjudicator rather than simply awards of payment. Their determination can have huge financial consequences, but the Referring Party may tactically determine that the threat of a large number where the principle has been won is better for negotiation than the potential risks of having that number considered by an adjudicator.

Mediation is on the increase. Parties are recognising this as a precursor to adjudication and a much more cost effective and certain way of resolving disputes. Not every dispute or party is best suited to mediation – but many, many of them are.

I do not believe there is any trend of parties trying to resolve disputes earlier. It is just that when they do emerge parties are trying to be smarter as to how they are dealt with.

Helena Chen: Clients' budgets for legal fees are tight in financial hard times. Clients have also become more interested in contingent fee arrangements.

Generally speaking, Taiwan government entities and state-owned enterprises prefer litigation to arbitration, while the contractors prefer arbitration to litigation because the Taiwan Arbitration Act provides a nine-month time limit on arbitration proceedings. In other words, unless otherwise agreed by the parties, the arbitral tribunal shall render an award within nine months from the date when the sole or third arbitrator is appointed. The number of arbitration cases in Taiwan declined significantly in recent years after the government deleted the arbitration clause from its standard construction contracts approximately ten years ago.

After contractors' continuous efforts to lobby for the use of arbitration to resolve disputes arising from government procurement contracts, including infrastructure construction contracts, paragraph two of Article 85-1 of the Government Procurement Act was amended to introduce a med-arb mechanism into government procurement contracts. The new law provides an avenue for contractors to refer disputes arising from government procurement construction contracts to arbitration without a written arbitral agreement, when certain criteria are met. But whether this new law can really benefit contractors is to be observed.

Parties are not proactive in dealing with potential disputes earlier for various reasons, including tight legal budgets, the desire to maintain a harmonious relationship with the owners, government officers' lack of motivation to handle a potential problem before it actually arises, etc.

Sumeet Kachwaha: The Indian approach to ADR has been dismally conservative and lacking in imagination. The courts are overburdened and impractical for resolving commercial or construction disputes. Arbitrations also suffer due to lack of a trained arbitration bar or sophisticated arbitrators. The local arbitral institutes have not kept up pace with the best practices. Arbitrations often get bogged down and resemble the courts they are designed to avoid. As a result, a great many international arbitrations are getting seated outside India. The SIAC is perhaps the biggest beneficiary. In the past several years, India has been either the largest or the second largest contributor to the SIAC workload.

As to the other ADR mechanisms, conciliation does not work because the government – the largest driver in infrastructure and construction – is also the least enthusiastic. Bureaucrats/ government decision-makers wish to safeguard themselves against questioning and being answerable to multitude of watchdog bodies. They prefer the safer route of resolution through a judicial process (often until the bitter end permissible in law). DRBs are used but given the voluntary nature of the mechanism, the recommendations are usually not accepted where the stakes are large.

EMERGING MARKETS

The emerging markets continue to be a key focus for construction companies worldwide. Have you seen an increase in activity among your clients in these territories? What challenges arise when working in emerging markets? How can you help clients to mitigate risks?

Andrew Ness: The US market was historically so large and robust that only a small fraction of construction companies looked to emerging markets for business. That history has left most US firms still relatively inexperienced in international contracting. The Great Recession has certainly accelerated the interest of US firms in emerging markets and, predictably, a few who jumped in without fully understanding the risks have been burned. Certainly there is much the legal team can do to mitigate risks in the areas of corporate organisation, taxation issues and the like, and we can discuss with clients, in detail, subjects such as the choice of local partner, currency fluctuations, import/export controls, payment security and the choice of dispute resolution forum, so that they can make informed decisions on the risks they are accepting. Ultimately the clients most at risk are those that choose to deal with emerging market owners (often government-owned companies) that insist on very difficult contract terms, and those otherwise without the market leverage to obtain reasonable contractual protections respecting the key risk areas.

David Courtney-Hatcher: In international construction industry terms Oman is, as I've said, very much an emerging market. Oil and gas revenues are ploughed back into infrastructure development, economic diversification and job creation. Oman is also due to benefit from $10 billion in funding from the richer GCC states over the coming decade. This funding was agreed early in 2011 amid the height of the concerns over the stability of some Arab countries.

The challenges confronting foreign entrants into this market will include dealing with the public procurement processes that impose standard form contracts which are outdated and often inappropriate to the projects on which they are used. There is also a reluctance to engage in proactive dispute resolution. The prevalence of a "lowest bid wins" approach can also be challenging to foreign contractors. We regularly advise clients in this market how to pre-empt or navigate these challenges.

Helena Chen: The overall construction market in Taiwan is relatively small owing to the size of the country and its population. In addition, most major infrastructure construction projects, including the Taiwan High Speed Railway, MRT systems in Taipei and Kaohsiung, the CKS Airport Link, etc, are either completed or under construction. Therefore, the construction industry feels the need to go overseas to find work. However, only a few Taiwan construction companies are equipped with the necessary manpower and skills to go overseas. The main overseas market for Taiwan construction companies is emerging markets, where technologies and skills imported from Taiwan are welcome.

The risks involved in working in emerging markets are multi-layered. First of all, without proper legal support, Taiwan construction companies are often exposed to legal risks arising from the difference between Taiwan law – which Taiwan engineers are used to – and the terms of construction contracts used in international construction projects. In addition, there might be different unspoken or hidden rules, unbeknownst to outsiders, in each emerging market. When penetrating a new emerging market, foreign companies will incur certain costs to learn those unspoken or hidden rules in that particular emerging market. Furthermore, nowadays Taiwan engineers are less willing to work overseas as they were 15 years ago. Accordingly, the cost of dispatching Taiwan engineers to work overseas is higher than before. Last but not least, construction companies from other countries – Korea, say – are competing fiercely in the international market.

Sumeet Kachwaha: The initial enthusiasm of foreign players in India's construction and infrastructure market seems to have waned to some extent. Foreign investors, though still interested, have mixed feelings about India. Currently, they are more visible where high-end technology is involved (and not in regular construction contracts). In construction, the players are mostly from Korea, Malaysia and China. Other significant international players are Leighton Holdings in Australia, Isolux in Spain and Vinci in France. Many foreign companies have got discouraged because of delays in decision-making and obstacles. Typical factors which hold up infrastructure project relate to land acquisition, removal of encroachments, shifting of utilities and obtaining environmental clearances.

It is crucial for foreign players to have their ear on the ground, have realistic expectations and be prepared for multi-layered decision making (and sometimes authorities acting at cross-purposes). India is essentially a jurisdiction for those with patience and who are prepared to last. Broadly, it makes more sense to be in a multitude of mid-range projects rather than in a one-off mega project. Large projects tend to attract attention and land up in rough weather. These, especially, must be approached with that much extra care.

LOOKING FORWARD

What's in store for the year ahead? Do you expect to see an increase in commercial projects? Do you expect to see more "green building"?

Andrew Ness: The US economy at last looks poised to take off in 2013, and the biggest risk is that the budget impasse in Congress will derail this. For the first time in five years, there is a realistic hope that the commercial construction market may see the start of a widespread upturn, and not just the occasional bright spot. It will take a long time, however, to refill the pipeline, and many contractors remain very much at risk after surviving the long drought of projects to this point. LEED-rated projects will be at the forefront whenever expansion comes. At least in most major urban centres, the concept of "green building" is no longer a fad but an established market requirement. Developers of Class A office buildings and numerous other types of commercial projects now consider a LEED certification as a "must" for their significant projects, as many prospective tenants will not consider an unrated new building. With buildings accounting for around 40 per cent of overall energy usage in the US, such smart, green projects are a key part of any effort to move toward sustainability, and the US market is starting to respond to the challenge in a significant way.

David Courtney-Hatcher: I direct you back to my answer to the first question. There are no statutorily prescribed green building codes in Oman. However, there are signs of increasing interest in the development of sustainable construction practices.

Oman is not subject to any carbon emissions or climate change targets. Nonetheless, it has adopted regulations to govern the issue of approvals for Clean Development Mechanism (CDM) projects under the Kyoto Protocol to the UN Framework on Climate Change. The Directorate-General of Climate Affairs has the responsibility for assessing CDM projects in Oman.

Lindy Patterson QC: Renewables, renewables, renewables. I do not see any increase in the year ahead in commercial projects. Publicly procured projects – mainly infrastructure, as well as those on the waste side – are likely to dominate the market. Sitting alongside this is the renewables market. Most contractors and consultants are trying to get into these markets, although some might say if they are not already there they may be too late.

We have seen a large number of disputes both in onshore and offshore wind. For onshore the disputes are tailing off, and those claims that came out of issues around the turbine base design and loadings appear to be historic rather than current. The second generation to be working on these projects has learned a lot. Frameworks of contractors are also ensuring that parties benefit from experience and knowledge on previous projects. For offshore, the issues are still new. In each case the consequential losses, if the job does not proceed as planned, can be fatal.

Biomass, gas storage and waste-to-energy are other projects where new issues and disputes continue to emerge. This is likely to be the case for several years to come.

On green building, I believe the jury is still out as to whether we will see anything significant during this coming year.

Helena Chen: Urban renewal in Taipei City and joint development projects along the Taipei MRT lines will remain active. The Green Building Certification System was established in 1999 by the Ministry of the Interior and has been well received. In addition, the Industrial Development Bureau of the Ministry of Economic Affairs (IDB) launched a Green Factory Certification System in April 2012. This is the world's first green certification system specially designed for factories. It is a duel certification system, which examines both "green building construction" and "clean production."

To obtain a Certificate of Green Factory Label, applicants must obtain both a Certificate of Green Building Label issued by the Ministry of the Interior and a Certificate of Cleaner Production Assessment from the IDB. The IDB just amended the Operational Guidelines Governing the Promotion of Certificates of Green Factory Label in March 2013. There have been nine companies certified under this new system so far, and the IDB expects more certificates to be issued in the coming years.

Sumeet Kachwaha: Until recently green buildings were seen as a fad, but perhaps the tide is turning. In February 2009, the central government has come out with its first comprehensive policy announcement on the subject. Green buildings (which can save up to 30 to 40 per cent of conventional energy) have become mandatory for all new government and public sector buildings in several states in India. A national rating system called the GRIHA has been developed, keeping in mind different climatic zones of the country. (Details are available at www.mnre.gov.in). Incentives include cash payment to architects who design buildings above a certain built-up area, and cash incentives to municipal corporations and local bodies that offer property tax rebate to green buildings.

India is currently the tenth largest economy in the world and it could be among the top five in the next 10 to 15 years. The story of India's growth is premised on democracy, rule of law, a strong and independent judiciary, a large English-speaking population and a growing middle class. Generally, there is every reason to be optimistic of the growth and potential of the Indian construction and infrastructure sector. The strengths vastly outweigh the weaknesses.